

PART VI

STRUCTURE OF CIVIL LITIGATION

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INTRODUCTION

1 OBJECTIVE AND METHODOLOGY

- 1 The idea of this part of the compendium on Civil Procedure and Justice is to identify new developments concerning the pivotal elements of the structure of civil litigation, to analyse whether there exist overarching models that are adopted by different national systems, and to find out where elements of local legal culture are determinant factors. The focus of the analysis therefore lies on the central characteristics of the structure of civil proceedings and not on the description of details.
- 2 Certainly, one procedural system might adopt different models for different elements of the proceedings. This means that there is probably not one model A and one model B for the entire structure of civil litigation; it is rather to be expected that there are different models for different elements of the structure.
- 3 This comparative analysis will consider written rules, case law, the behaviour of the parties, their representatives, judges and other persons, such as third parties, in the context of civil proceedings, statistics, and the attitude to litigation within society as well as the reputation of judges and solicitors. Practice might differ from law in the books (see part 1 of this compendium on 'Comparative Studies').¹
- 4 The analysis is based on an open-minded starting point: the traditional common law – civil law divide approach does not serve as a basis; legal families are not considered to be the starting point either.²

2 ANALYSIS OF UNCOMPLEX LAWSUITS IN ORDINARY MATTERS

- 5 The analysis will be limited to uncomplex lawsuits in ordinary matters. This scope of the analysis is defined by the negative: Our analysis will not include collective litigation (for

¹ P Gilles, *Prozessrechtsvergleichung / Comparative Procedure Law*, (Giesecking 1996); P Gottwald, 'Comparative civil procedure' *Ritsumeikan Law Review* 2005 (22), 23–35 (available at <http://www.asianlii.org/jp/journals/RitsLRev/2005/2.pdf>); S Huber, 'Prozessrechtsvergleichung heute' in B Hess (ed), *Europäisches Insolvenzrecht – Grundsätzliche Fragen der Prozessrechtsvergleichung* (Giesecking 2019) 77–109; A Gonçalves de Castro Mendes, 'O Direito Processual Comparado no Mundo Contemporâneo' *Revista Eletrônica de Direito Processual* 2020 (21), 1–19 (available at <https://www.e-publicacoes.uerj.br/redp/article/view/50768/33403>); A Gonçalves de Castro Mendes / C Paes de Castro, 'Direito Processual Comparado, Teoria Geral do Processo e Precedentes' *Revista Eletrônica de Direito Processual* 2022 (23), 49–76 (available at <https://www.e-publicacoes.uerj.br/redp/article/view/67776/42396>).

² N Bersier et al, *Common Law – Civil Law. The Great Divide?* (Springer 2022); S Huber, 'Prozessrechtsvergleichung heute' in B Hess (ed), *Europäisches Insolvenzrecht – Grundsätzliche Fragen der Prozessrechtsvergleichung* (Giesecking 2019) 77–109; J H Merryman and R Pérez-Perdomo, *The Civil Law Tradition. An Introduction to the Legal Systems of Europe and Latin America*, (Stanford University Press 2018); J Walker and O Chase, *Common Law, Civil Law and the Future Categories* (Lexis Nexis 2010).

collective litigation, see part 10 of this compendium), it will not cover special subject matters, eg, family matters³ (for special subject matters, see part 12 of this compendium), and it will not deal with special forms of procedure which are not related to special subject matters, such as payment order procedures or small claims procedures (for such special forms of procedures, see part 11 of this compendium).

- 6 As in each national system there is one set of procedural rules designed for private law cases which at least comprise ordinary cases, a common basis for the comparative analysis of the structure of civil litigation is guaranteed.
- 7 In this context, it might nevertheless be interesting to discuss the differences between a transsubstantive approach in comparison to an approach which is based on a system with different types of procedure for different subject matters (family matters, labour law cases, intellectual property law cases, administrative law cases, etc) and to analyse whether these differences have an impact on the structure of civil litigation in uncomplex lawsuits in ordinary matters.

3 THE INFLUENCE OF PURPOSES OF CIVIL PROCEDURE ON THE STRUCTURE OF CIVIL PROCEEDINGS

- 8 The purposes of civil procedure might influence the structure of civil proceedings. There can indeed be identified different approaches to the question what the purposes of civil procedure are.
- 9 One approach concentrates on a particular dispute and puts an emphasis on the idea of enforcing individual rights within just, speedy (and inexpensive?) proceedings. This means that civil proceedings are understood as an ancillary element to substantive rights. Still concentrating on a particular dispute, the focus could also be put on the idea of resolving the dispute. In accordance with such an understanding, court driven techniques of amicable dispute resolution might gain importance.
- 10 Another (additional) approach puts an emphasis on the public interest of the whole society and considers private law enforcement and deterrence understood in a broad sense as purposes of civil proceedings. In some regions of the world, eg, in Europe, we might observe a certain change of the traditional attitude, which might also lead to new elements within the structure of civil litigation. In this sense, jurisdiction aimed at assessing and establishing the constitutionality of norms or legal interpretation based on concentrated actions or incidents, through binding precedents or *erga omnes* effects, can also be cited as an example (for instruments of collective litigation, see part 10 of this compendium).

³ In those systems where special proceedings and even special courts have been established for special subject matters, parties cannot choose between the special proceedings and the ordinary proceedings.

- 11 In addition, the structure of civil litigation might be highly influenced by the existence of a proportionality concept. The legitimacy and the need of such a concept are even discussed in legal systems where such a concept is traditionally unknown. Procedural elements that create high costs, such as disclosure and discovery, might urge the legislators or courts to consider aspects of proportionality and the idea of abuse of process (for these questions in the context of disclosure and discovery, see part 7 of this compendium on 'Access to Information. Evidence'). It is, however, not a simple task to introduce the idea of proportionality without creating the risk of a denial of justice (for this fundamental question, see part 3 of this compendium, which deals with the key idea of access to justice).
- 12 Finally, the purposes of civil procedure are closely connected with the fundamental principles and rights of civil procedure, eg, the right to be heard. In this segment, the analysis will focus on such procedural rights and principles which influence the structure of civil litigation. For a general in-depth analysis of procedural rights and principles, it is referred to part 5 of this compendium.

4 STRUCTURE AND TERMINOLOGY

- 13 The foregoing leads to the following structure of this part 7 of the compendium: The fundamental rights and principles which might have an influence on the structure of civil proceedings will form the topic of the first chapter. In a second chapter, an analysis of the chronological order and the nature of the different elements of civil proceedings will follow. The third chapter will deal with the role of the judge, in particular with regard to early dispute resolution, case management, and settlement. The responsibilities of the parties and their representatives for are the subject of the fourth chapter. In a final fifth chapter, the conclusions of the different chapters will be put together to identify certain models of structure of civil proceedings.
- 14 Such a comparative analysis is confronted with linguistic challenges. In different regions of the world, English words may have different meanings. Sometimes, a transnational 'English' terminology has emerged, which does not correspond to the traditional terminology in English speaking countries. One example is the word 'trial', which is used with different meanings (sometimes, in a transnational context, it is used as a synonym for 'hearing'). Another example are expressions like 'principle of orality' or 'principle of immediacy', which do, for example, not exist in the traditional English terminology of the US.⁴ The non-existence of certain terms does, however, not necessarily mean that the idea behind the words does not exist. The analysis will therefore try to use a neutral terminology and describe the content of the fundamental principles without sticking to national or regional buzzwords. Certainly, this is sometimes difficult because English terminology has evolved against the background of the procedural systems in the

⁴ This terminology is however used in many current official documents of English institutions.

Common law countries, but on a transnational level, we can also observe the emergence of a new form of transnational English terminology of civil procedure (for more details about these questions, see part 1 of this compendium ‘Comparative Studies’).

CHAPTER 1 – PROCEDURAL RIGHTS, PRINCIPLES, AND APPROACHES INFLUENCING THE STRUCTURE OF CIVIL LITIGATION

- 1 The structure of civil proceedings has a serving function. It does not exist for its own sake, but it is generally designed against the background of underlying procedural rights and fundamental principles and approaches, which the lawmakers – be it a national legislator or a national court – had in mind when shaping the procedural framework for resolving disputes before state courts. Rights, principles and approaches that might have a particular influence on the structure of civil proceedings are the following: (1) the right of the parties to present their case, (2) the principle of concentrated presentation of facts and offers of evidence, (3) the public character of the proceedings, and (4) written-based or oral-based approaches.

1 THE RIGHT OF THE PARTIES TO PRESENT THEIR CASE

- 2 Many national constitutions either expressly or impliedly provide for the right of the parties to present their case.⁵ There are even supranational binding instruments which

⁵ For Belgium, cf Art 13 of the Belgian Constitution: ‘No one can be separated, against his will, from the judge that the law has assigned to him’.

For Brazil, cf Art 5 of the Brazilian Constitution: ‘XXXV – the law shall not exclude any injury or threat to a right from review by the judiciary; LIV – no one shall be deprived of freedom or of his assets without the due process of law; LV – litigants, in judicial or administrative processes, as well as defendants, in general, are ensured of the adversary system and of full defence, with the means and resources inherent to it; [...] LXXVIII – a reasonable length of proceedings and the means to guarantee their expeditious consideration are ensured to everyone, both in the judicial and administrative spheres.’.

In France, it is an underlying fundamental principle clearly expressed in Art 14 Code of civil procedure: ‘Nulle partie ne peut être jugée sans avoir été entendue ou appelée.’ Cf C Chainais, F Ferrand, L Maier, S Guinchard, *Procédure civile* (36th edn, Dalloz 2022), para 851 ff.

For Germany, cf Art 103(1) of the German Constitution [Fair trial]: ‘In the courts every person shall be entitled to a hearing in accordance with the law’.

For Iran, cf Art 34 of Iran (Islamic Republic of)’s Constitution of 1979: ‘It is the indisputable right of every citizen to seek justice by recourse to competent courts. All citizens have right of access to such courts, and no one can be barred from courts to which he has a legal right of recourse’. See https://www.constituteproject.org/constitution/Iran_1989.pdf.

For Japan, cf the Constitution of Japan, which provides as follows:

(Right of Access to the Courts) Article 32. ‘No person shall be denied the right of access to the courts’.

(Due Process Clause) Article 31. ‘No person shall be deprived of life or liberty, nor shall any other criminal penalty be imposed, except according to procedure established by law’. It is disputed whether this provision applies to civil litigation. Japan currently limits the application of this provision to Criminal and Administrative proceedings. According to the legislative history, however, it should also apply to Civil Procedure.

For Nigeria, cf Sec 36(1) of the Nigerian Constitution: ‘In the determination of his civil rights and obligations, including any question or determination by or against any government or authority, a person shall be entitled to a fair hearing within a reasonable time by a court or other tribunal established by law and constituted in such manner as to secure its independence and impartiality.’

For Norway, cf Dispute Act Sec 1-1 and the Constitution of the Kingdom of Norway Art 95.

guarantee this fundamental right. Important examples are the European Convention of Human Rights⁶, the EU Charter of Fundamental Rights⁷, the American Convention on Human Rights⁸, the African Charter on Human and Peoples' Rights⁹, the Arab Charter for Human Rights (ACHR)¹⁰ and the Statute of the Arab Court of Human Rights.

- 3 Even beyond regional areas with state systems of similar legal culture, there is worldwide unanimity about the core content of the parties' right to present their case, which is reflected by the Universal Declaration of Human Rights¹¹ and the International Covenant on Civil and Political Rights¹².

For Slovenia, cf Art 22 of the Constitution: 'Everyone shall be guaranteed equal protection of rights in any proceeding before a court [...]'. Art 23 of the Constitution: 'Everyone has the right to have any decision regarding his rights, duties, and any charges brought against him made without undue delay by an independent, impartial court constituted by law. Only a judge duly appointed pursuant to rules previously established by law and by judicial regulations may judge such an individual'.

For Spain, Cf Art 24 of the Spanish Constitution: '1. All persons have the [fundamental] right to obtain effective protection from the judges and the courts in the exercise of their rights and legitimate interests, and in no case may they experience a denial of defence (*indefensión*, which could literally be translated as 'defencelessness'). 2. [...]'.

For the US, cf the Fourteenth Amendment to the Constitution of the United States; it states in the final part of Sec I: '[...] nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws'.

For Vietnam, Cf the Constitution Art 103(3): 'The People's Courts are responsible for the protection of justice, human rights, citizen's rights, socialist regime, interests of the State and legal rights and interests of organizations and individuals'. Vietnam Constitution Art 103(7): 'The right of the accused or the defendants to be defended is guaranteed; the right of the persons concerned to defend their legitimate interests is guaranteed'.

For Afghanistan before 2021 (Attention: The Afghanistan's 2004 constitution was essentially abolished on August 15, 2021, with the overthrow and dissolution of the Islamic Republic of Afghanistan by the Taliban), Cf Art 27 of Afghanistan's Constitution (2004): '[...] No one shall be punished without the decision of an authoritative court taken in accordance with the provisions of the law, promulgated prior to commitment of the offense'. Interestingly, in Chapter 2 (Fundamental Rights and Duties of Citizens), Art 25 and 27 address the right to a [fair] trial in criminal cases and non-civil cases and in addition the adjective (Fair) is missing in the document. See https://www.constituteproject.org/constitution/Afghanistan_2004.pdf?lang=en.

⁶ Art 6 European Convention of Human Rights.

⁷ Art 47 EU Charter of Fundamental Rights.

⁸ Art 8 American Convention on Human Rights. Right to a Fair Trial, Sec 1.

⁹ Art 7 African Charter on Human and Peoples' Rights.

¹⁰ Art 13 (1): 'Everyone has the right to a fair trial that affords adequate guarantees before a competent, independent and impartial court that has been constituted by law to hear any criminal charge against him or to decide on his rights or his obligations. Each State party shall guarantee to those without the requisite financial resources legal aid to enable them to defend their rights'. Cf League of Arab States, Arab Charter on Human Rights, May 22, 2004, reprinted in 12 Int'l Hum Rts Rep 893 (2005), entered into force March 15, 2008. Available on <http://hrlibrary.umn.edu/instree/loas2005.html>.

¹¹ Art 10 Universal Declaration of Human Rights.

¹² Art 14 International Covenant on Civil and Political Rights.

- 4 In particular, the parties' right to present their case comprises the right to be notified and the right to be heard.¹³ This means for the question of structuring civil proceedings that, as a matter of principle, the proceedings, that are introduced by the claimant, cannot continue without the defendant being informed about these proceedings and having got the possibility to defend their position. *Ex-parte* proceedings must remain an exception reserved for urgent matters, and in such cases the defendant is to be heard as soon as possible afterwards.¹⁴
- 5 The parties' right to present their case is also crucial for the claimant. It guarantees them the possibility to put forward all the factual and legal allegations and offers of evidence that are necessary for convincing the court about the plaintiff's rights. Without this possibility, the right to effective relief¹⁵ would be undermined.
- 6 These dimensions of the parties' right to present their case would be an argument for a procedural system which would allow the parties to present their allegations without any time limits.¹⁶
- 7 The Norwegian system works according to this model in practice (for the theoretical approach see *below* chapter 2 'The principle of concentrated presentation of facts and offers of evidence'). Although the principle of proportionality permeates the rules of the Norwegian Dispute Act, including the rules on case management in Sec 9-4, Norwegian judges do not limit the duration of the parties' presentations. However, the drawback of this approach is that court hearings are overly long, which increases delay and costs.¹⁷
- 8 Such a system, however, bears the risk of delaying strategies on the defendant's side and of an inefficient use of judicial resources.¹⁸ Consequently, for the sake of efficiency, in many systems, the parties' right to present their case is limited by rules requiring the

¹³ See part 4 of this compendium on 'Constitutionalization and Fundamentalization of Civil Procedural Guarantees and Principles'.

¹⁴ Cf, eg, Art 23(4) of the Japanese Civil Provisional Remedies Act. For details, see part 11 on 'Special Forms of Procedures'.

¹⁵ For this right, see part 4 of this compendium on 'Constitutionalization and Fundamentalization of Civil Procedural Guarantees and Principles'.

¹⁶ Cf S Huber in F Inchausti Gascón, V Smith, A Stadler (ed), *ELI/UNIDROIT Model European Rules of Civil Procedure – a commentary*, Rule 47 para 47.05.

¹⁷ NOU 2020: 11, Den tredje statsmakt. Domstolene i endring. Utredning fra Domstolkommisjonen oppnevnt ved kongelig resolusjon 11 August 2017. Avgitt til Justis- og beredskapsdepartementet 30 September 2020, 265–266.

¹⁸ Cf S Huber in F Inchausti Gascón, V Smith, A Stadler (ed) (n 16) Rule 47 para 47.05.

presentation of factual allegations and offers of evidence within certain time limits.¹⁹ The structure of civil litigation is largely influenced by such an approach, which in many systems is called ‘principle of concentration’.²⁰ The US Procedural rules similarly prescribe time limitations for pleading, discovery, and disclosure of information, but these rules are not denominated as the ‘principle of concentration’.

- 9 In other countries, eg, in Spain, the expression ‘principle of concentration’ is normally not used in this sense of ‘requiring submission of facts and offers of evidence to be put forward as early as possible within the proceedings’. It is rather reserved for the idea not to split the main hearing into several hearings that are far from each other in terms of time. In fact, the notion of ‘concentration’ in Spain is linked to orality, immediacy and the value of direct contact between the adjudicator, the parties and the evidence: in Spain, it is common ground that the oral presentation of the arguments and the testimony before the adjudicator contribute to a judgment of better quality; it is required that the arguments and testimony are proffered either in a single ‘concentrated’ hearing or a series of ‘concentrated’ (=very close to each other in terms of time) hearings. The purpose of this ‘concentration’ is to make it easier for the adjudicator to remember all the arguments and testimony and make an overall evaluation when giving the judgment.²¹ There are however some Spanish authors who

¹⁹ Under the Brazilian system the plaintiff must indicate the fact, the legal grounds of the request and the evidence with which the plaintiff intends to demonstrate the truth of the alleged facts in the initial petition (cf Art 319 III and VI of the CPC). In turn, it is up to the defendant to claim, in the defence, to expose the fact and law reasons and matters, specifying the evidence they intend to produce (cf Art 336 CPC);

for the German system, cf Sec 273(2) n° 1, 275(1), (3) and (4), 276(1) and (3), 277, 282 and 296 of the German CCP (GCCP) (the English version can be consulted at https://www.gesetze-im-internet.de/englisch_zpo/englisch_zpo.html#p1053);

for Iran: Basically, the parties’ right to present their case is limited by rules requiring the presentation of factual allegations and offers of evidence within certain time limits. However, such limitation is affected by Art 199 of Iran’s CCP: ‘In all legal matters the court shall carry out any investigations or take any measure that is necessary for finding the truth, in addition to examining the evidence invoked by the parties.’ Therefore, relying on this provision, some courts have found themselves permitted to ignore such rules. The precedent in Iran’s Cour de Cassation is to greater extent, established in this matter

for Norway, cf Sec 9-16 Dispute Act, but courts almost always grant exceptions (see above para 7);

for the US, cf USFRCP 16 (scheduling order from the court setting time limits for pleadings, discovery, and dispositive motions practice);

for the Spanish system, cf Art 136, 265, 269–272, 399, 400, 405, 406, 412, 429(1), 437(1) and 438(1) of the Spanish CCP.

²⁰ For example in the German system cf O Jauernig, B Hess, *Zivilprozessrecht*, (30th edn, Beck 2011) § 28 para 9; P Willmann, *Die Konzentrationsmaxime* (Duncker & Humblot 2004); in Slovenia, there are also a principle of concentration and the duty of the parties to contribute to the effectiveness of procedure; the Brazilian system is similar; there, the principle of concentration is also called the principle of eventuality or estoppel (cf Humberto Theodoro Júnior, *Curso de Processo Civil*, vol I, (64th edn, Forense 2023), 96; for Norway, cf J E A Skoghøy, *Tvisteløsning* (4th edn, Universitetsforlaget 2022), 574–578; Iran’s Code of Civil Procedure also follows this approach.

²¹ Cf A de la Oliva Santos, *Curso de Derecho Procesal Civil I*, (4th edn, Editorial Universitaria Ramón Areces 2019), 235–240.

take account of how other systems define the idea of ‘concentration’ in the sense indicated above (requiring the concentrated submission of facts and offers of evidence at an early stage of the proceedings).²²

- 10 In this comparative analysis, the term ‘principle of concentration’ is used in a broad sense comprising all the dimensions indicated above. The following section however focuses on the concentrated presentation of facts and offers of evidence. The other dimensions of the principle of concentration will be discussed in Chapter 2 dealing with the different stages of the proceedings.

5 THE PRINCIPLE OF CONCENTRATED PRESENTATION OF FACTS AND OFFERS OF EVIDENCE

- 11 To implement the principle of concentrated presentation of facts and offers of evidence, many different approaches are conceivable.

5.1 The Flexible Approach

- 12 Many national systems follow a flexible approach, which gives the judge wide case management powers (for a detailed analysis of the court management, see chapter 2.3). To illustrate the functioning of such a flexible approach, the solutions of the procedural systems of the following countries will be outlined: Germany, Slovenia, Brazil, Japan, Togo, and the US, on the one hand, and Belgium, the Netherlands and Norway on the other hand. A short look at the ELI/UNIDROIT Model European Rules of Civil Procedure will round out the analysis.

- 13 Under the *German system*, there is one general rule which states that

[...] each party is to submit to the court its means of challenge or defence, specifically allegations, denials, objections, defence pleas, evidence and objections to evidence submitted, as promptly as, based on the circumstances of the proceedings, this corresponds to a diligent pursuit of the court proceedings and serves to promote them.²³

- 14 This general rule leaves much room for the evaluation of each individual case with its specific circumstances. The claimant is not obliged to bring all thinkable allegations right at the beginning, but they are entitled to concentrate on the main line of reasoning. Depending on the defendant’s allegations in their statement of defence, the claimant can then bring new allegations in their answer. This is a rather flexible approach, which

²² V Fairén Guillén, ‘Notas sobre el principio de concentración’ in *Estudios de Derecho Procesal* (Editorial Revista de Derecho Privado 1955), 291–298.

²³ Sec 282(1) of the German CCP. The English version can be consulted at https://www.gesetze-im-internet.de/englisch_zpo/englisch_zpo.html#p1053.

allows the court to adapt the conduct of the proceedings to the individual circumstances of each case, but which has the disadvantage of creating a certain degree of legal uncertainty.

- 15 In addition to this general rule, the court has the power (and depending on the circumstances the duty) to determine precise deadlines for specific procedural acts, in particular for the submission of the statements of defence and the claimant's answers to these statements.²⁴ If a party does not respect the general rule of Sec 282 German CCP (GCCP) or the time limits set by the court, the court will refuse the corresponding allegations of fact and offers of evidence unless their consideration does not create any delay in the proceedings or the violation of the principle of concentrated presentation is sufficiently excused.²⁵
- 16 Objections to the admissibility of the claim are subject to particularly strict requirements. In any case, the defendant must raise these objections prior to being heard on the merits, and if the defendant does not respect an earlier deadline set by the court and cannot present a sufficiently substantiated excuse for this, the objections presented belatedly will not be taken into consideration.²⁶
- 17 In *Slovenia* the parties may assert new facts and evidence at the first main hearing at the latest (Art 286 CPA). At subsequent main hearings the parties are allowed to present new facts and new evidence only if they were not able to submit them at the first main hearing through no fault of their own. The rule is thus flexible, and it is not applied strictly. Nevertheless, it still has certain deterrent effect at least. Understandably, the rule that the parties may bring forward new facts and evidence as late as in the first session of the main hearing, does not allow for an effective preparation of the main hearing. The importance of the preparatory stage of proceedings is diminished (and in practice, the distinction between pre-trial and trial – or preparatory stage and main hearing – is hardly existent). In addition, pursuant to Art 286a CPA, the court may ask the parties specific questions (eg, to submit specific items of evidence, to give additional factual explanations or clarifications, to reply to the other party's submissions). It may set a (cut-off) time limit thereto. Similar exceptions as mentioned above (no fault, no delay) apply.
- 18 The 2008 CPA amendment gave judges tools to implement a kind of written preparatory procedure, thus strengthening the preparatory stage and ensuring a better preparation of the main hearing. Judges now have the power to require (and to impose binding time limits) that parties make further submissions and clarifications concerning facts, evidence and legal positions in the set time limit.²⁷ The judge may exercise this discretion

²⁴ Cf Sec 275, 276 and 277 GCCP.

²⁵ Cf Sec 296 GCCP.

²⁶ Cf Sec 296(3) in conjunction with Sec 282(3) GCCP.

²⁷ Cf Art 286a/1 of the 1999 Slovenian Civil Procedure Act (CPA).

already in a written form before the main hearing. The discussed provision is framed following the example of Art 273 of the GCPC (according to which a court can demand from the parties to submit written statements on certain points that need to be clarified). If a court sets the time limits for the filing of new preparatory submissions and this time limit is not met, new submissions made after the time period has expired are admissible only if the court is convinced that admitting them will not delay the resolution of the dispute or if the party provides an adequate justification for the delay in presenting them.²⁸ The discussed tools are optional; the judge is empowered but not obliged to use them. Thus, in line with the world-wide trends in development of civil procedure, more room is now provided for the judge to adapt the unfolding of proceedings and its timeframe to the characteristics of each particular case. A judge can decide, according to the particularities of the given case, whether it shall implement a written preparatory procedure or whether a main hearing shall take place and the case shall be discussed orally with the parties. The latest amendment of the CPA promoted the idea of cooperation between the judge and the parties, eg, by requiring the court to adopt, after consultation with the Parties, a procedural plan.²⁹ This should include both issues of substantive preparation of the case (determining relevant and disputed facts and preliminary legal basis) as well as procedural preparation (eg, targeted dates for submissions and hearings).

- 19 In *Japan*, there is the principle of planned trials. This means that the court and the parties shall try to abide by the planned progress of litigation proceedings with the objective of achieving a fair and speedy trial.³⁰ As of timing for presenting allegations and evidence, the Japanese system generally follows German law tradition: Allegations and evidence shall be presented at an appropriate time, in accordance with the status of progress in

²⁸ Cf Art 286a/2 Slovenian CPA.

²⁹ Cf Art 279 Slovenian CPA.

³⁰ Cf JCCP Art147-3:

(1) If due to the complexities of a case, such as the large number of particulars that shall be examined or complications involving the same, or if due to any other circumstances, it is found to be necessary in order for the court to hold a fair and speedy trial, the court shall consult with both parties and formulate a plan for trial based on the outcome of that consultation.

(2) A plan for trial as referred to in the preceding paragraph shall specify the following particulars:

(i) the time frame for arranging issues and evidence;

(ii) the time frame for examining witnesses and the parties themselves;

(iii) the intended time frame for concluding oral arguments and rendering a judgment.

(3) In addition to the particulars set forth in the items of the preceding paragraph, the plan for trial as referred to in paragraph (1) may specify the time frame for presenting allegations or evidence with regard to any specific matter, and any other particulars that are necessary from the perspective of the planned progress of litigation proceedings.

(4) If the court finds it necessary in consideration of the current status of a trial, the status of the party's pursuit of litigation, and any other circumstances, the court may consult with both parties and modify the plan for trial as referred to in paragraph (1) based on the outcome of the consultation.

the litigation (principle of presentation at an appropriate time).³¹ In order to implement this principle, there are three provisions. The first is JCCP Art 157 (1):

With regard to allegations or evidence that a party has presented after the time for doing so, whether intentionally or through gross negligence, if the court finds that such allegations or evidence will delay the conclusion of litigation, it may rule to dismiss them without prejudice, upon petition or sua sponte.³²

- 20 The second is JCCP Art 157 (2): ‘The provisions of the preceding paragraph also apply if a party does not give the necessary explanation with regard to allegations or evidence whose import is unclear, or does not appear on the date for giving an explanation’.³³ The third is the special provision of dismissal of allegations or evidence without prejudice when a plan for trial has been established:

If a time frame for presenting allegations and evidence on a specific matter is specified pursuant to the provisions of Art 147-3, paragraph (3) or Art 156-2 (including as applied mutatis mutandis pursuant to Art 170, paragraph (5)), and the court, with regard to allegations or evidence that a party has presented after the expiration of such time frame, finds that such allegations or evidence would be substantially detrimental to the progress of litigation proceedings based on the plan for trial, the court may rule to dismiss them without prejudice upon petition or sua sponte; provided, however, that this does not apply if the party has made a prima facie showing of reasonable grounds for the party having been unable to present the allegations or evidence within that time frame.³⁴

- 21 If the court of first instance decides to follow one of the proceedings for issue and evidence arrangement before the trial (oral arguments proceeding), there is a very particular incentive for the parties to present facts and to offer evidence as early as possible. Judges often choose the preparatory proceedings for the trial.³⁵ It is not open to the public but it is guaranteed that both parties can attend the preparatory hearing.³⁶ During such a hearing, the court may reach a judicial decision regarding the offering of evidence or any other judicial decision that may be reached during a hearing other than a hearing for oral arguments, and may examine written evidence and objects.³⁷ For such

³¹ Cf JCCP Art 156-2: ‘If the presiding judge finds it to be necessary for the progress of litigation proceedings based on a plan for trial as referred to in Article 147-3, paragraph (1), the presiding judge may specify a time frame for presenting allegations and evidence on a specific matter, after hearing the opinions of the parties’.

³² Cf JCCP Art 157(1).

³³ Cf JCCP Art 157(2).

³⁴ Cf JCCP Art 157(2).

³⁵ Cf JCCP Art 168–174.

³⁶ Cf JCCP Art 169.

³⁷ Cf JCCP Art 231(mutatis mutandis application to objects equivalent to documents, JCCP Art 170(2)).

a case, the JCCP states that, at the request of the adverse party, a party that has presented allegations or evidence after the closure of the preparatory proceedings shall explain to the adverse party the reasons why the party was unable to present the allegations or evidence prior to the closure of the preparatory proceedings. This is the Japanese way to encourage both parties to present allegations and evidence as early as possible. This is not a rigid preclusion and sanction system but has rather the indirect effect to motivate the professional lawyers who want to avoid explanation, which means excuse.

- 22 Finally, there is the Japanese Act on the Expediting of Trials.³⁸ The average duration of litigation proceedings in first instance of District Court (not Summary Court) is about 10 months.
- 23 Under *Brazilian Procedural Law*, the principle of concentrated presentation of facts and offers of evidence is implicit, based on several rules contained in the Brazilian Code of Civil Procedure and applied with some flexibility. The parties may present their arguments at different moments of the procedure, according to the respective phase. In the initial phase, the claimant must lay down the essential facts (cause of action) and the claim in the statement of claim; there are only limited possibilities to alter the initial claim. In response, it is up to the defendant to present their defence, alleging procedural preliminaries or arguments on the merits. The parties must indicate, at this initial stage, the intended pieces of evidence to be produced. Certainly, during the proceedings, supervening facts might be presented and require new pieces of evidence. After this initial phase, the evidentiary and decision phases follow. In all these phases, there are certain deadlines; but the Brazilian CPC foresees the possibility for the judge³⁹ to extend procedural deadlines with the objective of guaranteeing the parties right to present their case.⁴⁰ The judge also has the power to change the order of the taking of evidence, adapting them to the specific circumstances of the dispute. However, public order issues may be alleged and decided at any time.⁴¹
- 24 The new Brazilian Code of Civil Procedure also has some other new and important provisions and possibilities that may be emphasised in this context: a) the rule contained

³⁸ Art 2(1) states that the objective of expediting trials is to conclude the litigation proceedings of the first instance within a period of two years and, with regard to other proceedings of the court, to conclude each litigation proceeding as fast as possible by implementing reinforced proceedings and improving the support system and structure.

³⁹ Art 139 Brazilian CCP.

⁴⁰ For instance, it may happen when the plaintiff does not pay the court costs within 15 days of filing the action due to the closure of banks due to a staff strike. The same may occur if the defendant did not present the defence on time because the system of the respective judicial body was out of service on the last day of the appropriated period.

⁴¹ The lack of jurisdiction, the absence of procedural requirements, the prior existence of *res judicata* or a decision contrary to a binding precedent signed by a higher court are some examples of public order issues.

in Art 190, in the sense that parties may conclude procedural conventions providing for changes in the procedure with the aim of adjusting it to the specifics of the case; so, they can agree on special rules for the procedural burdens, powers, and duties before or during the proceedings; b) Art 191 establishes that the judge and the parties may, by mutual agreement, establish a timetable for the execution of procedural acts. The deadlines set in the agreed calendar will only be modified in exceptional, duly justified cases. When the parties establish by agreement the procedural schedule, there is no need to communicate the dates for specific procedural acts to the parties (subpoena).

- 25 In the *United States*, federal procedural rules prescribe the timing of deadlines for submission of pleadings, including the plaintiff's complaint and the defendant's answer, including any submissions as the part of third-party practice by impleading litigants. In addition to deadlines for submission of pleadings, rules also govern deadlines for the conduct of discovery, including discovery by expert witnesses. At the outset of litigation, the judge will meet with the parties and will accomplish a scheduling order that sets out deadlines for submission of pleadings, amended pleadings, discovery, and dispositive motions. This scheduling order is binding on the parties to the litigation, although in special circumstances attorneys may request extension of time in which to make filings.⁴² If the parties mutually agree to an extension of time, the judge will typically grant such an extension. If the parties do not agree, then the judge can grant or deny a motion for extension of time in the judge's discretion. Before trial, the judge has the power to make rulings on the admissibility of evidence in so-called motions *in limine*.

- 26 Art 75 of the Code of civil procedure of *Togo* states:

If the proof of the facts of the case requires investigation measures, these are ordered by the court at the joint request of the parties or even ex officio. After execution of the measures of investigation within the time limits fixed by the president of the court or his delegate, the clerk notifies the minutes or reports of these measures to each of the parties and convenes them for the hearing of the judgment according to the new deadline fixed by the president of the court.

This procedural arrangement could be seen as a time-frame flexible approach.

- 27 In *Belgium*, the claimant is allowed to change the initial claim and to add additional or new claims in the course of the proceedings. The amended, expanded or new claim should be based on a fact, or an act relied upon in the act initiating the procedure.⁴³ This requirement is, however, not interpreted very strictly. As long as there is a connection between the amended, extended or new claim and the facts and acts relied upon in the

⁴² USFRCP 16; cf also USFRCP 26(f) (discovery scheduling).

⁴³ Cf Art 807 Belgian Judicial Code.

act initiating the proceedings, the requirement is fulfilled.⁴⁴ Facts can also be amplified or supplemented for this purpose. Moreover, the violation of this rule cannot be raised by the court of its own motion. Parties can thus agree to extend the scope of the proceedings to other issues. Of course, the opportunity to do so also depends on the procedural calendar agreed upon by the parties or imposed by the court. In principle, it is not possible to amend or extend a claim or to bring a new claim after final submissions have been exchanged, as this may violate the other party's right to due process. But again, it should be stressed that Belgian civil procedure is very liberal/flexible (party driven) and a request may always be granted where the other party agrees.

- 28 In the *Netherlands*, a claimant has the power to limit⁴⁵, extend or change⁴⁶ their claims or the grounds relied upon as long as the judge has not yet communicated the term in which a final judgment will be delivered. The defendant can oppose the extension or change of the claim where this would be in breach with the requirements of due process. The judge may also reject a change or extension of a claim on this ground of its own motion.⁴⁷
- 29 The *Norwegian system* is theoretically also based on the general idea of concentration, but very flexible in practice (see above chapter 1). Sec 1-1 of the Norwegian Dispute Acts identifies the purpose of the Act and the general principles that it is based on. The aim of sound, efficient and trustworthy proceedings is interpreted to encompass the principle of concentration.⁴⁸ The concentration of the ambit of the dispute and the evidence is regulated by giving judges a duty to clarify incomplete and unclear allegations,⁴⁹ and in the duty to exercise efficient case management.⁵⁰ However, courts practice the rules on preclusion of new claims, grounds for claims and evidence leniently, thus watering down the rules. This was identified as a problem by the Norwegian Court Commission in its 2020 report.⁵¹ The commission proposed several measures including adding an explicit statement that the court has an obligation to assist the parties in specifying, and when appropriate, narrowing, the ambit of the dispute during the case management hearing, spending more time in case management hearings and the court

⁴⁴ Note that the act initiating the proceedings is only required to contain a short summary of the claim and the pleas (in fact) relied upon: Art 702, 3° Belgian Judicial Code.

⁴⁵ Cf Art 129 Dutch Code of Civil Procedure.

⁴⁶ Cf Art 130(1) Dutch Code of Civil Procedure.

⁴⁷ Cf Art 130(1) Dutch Code of Civil Procedure.

⁴⁸ I L Backer, *Norsk sivilprosess*, (2nd edn, Universitetsforlaget Oslo 2020) 292–293. J E A Skoghøy (n 20) 574–578.

⁴⁹ Cf the Norwegian DA Sec 11-5 and 11-6.

⁵⁰ Cf the Norwegian DA Sec 9-4.

⁵¹ NOU 2020: 11, Den tredje statsmakt. Domstolene i endring. Utredning fra Domstolkommisjonen oppnevnt ved kongelig resolusjon 11 August 2017. Avgitt til Justis- og beredskapsdepartementet 30 September 2020, 274–275.

drafting a summary of the case before or after the case management hearing.⁵² The case summary is inspired by Swedish and Finnish law.

- 30 The *ELI/UNIDROIT Model European Rules of Civil Procedure* are also based on a flexible approach, which is composed of the general duty of the parties to present their allegations in due course⁵³ and of the court's power to set specific deadlines.⁵⁴ Only for very specific procedural acts, the Model Rules provide for a precise deadline.⁵⁵

5.2 The Rigid Approach

- 31 At the opposite end of the flexible approach, there is the Spanish system, which represents a paradigm of a rigid approach, where concentration is reinforced with a strict legal preclusion.
- 32 On the one hand, the Spanish system aims at concentrating the allegation of the full list of facts and legal perspectives of the case,⁵⁶ as well as the submission of the bulk of the evidence, right at the beginning of the proceedings and in a short period of time, namely the time between the filing of the statement of claim and the filing of the statement of defence. On the other hand, once this period has elapsed, a strict legal preclusion applies, whereby the parties are *ex lege* barred from introducing any element of fact, law or evidence that they could have submitted during the aforementioned period.
- 33 In this regard, first, the *claimant* is required to include into the statement of claim an exhaustive description of all the facts and legal grounds upon which the claim is based, as well as to attach all their documentary evidence.⁵⁷ Then, the same applies to the *defendant*, who has a non-extendable time-limit of 20 working days (10 working days in cases up to EUR 15,000) to file a statement of defence that includes all potential relevant facts and legal grounds of defence and to attach all relevant documentary evidence.⁵⁸ Once the two statements have been filed – with the attached documents –, a strict legal

⁵² NOU 2020: 11, Den tredje statsmakt. Domstolene i endring. Utredning fra Domstolkommisjonen oppnevnt ved kongelig resolusjon 11 August 2017. Avgitt til Justis- og beredskapsdepartementet 30 September 2020, 278–281.

⁵³ Cf Rule 47; for an analysis of this approach, cf S Huber in F Inchausti Gascón, V Smith, A Stadler (ed) (n 16) Rule 47 para 47.3 ff.

⁵⁴ Cf Rules 49 and 50; for an analysis of this approach, cf S Huber in F Inchausti Gascón, V Smith, A Stadler (ed) (n 16) Rule 49 para. 49.12 ff.

⁵⁵ Cf Rule 54; for an analysis of this approach, cf S Huber in F Inchausti Gascón, V Smith, A Stadler (ed) (n 16) Rule 47 para 47.08 ff.

⁵⁶ That Spanish procedural law requires the parties to express the legal perspective(s) applicable to the case may be seen as a consequence of Spain being a 'country of lawyers' with a tradition of 'judicial proceedings with lawyers' (A. de la Oliva Santos, *El papel de juez en el proceso civil* (Civitas 2012) 77–80).

⁵⁷ Art 399, 437(1) and 265 of the Spanish CCP.

⁵⁸ Art 405, 438(1) and 265 of the Spanish CCP.

preclusion applies and hardly any changes are admissible.⁵⁹ After the two initial briefs have been handed in, the full picture of the dispute is expected to become ‘frozen’ and anything that happens afterwards shall consider the dispute as defined by the initial briefs.

- 34 These strict rules combining concentration and strict legal preclusion provide certainty to the court and the parties, who, from a very early stage, get to know what the full picture of the dispute is and what are the ‘weapons’ of the opponent. Importantly, they are also meant to contribute to speeding up the proceedings, since it prevents the procedure from going back and forth, with the inclusion of new data creating delays in terms of additional procedural efforts, efforts consisting of, at least, the preparation of requests for the inclusion, allegations of the opposing party as to whether the requests should be accepted or not, and decisions of the court on the acceptance or denial of the requests. Finally, they are also understood to prevent abuses and foster the due diligence and responsibility of the parties and their representatives, as they are aware that only they (not the other parties nor the Justice system) will bear the negative consequences of any intentional or neglectful mistake they make.⁶⁰
- 35 The rigid rules may, nevertheless, entail some risks to the fairness of the final outcome in terms of allowing for the possibility of a judgment that does not finally take into account relevant information or evidence that one of the litigants forgot to disclose at the right time. Indeed, under the rigid Spanish system, any omission may end up being fatal for the interests of the party, who might eventually lose the pending case and be left with the only solution of instituting a follow-up suit against their legal representative for the damages arising from a lack of professional diligence.
- 36 In light of these risks to fairness or the final outcome, the Spanish system provides for an escape valve of the rigid system: when a party demonstrates that a failure to mention a fact or a legal argument, or failure to submit a piece of documentary evidence, was not at all due to a lack of diligence attributable to the party themselves or to their lawyer (because it was truly impossible for the party and their lawyer to have knowledge of the omitted defence or evidence or of its relevance to the proceedings), the omitted fact, legal perspective or piece of evidence could still be admitted at a later stage in the pending proceedings. However, the truth is that Spanish courts are very reluctant to apply this escape valve, and the majority of the requests for a late submission are rejected.

5.3 Impact on the Structure of Civil Litigation

- 37 The principle of concentrated presentation of facts and offers of evidence ensures that the court has enough information after the exchange of the first statement of claim and

⁵⁹ Art 400, 437(1), 136, 412, 269–272 and 499 of the Spanish CCP.

⁶⁰ Cf E Vallines García, *La preclusión en el proceso civil* (Civitas 2004) 112 ff.

the first statement of defence for gaining a sufficiently clear understanding of the case. Such an understanding significantly increases the chance that the court can manage the case efficiently. So, the principle of concentrated presentation does not only influence the time for bringing forward certain allegations, but it also has a clear influence on the entire structure of civil litigation insofar as it allows an efficient case management avoiding the discussion of irrelevant aspects. It is interesting to note that in several procedural systems, recent reforms have established the possibility for the court to set up a timetable for the proceedings in cooperation with the parties, which then becomes binding (for more details, see Chapter 2 subdivision 4.4.3).

6 THE PUBLIC CHARACTER OF THE PROCEEDINGS

- 38 The parties' right to a public hearing is one of the most important procedural rights. It is often guaranteed by constitutional law – either expressly⁶¹ or impliedly⁶² – and binding

⁶¹ The Brazilian Constitution establishes in its Art 5: 'LX – the law may only restrict the disclosure of proceedings if the restriction is required to protect privacy or the interest of society', and in its Art 93: 'IX – all judgments of the bodies of the judicial branch shall be public, and all decisions shall present grounds, under penalty of nullity, but the law may limit attendance, in given acts, to the interested parties and to their lawyers, or only to the latter, whenever preservation of the right to privacy of the party interested in confidentiality will not harm the right of the public interest to information'. This principle is also mentioned in Art 11 of the Brazilian Code of Civil Procedure.

Sect 19 (14) of the Ghanaian Constitution provides for similar guarantees.

For Japan, cf the Constitution (Principle of Open Trial) Art 82: 'Trials shall be conducted and judgment declared publicly. Where a court unanimously determines publicity to be dangerous to public order or morals, a trial may be conducted privately, but trials of political offenses, offenses involving the press or cases wherein the rights of people as guaranteed in Chapter III (Human Rights Protection Clauses) of this Constitution are in question shall always be conducted publicly.' This article is strictly adopted to the ordinary litigation and even small claims proceedings. Personnel Litigation Law, the Patent Act and the Unfair Competition Prevention Act etc contain exceptional provisions with rigid requirements in order to protect privacy and trade secrets. For example, Art 22(1) Personnel Litigation Law provides that the court may issue a ruling to conduct an examination concerning a particular matter in camera if a party to personal status litigation or their legal representative (hereinafter collectively referred to as a 'party or representative' in this paragraph and the following paragraph) or a witness is to be examined regarding a matter that is the basis for the familial relationship status change or declaratory judgment as to whether a familial relationship exists that is the subject matter of the suit being litigated, and that concerns a deep personal secret from the private life of the person subject to examination, when the court finds unanimously that the party, representative, or witness would be unable to provide a sufficient statement regarding that matter in open court because it is clear that doing so would substantially interfere with their life in the community, and that the court cannot make an appropriate judicial decision on the status change or declaratory judgment in question in the absence of such a statement, based solely on the other evidence. (2) Before issuing the ruling referred to in the preceding paragraph, the court must hear the opinions of the party or representative and the witness. (3) If a court will conduct an examination concerning a particular matter in camera pursuant to the provisions of paragraph (1), it must declare this and indicate its reason for doing so before having the public leave the courtroom. Once the examination concerning the matter in question has ended, the court must allow the public to re-enter the courtroom.'

The procedural guarantee of a public hearing is explicitly recognized under Sec 36 subsection 3 of the Nigerian Constitution as follows: 'The proceedings of a court or the proceedings of any tribunal relating to the matters mentioned in subsection (1) of this section (including the announcement of the decisions of the court or tribunal) shall be held in public'.

For Slovenia, cf Art 24 of the Constitution: 'Court hearings shall be public. Judgments shall be pronounced publicly. Exceptions shall be provided by law'.

For Spain, cf Art 24 of the Spanish Constitution: '1. [...] 2. Likewise, all (persons) have the right [...] to a public trial without undue delays and with full guarantees; [...]'

For the US, it can be observed that the fundamental right to a public hearing is represented through the American doctrine of procedural due process, guaranteed by the Fifth and Fourteenth Amendments to the U.S. Constitution. Procedural due process requires that every litigant have notice of a proceeding and the opportunity to be heard. Almost all hearings and trial in the United States are open to the public. A judge, in their discretion, may close some proceedings, however, or limit public access in some fashion (eg, ability to observe proceedings remotely, rather than in person).

For Vietnam, cf the Constitution Art 107(3): 'The People's Courts shall hold their hearings in public. In special cases, which require the protection of state secrecy, fine customs and beautiful habits of the

supranational instruments, such as the European Convention on Human rights.⁶³ The ELI/UNIDROIT Model European Rules of Civil Procedure also comprise a corresponding rule.⁶⁴ It is interesting to observe that the American Convention on Human Rights expressly establishes the public character only for criminal proceedings.⁶⁵ This might reflect a general trend to put more emphasis on the public character of proceedings in the criminal context (for a detailed analysis of the principle of public proceedings, see part 4 ‘Constitutionalization and Fundamentalization of Civil Procedure Guarantees and Principles’, chapter on ‘the right to public proceedings’).

- 39 A question which is highly debated in the context of civil proceedings concerns the right of the parties to waive their right to a public hearing. Traditionally, the right to a public hearing was considered to protect the parties against unfair treatment by the court.⁶⁶ In systems where the citizens have developed a high degree of confidence in state courts, the parties do not fear unfair treatment by the courts but rather the publicity of their case.

6.1 The Purposes of the Public Character

- 40 The principle of public proceedings is strongly embedded in traditional justice systems in most *African cultures* and serves two essential functions. First, it reinforces the legitimacy of traditional authorities and their power to dispense justice on behalf of society. In addition, it guarantees the existence of ‘witnesses’ during the proceedings and the delivery of the final judgment.⁶⁷
- 41 The public nature of court proceedings is also protected by the *Belgian Constitution* and can only be departed from where this would endanger public order or good morals.⁶⁸ That being said, the Belgian Judicial Code provides for further exceptions to this rule, in

nation, the protection of youths and the protection of privacy according to the legitimate requirement of the persons concerned, the People’s Courts can hold their hearings in secret.’

⁶² For example, in Germany where the right to a public hearing is expressly provided for in the Courts Constitution Act (cf Sec 169), but not in the Constitution; on the constitutional level, it is however, derived from the constitutional principle of democracy.

⁶³ Cf Art 6; for an analysis, cf J A Frowein, W Peukert, *Europäische Menschenrechtskonvention. EMRK Kommentar* (4th edn, Engel Verlag 2023) comment on Art 6;

cf Art 13 (2) of the Arab Charter on Human Rights, May 22, 2004: ‘Trials shall be public, except in exceptional cases that may be warranted by the interests of justice in a society that respects human freedoms and rights.’ (reprinted in 12 Int’l Hum Rts Rep 893 (2005), entered into force March 15, 2008, available at <http://hrlibrary.umn.edu/instate/loas2005.html>).

⁶⁴ Rules 17 and 18(2).

⁶⁵ Art 8 Sec 5.

⁶⁶ Cf, for example, S Huber, ‘Mündlichkeit und Unmittelbarkeit’ (2022) ZJP 183, 191 ff.

⁶⁷ K Ainuson, ‘Role of Public and Media in Civil Court Proceedings in Ghana’, KAS African Law Study 2018, 57.

⁶⁸ Art 148 Belgian Constitution.

particular in family matters,⁶⁹ and also the protection of trade secrets or the confidential nature of other data may warrant a limitation of the public nature of proceedings.⁷⁰

- 42 In *Brazil*, the principle of public proceedings concerns the hearings and the trial sessions as well as the case files, the respective decisions, and general access to the judiciary's buildings – certainly in accordance with the working hours and the service standards.⁷¹ However, the constitutional provisions make clear that the principle of public proceedings is not absolute and can be restricted for protecting privacy or the public interest.⁷²
- 43 In the *United States*, generally all hearings and trials are open to the public as an aspect of fundamental due process guaranteed to litigants by the Fifth and Fourteenth Amendments to the US Constitution, and the Seventh Amendment to a right to trial by jury. Due process requires that litigants have notice of the proceedings and the opportunity to be heard. In some circumstances the judge may limit access to a public trial where the presence of persons in the courtroom might be unduly prejudicial to litigants involved in the proceedings. For example, in DES⁷³ litigation the trial judge ordered that DES injured children (as plaintiffs) be excluded from the trial courtroom as potentially unduly prejudicial to the defendants in the lawsuit. However, the trial judge made arrangements for the DES victims' plaintiffs to watch the proceedings remotely on video and outside the courtroom. If members of the public who are physically present in the courtroom and become unduly disruptive of the proceedings, the judge may order the removal of disruptive members of the public.
- 44 Also in the *Netherlands*, the public nature of courts proceedings is protected by the Constitution.⁷⁴ The public nature can only be departed from in circumstances determined by law.⁷⁵

⁶⁹ Art 757 Belgian Judicial Code.

⁷⁰ Art 871bis.

⁷¹ A Gonçalves de Castro Mendes, *Teoria Geral do Processo* (Lumen Juris 2009) 28 ff.

⁷² Cases related to privacy are found more frequently, such as those involving exposure to personality rights. Thus, proceedings involving divorce or child custody can be done without public access. Concerning the public interest, the courts have mainly affirmed the lack of public interest to guarantee the incidence of publicity, as occurred in a judgment in which the Brazilian Constitutional Court affirmed the right of access to the records of proceedings that were conducted in the Superior Court Military in the 1970s, that is during the dictatorial period (ROMS nº 23.036). However, it can be indicated that proceedings involving data sensitive to the country's military security as well as digital platforms of public bodies can be conducted in 'secrecy of justice'.

⁷³ Abbreviation for the Synthetic Drug Diethylstilbestrol.

⁷⁴ Art 121 Dutch Constitution.

⁷⁵ Cf Art 27 and 29 Dutch Code of Civil Procedure.

- 45 In *Japan*, the right to a public trial is a constitutional principle.⁷⁶ The parties cannot limit this principle by way of consent. This very rigid approach is a consequence of historical experience.
- 46 The situation is different in *Iran*. Principle 165 of Iran's Constitution (1979) states:

Trials are to be held openly and members of the public may attend without any restriction, unless the court determines that an open trial would be detrimental to public morality or discipline, or if in case of private disputes, both the parties request not to hold open hearing.

This makes clear that in private disputes, the parties have the possibility to exclude the public. In practice it is, however, not always the parties who decide; it must be observed that, in practice, courts often refuse a public hearing even if neither party makes such a request.⁷⁷

- 47 Finally, it can be observed that not in all, but in many procedural systems, for example in *Belgium, Brazil, Germany, Japan, Norway, Slovenia, Spain, Togo, and the United States*, the public character of the proceedings is also considered as a principle of public policy. As such, it is not only established in the interest of the parties but also in the interest of the whole society. It is considered as an instrument designed to create confidence in the judicial system.⁷⁸ Control of the judiciary can be exercised by any person.

6.2 The Impact on the Structure of Civil Litigation

- 48 An understanding of the principle of public proceedings in such a sense that it does not only protect the individual parties but also the public interest has an important influence on the structure of civil litigation as it bars parties from shaping their own procedure without public elements.⁷⁹
- 49 A different question is whether the public element is necessarily a public hearing. The overview of the different national approaches in section 3.1 has shown that many systems provide for proceedings without public hearing, eg, for reasons of efficiency in the context of small claims. One example is the EU small claims regulation, which is however limited to transnational cases where the organization of a hearing is more

⁷⁶ Cf Art 82.

⁷⁷ Observation by Majid Pourostad.

⁷⁸ L Rosenberg, K H Schwab, P Gottwald, *Zivilprozessrecht* (18th edn, Munich 2018) § 21 para 16. For Norway: J E A Skoghøy (n 20) 565–570; for a comparative overview cf A Nylund, A Cabral, *Contractualisation of Civil Litigation* (Intersentia 2023) para 5.2.2. For Spain A de la Oliva Santos (n 21) 171, 240–241.

⁷⁹ For the question of private autonomy in the context of civil proceedings, cf A Nylund, A Cabral (n 78).

complicated and leads to a heavier burden for the parties than in national cases.⁸⁰ Another example is the development of pure online proceedings without videoconferencing. In Norway, there is a specific mechanism for out-of-court dispute resolution, particularly in consumer cases. The proceedings in these cases are purely written, and the decisions of the public CDR body are enforceable and governed by the rules on *res judicata* like a court ruling.⁸¹

- 50 Considering modern technology, the absence of a public hearing does however not necessarily mean that the principle of public proceedings is not respected. If public control can be ensured by other public elements which are also a solid basis for gaining and keeping confidence in the judicial authorities, proceedings without public hearing should be in conformity with the principle of public proceedings and, thus parties could be given the possibility to waive their right to a public hearing.⁸² Other elements that could ensure the public character of the proceedings are public access to key documents of the case, the public ruling and the publication of all decisions. In this context, the use of new technologies might play an important role.⁸³
- 51 The *English Procedural law*, for example, guarantees public access to essential court documents.⁸⁴ Also in *Spain*, all court records are considered to be public, and non-parties may obtain anonymized copies if they show a 'legitimate interest'.⁸⁵ The *Norwegian Dispute Act* Sect 14-2 grants a general access to court records and rulings, as well as many written statements and submissions and evidence, and the *Japanese Code of civil*

⁸⁰ Regulation (EC) No 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European Small Claims Procedure, OJ L 199, 31/7/2007, 1–22; cf Art 5.

⁸¹ A Nylund, 'Alternative Dispute Resolution, Justice and Accountability in Norwegian Civil Justice' in J Hoevenaars, B Kas, X Kramer and E Themeli (ed), *Frontier in Civil Justice: Privatisation, Monetisation and Digitisation* (Edward Elgar publishing 2022), 81–100, 98–99.

⁸² For this idea, cf for example, S Huber (n 66) 204.

⁸³ In Brazil, the constitutional provision has a broad meaning in terms of public hearings, publication of judicial decisions and access to records. However, access to the records is only broadly guaranteed to the parties and lawyers. Those who are not party to the respective proceedings, need to demonstrate a legitimate interest in the access to the records. Likewise, especially in electronic records, there may be limitations on data accessibility due to data protection legislation. In Brazilian doctrine, the principle of publicity and simplified procedures, such as the special courts for less complex cases, have not been seen as conflicting because publicity is interpreted as the availability of access to procedural acts, which are sometimes made public through electronic means and without major costs or difficulties for the judicial bodies and the parties.

⁸⁴ Cf UKCPR 5.4C; for an analysis of this rule, cf N Andrews on *Civil Processes – Court Proceedings, Arbitration & Mediation* (2nd edn, Intersentia 2019) para 26.19 ff.

⁸⁵ Art 120(1) of the Spanish Constitution and Art 234(2) and 235 of the Spanish Organic Act on the Judiciary.

procedure also contains a provision that quite generously grants access to court records at the outset while protecting legitimate interests against disclosure.⁸⁶

- 52 In the *United States*, all pleadings filed with the court are public documents and subject to access by the public and the media. However, ready access to court documents currently is limited by the requesting party's ability to pay for access and downloading of such documents, which may be very expensive. Information disclosed during discovery generally is not made public and may be sealed by court order or subject to non-disclosure as a result of protective orders. On the other hand, discovery materials

⁸⁶ Art 91 JCCP:

- (1) Any person may file a request with the court clerk to inspect a case record.
- (2) Only the parties to the case or a third party that makes a prima facie showing of interest in the case may file the request under the provision of the preceding paragraph with regard to a case record involving oral arguments that are prohibited from being disclosed to the public.
- (3) The parties to a case and any third party that makes a prima facie showing of interest in the case may file a request with the court clerk to copy the case record, to be issued an authenticated copy, transcript, or extract of the case record, or to be issued a certificate of the particulars of the litigation.
- (4) The provisions of the preceding paragraph do not apply with respect to case records that have been prepared in the form of audiotapes or videotapes (including objects on which a fixed set of information has been recorded by any means equivalent thereto). Nevertheless, the court clerk shall permit the reproduction of such audiotapes or videotapes at the request of a party to the case or a third party that makes a prima facie showing of interest in these objects.
- (5) A request to inspect, copy, or reproduce a case record may not be filed if these actions would be detrimental to the preservation of the case record or the performance of the court's duties.

Art 92 JCCP:

- (1) If the party to a case makes a prima facie showing of the following grounds, the court, at the petition of said party, may rule to limit the persons that may request to inspect or copy the part of said case record in which the relevant confidential information is entered or recorded, that may request to be issued an authenticated copy, transcript, or extract of that part of the case record, or that may request to reproduce that part of the case record (hereinafter referred to as 'Inspection, etc. of the Confidential Portion') to the parties to the case:
 - (i) a material piece of confidential information about the private life of a party is entered or recorded in the case record, and a third party's Inspection, etc. of the Confidential Portion of the case record would be substantially detrimental to that party's social life;
 - (ii) a trade secret (meaning a trade secret as prescribed in Article 2, paragraph (6) of the Unfair Competition Prevention Act; the same applies in Article 132-2, paragraph (1), item (iii) or paragraph (2)) being kept by a party to the case has been entered or recorded in the case record.
- (2) Once a petition as referred to in the preceding paragraph has been filed, a third party may not request for Inspection, etc. of the Confidential Portion of the case record until a judicial decision on the petition becomes final and binding.
- (3) A third party seeking to file a request for Inspection, etc. of the Confidential Portion of a case record may file a petition with the court of record, to revoke the ruling set forth in paragraph (1), on the grounds that any requirement prescribed in said paragraph has not been met or is no longer being met.
- (4) An immediate appeal may be filed against a judicial decision dismissing the petition set forth in paragraph (1) without prejudice and against a judicial decision on the petition set forth in the preceding paragraph.
- (5) A judicial decision revoking a ruling as referred to in paragraph (1) does not come into force unless it becomes final and binding. A partial reform of Civil Procedure to introduce ICT to Civil Procedure has provisions of open access to case records by way of ICT, but it has limitation and is not to guarantee so called ubiquitous access to the court and case record.

may be obtained through judicial order. Judicial orders and jury verdicts are all a matter of public record in the United States.

- 53 Certainly, such an approach raises issues of data protection (for this problem, see part 9 of this compendium on 'Digital Revolution and Procedure', chapter 3).
- 54 In any case it is to be noted that a public hearing is still a corner stone of civil proceedings in many countries. Both in *Belgium* and *the Netherlands*, the principle of the public nature of the proceedings very much entails a public hearing. Both constitutions⁸⁷ and civil procedure rules⁸⁸ explicitly refer to the public nature of the hearing.
- 55 In *Slovenia*, according to Art 24 of the Constitution, the judgments are pronounced in public. But very often, the courts do not deliver a judgment in a hearing, but at a later stage, in writing, only made available to the parties. Concerning publication of the judgments, two issues arise: (1) judgments of the first instance courts are not publicly available in official and free access databases; (2) strict rules on 'anonymization' apply – names of the parties (either natural or legal persons) are deleted.
- 56 In *Togo*, logistical difficulties prevent the public from accessing court rulings. However, in the process of modernising the justice system, websites have been created for the publication of rulings, especially in commercial matters where the interest of the public to access to essential courts documents is more significant.

6.3 Conclusion

- 57 Two developments can be observed: On the one hand in systems where the people have developed a high degree of trust into the judiciary, parties are increasingly interested in excluding the public from their proceedings; additionally, states all over the world create new procedures for certain types of cases where the courts can conduct the proceedings without public hearing for reasons of efficiency. On the other hand, new public elements have become increasingly important and might diminish the importance of public hearings as guarantor of the public character of the proceedings.

7 WRITTEN-BASED AND ORAL-BASED APPROACHES

- 58 Written and oral elements are not a value by themselves. They always serve a certain procedural purpose.

⁸⁷ Art 148 Belgian Constitution; Art 121 Dutch Constitution.

⁸⁸ Art 757 Belgian Judicial Code; Art 27(1) Dutch Code of Civil Procedure.

- 59 Written elements are often said to constitute a better basis for the court when it has to render a judgment. Due to their clarity and certainty, they are intended to protect the parties against arbitrary decision making.⁸⁹
- 60 Oral elements are often considered to ensure the public character of the proceedings, to guarantee the parties' right to be heard and to facilitate an amicable solution of the dispute. Oral elements of the procedure lead to the follow-up question of immediacy.
- 61 Whether a system follows a written-based or an oral-based approach has a very strong impact on the structure of civil litigation. Oral elements always presuppose a meeting of the court with the parties and their representatives, and when indicated, with other persons, such as witnesses. Thanks to modern technology they do not necessarily have to meet in person; they can also meet virtually via videoconference, or even a telephone conference might be sufficient. But the court must organize such a meeting where each person concerned has to be available. This can prolongate the proceedings; in particular, but not exclusively, under Covid conditions, this has become a real problem.⁹⁰

7.1 Traditional Distinction between Written-Based and Oral-Based Approaches

- 62 Traditionally, there was a clear distinction between systems that followed the written-based approach and systems that followed the oral-based approach. The *German Code of Civil Procedure* of 1877, which entered into force in 1879, implemented the oral-based approach. The court was only empowered to take into consideration allegations that were presented during the oral hearings. Allegations that were solely put forward in the written memoranda remained unconsidered.⁹¹
- 63 Almost 100 years later, the new *French Code of Civil Procedure* from 1976⁹² still clearly distinguished between an oral-based and a written-based approach. It provided for the oral-based approach in its pure form for disputes of small amounts (nowadays, this category goes up to EUR 10,000⁹³; for the recent development, see below 4.2).
- 64 While the law in *Slovenia* proclaims the importance of orality of proceedings (Art 4 CPA), the practice clearly moves towards accentuated written procedure. This goes on account of the – unwarranted – habit of piece-meal style of litigation where the parties file

⁸⁹ S Huber (n 66) 185.

⁹⁰ B Krans and A Nylund (ed), *Civil Courts Coping with Covid-19* (eleven international publishing 2021 – open access).

⁹¹ S Huber (n 66) 192 ff.

⁹² *Nouveau Code de procédure civile*, adopted by the décret n° 75-1123, JORF n° 0285 dated 9/12/1975 (the text of the Code is in the appendix of this décret); in 2007, in the title of the Code, the adjective 'new' was deleted by law n° 2008-1787 relative à la simplification du droit dated 20/12/2007, JORF n° 0296 (21/12/2007).

⁹³ C Chainais, F Ferrand, L Mayer and S Guinchard, *Procédure civile* (36th edn, Dalloz 2022) para 960 ff (L Mayer).

numerous ‘preparatory briefs’ between the sessions of the main hearing; the latter are often adjourned as the opponent requires more time for preparation. The practical experience also clearly shows that the ‘style’ of litigation very much depends on the method of lawyer’s remuneration. The Slovenian Lawyer’s tariff is based on a ‘taximeter’ approach (same as in Austria); each submitted document entitles a lawyer to a fee. For a certain time though, the legislature opted for the ‘German’ system of lump-sum fees regardless of the number of written submissions filed during the proceedings. Remarkably, the practical effect was an immediate decrease of lawyers’ written briefs. Yet, the powerful lobbying of lawyers resulted in a shift back to the Taximeter model – and judges already report that the number of written briefs (which also results in the number of adjournments of hearings) has rapidly grown again.

- 65 In *Japan*, the oral argument is essential to civil litigation proceedings,⁹⁴ but JCCP Art 161(1) provides that oral arguments shall be prepared in writing. Therefore, many cases of real oral argument in Japan just become the place for an exchange of briefs except examinations of witnesses and parties and expert witnesses. For specific situations, the rules provide for a decision without hearing. This concerns for example the case where the complaint is not in accordance with the law and the defect cannot be corrected.⁹⁵
- 66 The *Spanish system* was entirely written-based from the thirteenth century until the entry into force of the new Code of Civil Procedure in January 2001.⁹⁶ The new Code entailed a true procedural revolution, as it implemented an oral-based approach and put an end to centuries of written-based tradition.⁹⁷
- 67 In *Belgium*, written submissions are the basis of civil proceedings. As a rule, a judge is only required to respond to pleas and arguments included in the parties’ written submissions.⁹⁸ While parties are not prevented from pleading issues at the oral hearing that were not included in their written submissions, a judge is not obliged to respond to them in its judgment. Only in cases where ‘short debates’ are possible, the case will immediately be pleaded at the initial hearing or at a hearing shortly thereafter and no

⁹⁴ JCCP provides in its Art 87(1) as follows: The parties shall conduct oral arguments before the court in connection with the litigation; provided, however, that for a case to be concluded by a ruling, the court determines whether or not oral arguments should be conducted.

(2) If oral arguments are not conducted pursuant to the provisions of the preceding paragraph, the court may hear the parties.

(3) The provisions of the preceding two paragraphs do not apply when otherwise provided.

⁹⁵ Cf JCCP Art 140.

⁹⁶ The ordinary civil procedure was the medieval *solemnis ordo iudiciarius*, based on the romano-canonical model of written procedure. The procedure was structured in sequential time-limits where almost absolutely everything was made in writing. The court clerks usually took care of the proceedings and judges usually did not look at the case until the whole casefile was completed.

⁹⁷ Cf A Mejía Salazar, ‘Evolución histórica de la oralidad y la escritura en el proceso civil español y ecuatoriano’ (2017) 6 *Ius Humani. Revista de Derecho* 73, 79–83.

⁹⁸ Art 780, 3° Belgian Judicial Code.

exchange of written submissions will take place.⁹⁹ Further to this, first-instance proceedings before *juge de paix* (the Justice of the Peace) tend to be more informal than first-instance proceedings before *tribunal de première instance* (the court of first instance) and are often oral based. A distinction thus appears to emerge between low-value, simple claims on the one hand, where written elements are less important, and high-value or complicated claims, where written submissions are at the core of the proceedings. In those cases, the oral hearing is usually no more than a repetition of the written submissions, unless the court seizes on the opportunity to ask questions or further clarifications – this depends very much on the individual judge.

- 68 The *United States* does not have a strong written or oral tradition exclusively. The US has always had a combined system of written and oral elements to its procedural law, to be discussed in the following section.
- 69 In *Togo* there is no formal distinction between oral and written proceedings. This is so because in all matters the procedure is oral except for reasons related to public order.

7.2 Recent Development Towards a Combination of Written and Oral Elements

- 70 It can be observed that many systems that had chosen one approach as their starting point have evolved away from it. Nowadays, we often find a mixture of oral and written elements. Formally, many systems have upheld their traditional rule that only written elements or only oral elements are to be considered by the court for the final judgment. But as both approaches in their pure form are too complicated for everyday court life, elements of the other approach have been incorporated.
- 71 This is, for example, the situation under *German law*. The original purely oral-based approach turned out to be cumbersome. The practice found ways to circumvent the formal requirements of oral presentation, and finally, the German legislator allowed the parties and their lawyers to make a simple oral reference to the written memoranda during the oral hearing, which was then considered to fulfil the condition of oral presentation.¹⁰⁰ This rule has put the ideal of an oral-based approach far into perspective.
- 72 This was also the approach taken by the new *Spanish Code of Civil Procedure*, under which the court may take into account any written materials appearing in the court file, so long they are referred to by the parties. Thus, there is no need to read out the text of briefs, documents or expert reports in the courtroom: the parties may simply refer to them and the court will be then expected to read them and extract from them the proper

⁹⁹ Art 735 Belgian Judicial Code. Cases are dealt with following the ‘short debates’ procedure where parties agree to its application or in the following instances: uncontested debts, interim measures, change of language of proceedings, issues of competence, request for delay of payment.

¹⁰⁰ For this development, cf S Huber (n 66) 192 f.

legal consequences, if any. This approach explains why no final hearing is required when the parties agree on the facts and they limit the dispute to a purely legal issue,¹⁰¹ or when all the evidence is of documentary nature.¹⁰² And it also explains why, in cases up to EUR 15,000 no hearing will be held if no party requests it and the court deems the hearing to be unnecessary.¹⁰³

- 73 Oral hearings stand very strong in *Norway*, too strong, one could argue. Although the Dispute Act does not require the parties to do so, normally they will read aloud relevant passages from written evidence and applicable legal sources, including preparatory works and legal doctrinal writings.¹⁰⁴ In a recent defamation case, one party insisted that the entire novel (approximately 300 pages) would have to be read aloud in the main hearing for the judge to be able to decide whether it was defamatory. The case settled, so the judge and the parties did not have to sit for hours listening to someone reading the book. In the Norwegian climate case, several days were spent in the Norwegian Supreme Court on reading aloud from government documents.
- 74 Under *French law*, it also turned out that even within the limited area of disputes up to an amount of EUR 10,000, the purely oral-based approach was unpracticable. In a first reaction, the *Cour de cassation* decided that parties respected the requirement of orality by referring to their written statements,¹⁰⁵ and the French legislator followed in 2010 by adopting a corresponding regulation.¹⁰⁶ For disputes of an amount higher than EUR 10,000, we can observe the opposite development in France: For this type of dispute, the French Code of civil procedure from 1976 provides for a procedure which is qualified as written.¹⁰⁷ So, written elements are the determinant factors of the proceedings. The court is only allowed to take into consideration what is documented in the case file.¹⁰⁸ Accordingly, the term ‘written elements’ is to be understood in a broad sense, also comprising all forms of electronic communication and documentation. But there is, in general¹⁰⁹, an oral hearing at the end of the proceedings, which is intended to allow an uncomplicated exchange of views between the court and the parties and to

¹⁰¹ Art 428(3) of the Spanish Code of Civil Procedure.

¹⁰² Art 429(8) of the Spanish Code of Civil Procedure.

¹⁰³ Art 438(4) of the Spanish Code of Civil Procedure.

¹⁰⁴ NOU 2020: 11, Den tredje statsmakt. Domstolene i endring. Utredning fra Domstolkommisjonen oppnevnt ved kongelig resolusjon 11 August 2017. Avgitt til Justis- og beredskapsdepartementet 30 September 2020, 282–284.

¹⁰⁵ Case n° 96-44-672 (Cour de cassation, chambre sociale, France), Judgment 17 July 1997 [Bulletin 1997 V n° 281, 204].

¹⁰⁶ Cf the new Art 446-1 FCCP, adopted by the *Décret n° 2010-1165 relatif à la conciliation et à la procédure orale en matière civile, commerciale et sociale* dated 1 October 2010 (Art 5).

¹⁰⁷ Art 774 FCCP in conjunction with a *conclusion e contrario* of Art 761 n° 3, 817 FCCP.

¹⁰⁸ C Chainais, F Ferrand, L Mayer and S Guinchard, *Procédure civile* (36th edn, Dalloz 2022) para 1645 ff (L Mayer).

¹⁰⁹ For an exception, cf Art L212-5-1 *Code de l'organisation judiciaire* (French Courts Constitution Act).

guarantee the public character of the proceedings.¹¹⁰ Currently, there is a strong debate about the question whether to strengthen this oral hearing.¹¹¹

- 75 In *Brazilian law*, in terms of assessment of evidence, there is no distinction between whether it was produced orally or in writing. The legislator has repeatedly sought to strengthen hearings and, consequently, face-to-face procedural acts with the main purpose to achieve consensual solutions. Whether oral or written acts are more important, seems to depend on the object of the dispute. In certain areas, such as family law, oral evidence is widely used. In others, such as conflicts related to public law, the evidence is essentially documentary.
- 76 In the *Netherlands*, the oral hearing has a multiple goal. Next to the traditional function of allowing parties to plead their case, the judge can use the oral hearing as a case management conference or to verify whether an agreement between the parties is possible.¹¹² In light of this, the oral hearing has become an important element in Dutch civil proceedings.¹¹³ The strongest element of orality in Dutch civil procedure is that a judge may deliver an oral (final) judgment at the end of an oral hearing.¹¹⁴ Conversely, a judge may also dispense with the oral hearing in case he or she does not find an oral hearing appropriate.¹¹⁵
- 77 The *Iranian system* having adopted a written-based approach in 1952 also integrated oral elements into their current system of civil procedure. So, in the first instance, the courts determine a hearing.¹¹⁶
- 78 Although *Japan* follows an oral-based model, briefs have an important role. According to the principle of the freedom of personal conviction, in reaching a judgment, the court decides whether to find allegations of fact to be true on the basis of their personal conviction.¹¹⁷

¹¹⁰ Cf the Art 778 ff FCCP.

¹¹¹ Cf Conseil National des Barreaux at <https://www.cnb.avocat.fr/fr/actualites/le-cnb-propose-un-etat-des-lieux-de-laudience-et-engage-des-reflexions-prospectives>; we thank *Lucie Mayer* for her advice.

¹¹² Art 87(2) Dutch Code of Civil Procedure.

¹¹³ According to the Dutch legislator, the oral hearing is at the heart of the procedure: cf A S Rueb, E Gras, R G Hendrikse and A W Jongbloed, *Compendium van het Burgerlijk procesrecht* (Wolters Kluwer 2021) 141, nr. 6.6.

¹¹⁴ Art 30p(1) Dutch Code of Civil Procedure.

¹¹⁵ Art 131 Dutch Code of Civil Procedure.

¹¹⁶ Art 64 of Iran's CPC: 'The chief clerk of the court must, immediately after completion of the file, make it available to the court. The court peruses the file and, if it is complete, returns it to the court office, with the instruction to schedule a hearing date (hour, day, month and year) and to notify the petition. The hearing must be scheduled in such a way that the gap between the date of notification to the parties to the case and the date of hearing is no less than five days.'

¹¹⁷ JCCP Art 247.

- 79 The *United States* incorporates a procedural system of mixed written and oral components. The fundamental documents setting forth the basis for the litigation are accomplished through written pleadings such as the complaint, answer, and reply.¹¹⁸ Procedural motions to dismiss the litigation at any early stage before trial are accomplished through written motion practice.¹¹⁹ Many of the discovery mechanisms, such as requests for admissions or interrogatories, are conducted by written instruments. However, American procedure includes a large oral component. The rules require multiple pre-trial conferences among the attorneys and the judge to agree on litigation scheduling and cooperative efforts at settlement. The court may request that the attorneys present their pre-trial dispositive motions through an oral hearing before the judge. Deposition testimony is conducted through oral proceedings. All hearings and the trial itself will be conducted orally.

7.2.1 *Relation Between Oral Elements and the Public Character of the Proceedings*

- 80 Under the *German procedural system*, where the starting point was the oral-based approach, oral elements have always kept their importance for ensuring the public character of the proceedings (for the relation between oral elements and the public character of the proceedings, see above chapter 2.3). When the German Code of Civil Procedure was adopted in the nineteenth century, the only realistic way for giving the public the chance to follow the proceedings was conducting oral hearings. Nowadays, new technologies have opened new possibilities. The more other elements ensure the public character of the proceedings, the less important is an oral hearing for implementing the principle of public proceedings (see above chapter 2.3).

7.2.2 *The Relation Between Oral elements and the Right to be Heard*

- 81 There is however another purpose of oral elements: in many systems they are considered to guarantee the parties' right to be heard.¹²⁰ People often understand better if they talk, and citizens might have more confidence in the final judgment if they

¹¹⁸ USFRCP 7-11.

¹¹⁹ USFRCP 12, 56.

¹²⁰ For example in Germany, S Huber (n 66) 197; for Norway: J E A Skoghøy (n 20) 553–561; explicitly there is no such a guarantee in Iran's CPC, but given Article 1: 'The civil Procedure Code is a collection of principles and regulations that is applied while considering personal matters and all civil and commercial lawsuits [...] from the 'principles' it can be obviously inferred that the parties' right to be heard is guaranteed.

In Japan the right to be heard is thought to be satisfied for the party to be given a chance to attend a date of oral argument. Real oral argument and presentation of briefs contribute not only to the correct writing of judgments but also to consensual settlement. The percentage of consensual settlement in litigation is more than 30% in the first instance of the District Court.

As indicated above, and as is true for other countries, the oral component of American procedural law embraces the due process concept of the right to be heard.

For a detailed analysis of the right to be heard, see Part III on Access to Justice and Costs of Litigation and Part 4 on Constitutionalization and Fundamentalization of Civil Procedural Guarantees and Principles.

had the possibility to tell the judge their own story. This, however, might depend on the nature of the parties: The less professional a party is, the more they might feel the need to talk to the judge face-to-face. But even this may be changing over time. People growing up in a world where online chatting replaces face-to-face communication might develop new preferences.

82 If a hearing is intended to guarantee the parties' right to be heard, the hearing must be organized accordingly. It should give the parties the possibility to argue their case.

83 Under German law, the theoretical approach goes indeed into this direction. Sec 137 of the German Code of Civil Procedure states:

(1) [...]

(2) The parties are to make their submissions *ex tempore*; they are to summarize the case as regards its facts and circumstances and as regards its legal ramifications.

(3) The parties may refer to documents, provided that none of the parties object to this and provided that the court believes such reference is reasonable. Documents will be read out only insofar as their exact wording is relevant.

(4) In proceedings in which the parties must be represented by counsel, the attorney and, upon corresponding application being made, the party itself are to be granted leave to speak.¹²¹

84 In practice, the representatives of parties tend to limit their pleading to a reference to the written memoranda if the case at hand is rather simple. But if a case is complex, the hearing might last several hours and lead to a real dialogue between the judge(s), the representatives of the parties and – depending on the circumstances – the parties themselves. The judge manages the hearing and focusses the discussion on the elements which are relevant for rendering the final judgment. The hearing is also the place where the taking of evidence is carried out so that the parties can directly discuss with the judge the results thereof and lay out their impressions.¹²² The objective is to concentrate the main hearing on one date; this requires a good preparation of the hearing. The preparatory phase can be written-based or oral-based or a mixture of both depending on the complexity of the case and on the chances of an early finding of an amicable solution (for more details concerning the relation between oral elements and an

¹²¹ English version of the German Code of Civil Procedure uploaded by the German government at <https://www.gesetze-im-internet.de/englisch_zpo/englisch_zpo.html>.

¹²² Cf Sec 278(2) and (3) of the German Code of Civil Procedure; cf S Huber (n 66) 194, 211.

amicable solution see chapter 4.2.2; for details about the structure of the proceedings and the place of the hearing(s) within the proceedings, see chapter 2).

- 85 On the surface, this is very similar in *Norway*, but there is one important exception: case management hearings are mandatory,¹²³ under the German system only before the new Commercial Courts.¹²⁴ Exceptions are very rare. There is no case management hearing in small claims cases, ie, when the amount in dispute is below NOK 250,000 (approximately EUR 25,000 – about 6 months income for many people). Case management hearings are disproportionately short, too short according to the Courts Commission,¹²⁵ compared to main hearings, and focussed on procedural issues and evidence: shall there be court-conducted mediation, shall there be another preparatory hearing (which is uncommon), should proceedings be split, or joinder take place, when shall the main hearing be held and what duration is expected? Further issues addressed during case management hearings are: timing and number of written submissions, if any, is an expert needed and what is the mandate of the experts(s), how are experts selected, need to provide access to evidence (disclosure) etc.¹²⁶
- 86 And there is another difference between the Norwegian and the German system: judges are not allowed to indicate how they view the case; such an indication would constitute a violation of the principle of impartiality.
- 87 In *Brazil*, the right to be heard does not necessarily need to be carried out orally. It can be satisfied through oral or written elements, by the party or by its representative. In current times, there has also been an increase in online procedural acts, with the possibility of assisting judges and judiciary officials by videoconference hearings and virtual or telepresence sessions, and even by sending recorded allegations and testimonies¹²⁷.
- 88 Compared to procedural systems such as the German and the Dutch one, where the main oral hearing takes place after intensive instruction and preparation by the judge, the *Belgian* system is rather peculiar. After an initial hearing where parties agree on or are imposed with a calendar for exchange of written submissions, the phase before the oral hearing takes place solely between the parties. They exchange multiple written statements between them before coming to final written submissions, which will determine the ambit of the case and the issues to be dealt with by the judge. During the

¹²³ Cf DA Sec 9-4 ss 3.

¹²⁴ Cf *Justizstandort-Stärkungsgesetz*, BR-Drs. 374/23 (18 August 2023), § 621.

¹²⁵ NOU 2020: 11, Den tredje statsmakt. Domstolene i endring. Utredning fra Domstolkomisjonen oppnevnt ved kongelig resolusjon 11 August 2017. Avgitt til Justis- og beredskapsdepartementet 30 September 2020, 280–281.

¹²⁶ This follows directly from DA Sec 9-4 ss 2.

¹²⁷ Cf A G de Castro Mendes and C P de Castro Mendes, 'O Acesso à Justiça (Digital) na Justiça Contemporânea' (2023) 24(2) *Revista Eletrônica de Direito Processual* 1 <<https://www.e-publicacoes.uerj.br/redp/article/view/76132>> accessed 5 July 2024.

written phase, parties may apply to the judge to order the taking of evidence but usually all evidence is written and attached to the submissions – alternatively, a request for evidentiary measures is included in the final written submissions and thus to be dealt with by the judge after the oral hearing. The exchange of written submissions is followed by an oral hearing, which often takes the form of traditional pleadings. The judge may or may not be prepared – Belgian civil procedure is not geared towards a fully prepared judge (there is generally no interaction between the judge and the parties during the exchange of written submissions prior to the oral hearing), it depends on the judge in question whether he or she is willing to do the work – and this will determine the course of the oral hearing. After the oral hearing, there is a deliberation phase of one month during which the judge has to come to a judgment. It is during that phase that a judge may discover that an important point has not been discussed by the parties or that it may be necessary to hear a witness or to order an expertise. In such instances, the proceedings will be reopened by way of an interlocutory judgment, in which the judge will set out the issues to be determined. Parties are then invited to respond by another round of written submissions, followed by another hearing on the particular issues. After that hearing, a new deliberation phase will start, in which it cannot be absolutely excluded – although unlikely – that the judge will reopen the proceedings again. All this shows that the Belgian system is based on written submissions and oral hearings. It can however be observed that the idea of the oral hearings as elements of the parties' right to be heard does not resonate much in Belgian civil procedure. It is rather the opportunity to submit written observations that secures a party's right to be heard – not the day in court.

- 89 Many *Japanese* judges are careful not to give a surprise judgment and raise relevant points during the oral hearing.
- 90 In the *Iranian* system, the proceeding is initiated by the written statement of claim by the plaintiff and the statement of defence by the defendant. As soon as the exchange of the written statements is finished, the court will schedule the first oral hearing, but Art 93 CPC still allows: 'Parties to the action may attend the court hearing, or otherwise send in a written submission.' In practice, since the courts are so busy, they encourage the parties to submit their written submissions. Some professionals even think it would be better to eliminate oral hearings completely from the civil proceedings.
- 91 The *United States* does not have comfortable rhetorical analogy to European concepts of extensive 'preparatory' phases before a main hearing, because the United States has a jury trial system. Very few cases in the United States are bench trials conducted exclusively by the judge where the judge will extensively work with the attorneys to limit the scope of the dispute. Some bench trials may be mandated by statute, or by consent of the parties. But bench trials are rare. In the US, in the ordinary course of pre-trial procedure the scope of the litigation may be narrowed through a judge's rulings made during pre-trial motion practice to dismiss the case, or for a more definite statement by the parties, or by motions to strike pleadings. Typically, these motions are decided on

the written submissions, or in some instances the judge may ask the litigants to appear before the judge to argue the merits of these motions. If a case proceeds to a jury trial, the judge will issue a pre-trial order that sets out the scope of the triable claims and defences and any rulings on the admissibility of evidence, including expert witness testimony.

7.2.3 *The Relation Between Oral Elements and Efforts to Find an Amicable Solution*

- 92 Oral elements have particularly (re)gained in importance by procedural reforms which have put an emphasis on the court's mission to encourage and support the parties for finding an amicable solution for their dispute.¹²⁸ In *Germany*, there can be observed a clear development towards an active judge who should make substantial efforts for coming to a settlement agreement. The German legislator has even established a special oral hearing which is exclusively intended to explore the possibilities for such a settlement.¹²⁹ During this hearing, the judge tries to enlarge the discussion to the long-term interests of the parties going beyond the actual legal dispute.¹³⁰ This requires a real dialogue between the judge(s) and the parties or their representatives.
- 93 The situation is almost similar in *Japan*. Since the number of judges is limited and the courts are overcharged, many judges try to resolve disputes through settlement. In particular, in cases where continuous dispute resolution is desirable, such as labour-related disputes, judges actively attempt to reach settlements. Oral argument proceedings and settlement proceedings are strictly distinctive. The disclosure of intermediate thoughts of the judge in the course of settlement efforts varies from judge to judge, and some judges strongly recommend both parties to reach settlement in order to avoid writing a judgment. In lease-related disputes on land and house, the Land and House Lease Act provides for an obligatory mediation effort before going to court.
- 94 In *Spain*, the judge presiding the preparatory hearing is expected to begin the hearing by exploring whether the parties have reached a settlement or are willing to reach such settlement;¹³¹ and this possibility remains open during the whole proceedings.¹³²
- 95 In the *Iranian system*, courts often use the oral hearing for an attempt to reach an amicable solution. Although there is no legal duty for the court to do so, sometimes when it comes to a complex case from which the court wishes to get rid of, the court may even offer to refer the case to arbitration.

¹²⁸ For a detailed analysis of court efforts to find an amicable solution of the dispute, see chapter 3.4.

¹²⁹ Cf Sec 278 GCCP.

¹³⁰ P Gottwald and R Greger, 'Alternative Konfliktbehandlung im Zivilprozess – Ausgangsidee, Umsetzung, Ergebnis und Ausblick' (2016) ZKM 84.

¹³¹ Art 415, 428(2) of the Spanish Code of Civil Procedure.

¹³² Art 19 of the Spanish Code of Civil Procedure.

- 96 *Norwegian* judges have a duty to promote settlement in regular court proceedings or divert the case to court-conducted mediation, when appropriate, pursuant to DA Sec 8-1 and 8-3.¹³³
- 97 The *Brazilian legislator* has also been trying to increase consensual solutions, which still have relatively low numbers, around ten percent of the cases filed, by imposing the use of hearings focused centrally on the use of mediation and conciliation. However, the will of the legislator seems to find an obstacle in practice, as many processes end up developing without the aforementioned conciliation and mediation hearing.
- 98 In *Togo*, it is especially in commercial matters that we can observe the tendency towards an active judge, who simplifies the amicable resolution of disputes. Based on OHADA law, Art 20 of the 2020 Law instituting commercial jurisdictions allows the judge to engage in a real dialogue with the parties with the view of arriving at an amicable solution.
- 99 In the *Netherlands*, an explicit goal of an oral hearing is to find an agreement between the parties.¹³⁴ In practice, the judge may give his or her preliminary ideas about the outcome of the case, whether or not at the request of the parties, in order to stimulate the parties to come to an agreement. The judge will not take part in the attempt to come to an agreement but may instigate parties to undertake an attempt. Regarding the notion of 'oral hearing', it should be pointed out that the attempt to come to an agreement does not necessarily happen at the main hearing. An oral hearing may be ordered for such purposes at any moment during the proceedings.¹³⁵ In appeal cases, for example, a practice exists by which the appeal court orders an oral hearing immediately after the introduction of the appeal (this is called a '*mondelinge behandeling na aanbrengen*') for the purpose of checking whether an agreement is possible. Where this is not possible, the hearing will turn into a case management conference.
- 100 In *Slovenia*, one of the purposes of the preparatory conference (which is quasi obligatory) is that the judge and the parties should try to reach an in-court settlement, but also to examine options for ADR). In a preparatory conference a judge (the same judge to whom the case is assigned for ordinary adjudication) has an active role and must openly discuss with the parties factual and legal issues and possible settlement options. In line with traditional role of the judge in an Austrian-based type of civil procedure, a civil judge is expected to undertake an active role in assisting parties to reach settlement during the whole trial, not only in the preparatory conference. Judges have quite broad

¹³³ A Nylund, 'Institutional Aspects of the Nordic Justice Systems: Striving for Consolidation and Settlements' in L Ervo, P Letto-Vanamo and A Nylund (ed), *Rethinking Nordic Courts* (Springer 2021) 187–211, 190–193.

¹³⁴ Art 87(2)c Dutch Code of Civil Procedure.

¹³⁵ Art 87(1) Dutch Code of Civil Procedure; Art 344 Code of Civil Procedure.

space in that regard and are not prevented from actively giving proposals and hints, including openly stating their preliminary legal evaluations of the case (which often serves as a basis for a settlement), however they must be observant of the limits, imposed by the requirement of neutrality and impartiality.

- 101 In the *United States* there has been a recent trend towards more activist judges encouraging party settlement. The judge will raise the prospect of settlement at the initial meeting of the litigants at the outset of the litigation, during the time when the judge will work with the attorneys to create a scheduling order. In the U.S., non-complex litigation typically is party-initiated and party-run, with little intercession by the presiding judge. Some courts or judges may require that parties attend mediation at certain times during the case development. During motions practice or pre-trial hearings, judges may use their auspices to inquire concerning the status of possible settlement initiatives and may use the judicial office to encourage such settlement.
- 102 So, it can be observed that in many systems, for settlement negotiations judges seem to prefer oral hearings to an exchange of written statements. Modern forms of online mediation services however raise the question whether this attitude is still justified. For the time being, it can however be stated that oral elements are often combined with an active judge, who has the mission to encourage and support the parties for finding an amicable solution. This approach has also found its way into the ELI/UNIDROIT Model European Rules of Civil Procedure¹³⁶ (cf chapters 1.III and 4.2.6).

7.2.4 Oral Elements and the Question of Immediacy

- 103 Oral elements always lead to the follow-up question of whether the judges who render the final judgment and the judges who follow/guide the oral elements of the proceedings must be the same persons ('principle of immediacy').
- 104 The *German procedural system* is governed by the principle of immediacy.¹³⁷ There are however some important exceptions. For the taking of evidence, in particular for the examination of witnesses who cannot come to the court room, courts resort to delegated and requested judges, who summarize the results of the witness examination in a protocol.¹³⁸ There is no verbatim protocol.¹³⁹ Another exception concerns the situation in which a judge is replaced by another, either due to retirement, illness or a planned change of position. Here, in general, it suffices that the new judge is present during the final main hearing; the taking of evidence and the hearings that had been

¹³⁶ Cf Rules 9, 10 and 49(1).

¹³⁷ S Huber (n 66) 186 ff.

¹³⁸ Cf Sec 375 of the German Code of Civil Procedure.

¹³⁹ Cf Sec 160, 160a of the German Code of Civil Procedure; but there will be an exception before the new commercial courts; cf *Justizstandort-Stärkungsgesetz*, BR-Drs. 374/23 (18 August 2023), § 622.

conducted before are only repeated under very specific circumstances.¹⁴⁰ This shows, that under German law the replacement of a judge does not have a serious impact on the structure of the proceedings: The new judge continues where the former judge has stopped – with the exception of the final hearing. But as the time span between the final hearing and the finding of the final decision is usually quite short,¹⁴¹ this seldom creates difficulties.

- 105 A similar approach is to be found in the *Spanish system*. When there is evidence that it is impossible or very difficult to be taken at the final hearing (eg, witness living far away, without any possibilities of giving testimony via video-conference), the evidence may be taken by a different court; and the results will be documented or video-recorded and, then, evaluated by the court presiding the final hearing and giving judgment.¹⁴² Also, it is not required that the Spanish judge conducting the preparatory hearing is the same judge presiding the final hearing and giving judgment.¹⁴³ And, eventually, only when the judge presiding the final hearing subsequently becomes incapable of rendering the judgment (eg, because the judge dies or falls seriously ill for a long period of time) and the only option to decide the case is bringing a new judge in, should the final hearing be repeated before this new judge.¹⁴⁴
- 106 A relatively new phenomenon concerning the principle of immediacy is the use of modern technology for conducting the hearing(s). Hearings can be organized remotely in many procedural systems all over the world. Under Covid, the instrument of remote hearings became part of daily court life even in those countries where it had been sleeping beauty before.¹⁴⁵ On the one hand, the use of remote hearings makes oral elements possible even where a meeting in person is not possible and thus opens the path for a pragmatic implementation of an oral-based approach. On the other hand, it has to be seen that the personal impression in a remote hearing might be different in comparison to an impression gained in a meeting in person.¹⁴⁶ This is the reason why judges in *Germany* are reluctant to use remote technique for the examination of a witness (for the question of immediacy in the context of the taking of evidence, see part 8). A reason for the reluctance might be the missing of official guidelines for the use of video conferencing. Such guidelines exist, eg, in the English system in annex 3 to Practice

¹⁴⁰ S Huber (n 66) 196 ff.

¹⁴¹ Cf Sec 310(1) of the German Code of Civil Procedure.

¹⁴² Art 169(4) of the Spanish Code of Civil Procedure.

¹⁴³ A de la Oliva Santos, *Comentarios a la Ley de Enjuiciamiento Civil* (Civitas 2001) 342.

¹⁴⁴ Art 137, 199 and 200 of the Spanish Code of Civil Procedure.

¹⁴⁵ For a comparative analysis of this development, cf B Krans and A Nylund (ed), *Civil Courts Coping with Covid-19* (eleven international publishing 2021 – open access).

¹⁴⁶ B Glunz, *Psychologische Effekte beim gerichtlichen Einsatz von Videotechnik* (Siebeck 2012); M Wallimann, *Der Unmittelbarkeitsgrundsatz im Zivilprozess* (Siebeck 2016), 269 ff; S Huber (n 66) 200 ff; F Gascón Inchausti, 'Challenges for orality in times of remote hearings: efficiency, immediacy and public proceedings' (2022) 2(1) *International Journal of Procedural Law* 8, 18–22.

Direction 32 and also in the Spanish system in the form of a Guide prepared by the General Council for the Judiciary.¹⁴⁷

- 107 In *Iran* the situation is quite similar to Germany. Iran's civil procedural system follows the principle of immediacy. However, it seems that the scope of exceptions of Iran's Code of Civil Procedure is broader than under the German legal system. Art 244 GCCP provides:

If the witness is unable to appear before the court, and likewise in instances where the court deems it necessary, the court may hear the witness's testimony at their home, or at the place of their work, or at the place of dispute, through one of the judges of the court.

- 108 Under the title 'Site Inspection and Local Investigations' Art 255 specifies: 'Writ of site inspection or local investigations may be enforced by one of the judges of the court or the investigating magistrate.' On preserving evidence, Art 153 states:

The court may refer the securing of evidence to the alternate judge, or the chief clerk of the court, with the exception of cases where only the securing of evidence constitutes the basis of the court's judgment. In such a case the judge issuing the judgment must take action personally, or the report on the securing of evidence is trusted by the court.

- 109 In *Norway*, remote examination of experts and expert witnesses by telephone was common before the pandemic. By doing so, experts could avoid time-consuming travel to and from the court. During and after the pandemic, videoconferencing has largely replaced telephone conferencing. Witnesses, particularly those that are considered relatively trustworthy, can be examined remotely when travel entails high costs. Norwegian geography and climate are likely to have influenced the openness to remote examination of witnesses. Case management hearings are as a rule conducted remotely; this was already true before the pandemic.¹⁴⁸

- 110 The final hearing in small claims proceedings can be conducted remotely at the discretion of the court.¹⁴⁹ In regular proceedings, the main hearing can be conducted

¹⁴⁷ The Guide has its legal basis in Art 229 of the Spanish Organic Act on the Judiciary. This provision permits judicial proceedings to be conducted via 'videoconference or other similar system that allows bidirectional and simultaneous communication of image and sound and visual, auditory and verbal interaction between two persons or groups of persons geographically distant from one another, ensuring in any case the possibility of contradiction of the parties and the safeguarding of the right of defence, when so ordered by the judge or court'. The text of the Guide is available here:

<https://www.poderjudicial.es/stfls/CGPJ/INFORMACI%C3%93N%20COVID%2019/GU%C3%8DAS%20Y%20PROTOCOLOS/FICHEROS/20210505%20Gu%C3%ADas%20para%20la%20celebraci%C3%B3n%20de%20actuaciones%20judiciales%20 telem%C3%A1ticas.PDF> accessed 5 July 2024.

¹⁴⁸ DA Sec 9-4, 9-5.

¹⁴⁹ DA Sec 10-6 ss. 6.

remotely or a party can attend remotely when the court finds it suitable and justifiable (reasonable), or it is specifically provided (as is the case for preparatory hearings and for small claims proceedings).¹⁵⁰ Before the pandemic, the parties had to consent. One party could thus unreasonably refuse to consent, and thus delay the proceedings. Remote hearings and examinations are not considered to violate the principle of immediacy in Norway.

- 111 In the post-pandemic *Brazilian* reality, there is also a lively debate about the return of face-to-face activities or whether virtual hearings can be fully equivalent or not for the collection of evidence and the performance of other procedural acts. There is no resistance from the judges to carrying out procedural steps online. By contrast, the re-establishment of face-to-face hearings is defended especially by some lawyers and by governing bodies of the Judiciary as the National Council of Justice (CNJ).
- 112 In *Togo*, even before the pandemic, a process of modernization of the justice system had been initiated, resulting in the digitalization of certain aspects of the procedure. Today, the referral of cases to the judge and the payment of procedural costs is done online, especially in commercial matters. But there is still no possibility to guarantee the participation of the parties via video conference.
- 113 In *Belgium*, certainly in civil proceedings, there is a return to the pre-pandemic practice of in person court hearings. The debate on online court hearings is non-existent, which is perhaps due to the limited size of Belgium, court hearings not requiring an excessive amount of travelling. That being said, although civil procedure in Belgium is largely based on written submissions and evidence, the principle of immediacy is considered to be important. A judgment may only be decided by judges who were present during all hearings connected with the case¹⁵¹ – apart from the initial hearing.
- 114 In *Slovenia*, Art 214.a CPA states that if both parties agree and if the judge so decides, the parties, their representatives and/or witnesses and experts are allowed to attend the hearing remotely via videoconference (the judge should be in the courtroom, though; at least in the post-pandemic conditions). This method is however rarely used unless in cross-border context pursuant to the EU Taking of Evidence Regulation.
- 115 *Japanese* judges are reluctant to use remote technique for the examination of a witnesses. The situation is quite similar to Germany. Under the current Act, video conferencing is permitted for the examination of witnesses,¹⁵² parties¹⁵³ and expert witnesses¹⁵⁴ during the trial (oral argument) of the ordinary litigation. Written

¹⁵⁰ DA Sec 13-1 ss 3.

¹⁵¹ Art 779 Belgian Judicial Code.

¹⁵² JCCP Art 204.

¹⁵³ JCCP Art 210.

¹⁵⁴ JCCP Art 215-3.

preparatory proceedings and examination of witnesses in trial are allowed in small claims proceedings.¹⁵⁵

- 116 Telephone conferencing is permitted for preparatory proceedings.¹⁵⁶ However, this applies only if one of the parties appears on that date.¹⁵⁷ This was not a convincing system under the Covid-19 pandemic because at least one party has to come to the court. Therefore, a new reform Act permits web conference systems even when both parties don't come to court. Under the Covid-19 pandemic, the written preparatory proceedings, which is one of the proceedings of allegation and evidence arrangement, was frequently made use of. If a party resides in a distant location or if the court finds it to be appropriate for any other reason, the court may refer a case to written preparatory proceedings (meaning proceedings for arranging issues and evidence through the submission of briefs, etc, without the appearance of the parties).¹⁵⁸ The same is true for the use of telephone conference systems in the case in which both parties live in remote islands. The courts prefer Web conference systems, ie, Zoom/Reams. But this does not allow to take documentary evidence.
- 117 The *United States* common law system has no rhetorical concept of 'immediacy', and this language makes no sense to an American lawyer. To the extent that the concept of immediacy refers to the continuity of judicial involvement or oversight of litigation from initiation through verdict, settlement, or disposition of the litigation, usually a single judge is assigned to supervise and manage a case. However, in the same case, a judge may be assisted in various procedural rulings by magistrate judges who work with the federal judge. In addition, during the course of litigation a judge may be recused from a case or reassign the litigation to another judge. Such assistance by a magistrate judge, recusal, or case reassignment does not affect the validity of the proceedings.

¹⁵⁵ JCCP Art 176(3) and JCCP Art 372(3).

¹⁵⁶ JCCP Art 170(3).

¹⁵⁷ JCCP Art 170(3).

¹⁵⁸ JCCP Art 175.

CHAPTER 2 – DIFFERENT STAGES OF THE PROCEEDINGS

1 INTRODUCTION

- 118 This part investigates the structure of civil proceedings, the stages that proceedings consist of, using the functional comparative method.¹⁵⁹ Using this approach, four stages can be identified: the pre-action stage, initiation stage, the ‘mid-stage’, and the closure stage. Each of these serves specific functions that are shared by some, most or all of the countries studied.
- 119 The functions of the pre-filing stage are inter alia to encourage the parties to resolve their case without resorting to court proceedings, and to gather the information and evidence necessary to pursue their claims and evaluate whether their claims are tenable. During the initiation stage, the claimant files the action, and the court investigates whether the statement of claim meets pleading requirements, the court has jurisdiction, and the parties have standing and so forth. The initial phase also includes the integration of the defendant into the process, so that he, she or they can present their defence, practice or carry out acts foreseen within the initial phase of the procedure. The third stage is more variegated in a comparative perspective: it contains all the steps that are taken to put the court in a position to render its ruling. The fourth, and final, stage is the closure of the proceedings and the final judgment.
- 120 The comparative analysis is based, in the main, on the functional comparative method, except for the middle part of proceedings, for which a multi-method approach is employed. This chapters draws primarily on the insights gathered through brief national reports on the jurisdictions represented by the authors of this Segment, ie, Belgium, Brazil, Germany, Norway, Slovenia, Spain, Togo, the US, Iran and Japan.

8 PRE-ACTION STAGE

Linda S. Mullenix & Anna Nylund

8.1 Introduction

- 121 Prior to initiating a civil action or filing a lawsuit, many jurisdictions impose some requirements on potential parties to a civil litigation, by statute, rule, or customary law. These may include duties on the parties or their representatives to conduct a reasonable inquiry into the factual or legal basis for any claims or defences to an action and the evidence in support of their claims; a duty to approach opposing parties with an attempt to settle the dispute amicably prior to filing the litigation; or if settlement overtures fail, then serving a notice of claims on the opposing party setting forth the nature of the

¹⁵⁹ S Geoffrey, *An Introduction to Comparative Law Theory and Method* (Bloomsbury 2014) 96 ff.

claimant's claims, and the factual and legal basis for those claims. In some jurisdictions, the notice informs the opposing party of the basis for the lawsuit as well as the remedies that the claimant is seeking through litigation.

- 122 Inspired by reforms of English civil procedure in the 1990s, the pre-action stage has emerged as a distinct stage of Norwegian civil proceedings that consists of several elements.¹⁶⁰ This stage stems from a conceptual turn towards regarding the relationship between the court and the parties as a triad rather than a set of dyadic relationships, which calls for active cooperation between the parties, and the parties and the court. According to this view, prior to filing for court proceedings, the parties must not only investigate the factual and legal basis for their claims and evidence supporting them, but also cooperate to clarify misunderstandings, identify common ground and core disputed factual and legal issues. The parties should also carefully consider the risks and costs associated with litigation and consider the interests at stake, such as whether the case could help to prevent future disputes, both those that could potentially arise between the parties and those between third parties. The parties actively exchanging information and discussing their claims and the evidence supporting them in the spirit of cooperation would then result in the narrowing of the ambit of the dispute to the core disputed legal and factual issues.
- 123 The Norwegian pre-action stage also echoes the idea of courts as a last resort, one of the pillars of the English Woolf-reforms.¹⁶¹ In the spirit of cooperation, the parties should seek an amicable solution through negotiation, mediation, or any other process they find appropriate, and only when these fail to produce full settlement, should the parties be allowed to commence litigation. Settlement is interlinked to active exchange of information and the identification of the core disputed issues: one could be the by-product of the other. While negotiation or mediation might not result in full settlement, it can result in narrowing the scope of the dispute, and thus also in the court resolving only those aspects of the dispute that the parties were unable to resolve on their own. Conversely, identification of common ground, core disputed issues and the interests at stake, including litigation costs, could result in the parties settling the dispute or parts of it.¹⁶²

¹⁶⁰ H H Fredriksen and M Strandberg, 'Impact of the ELI/UNIDROIT European Model Rules for Civil Procedure on national law – the case of Norway' (2023) 3 Oslo Law Review 152, 152–164; I L Backer, 'Goals of Civil Justice in Norway: Readiness for a Pragmatic Reform' in A Uzelac (ed), *Goals of Civil Justice and Civil Procedure in Contemporary Judicial Systems* (Springer 2014), 105–121; A Nylund, 'Oral Proceedings during the Preparatory Stage' (2022) 12 International Journal of Procedural Law 57, 57–74.

¹⁶¹ H Woolf, *Access to Justice. Final Report*, to the Lord Chancellor on the Civil Justice System in England and Wales (Lord Chancellors Dept 1996) Sec 1; NOU 2001: 32, Rett på sak. Lov om tvisteløsning (tvisteloven), Utredning fra Tvistemålsutvalget oppnevnt ved kongelig resolusjon 9 April 1999. Avgitt til Justis- og politidepartementet 20 December 2020, Bind A, 208, 211.

¹⁶² H H Fredriksen and M Strandberg (n 160) 152–164; see also below Chapter 4 part IV. Eg, A Nylund (n 160) 57–74.

- 124 The rationale for cooperation was also to expedite court proceedings and to reduce costs associated with them.¹⁶³ If the parties have framed the dispute based on the information they have gathered and received from and discussed with the opposite party, the ambit of the dispute is likely to be deliberately limited. Hence, case management would be relatively easy, and the date of the main hearing could be determined early and set within less than six months from the commencement of the proceedings. Because the ambit of the dispute would be narrow, the proceedings could be limited to the issues selected by the parties, and consequently faster and cheaper than if the scope of the dispute is broader or even unclear.
- 125 The intended aims of the pre-action stage have not been met in Norway, at least not regarding narrowing of the dispute.¹⁶⁴ One reason is that the aims related to narrowing the scope of the dispute are not regulated – only the prospective claimant is required to notify the prospective defendant of the claims, ground for claims and main evidence supporting those claims, while the defendant has no duty to act, and the concept of cooperation is not translated into sufficiently clear duties. Hence, only the claimant can be sanctioned, and sanctions are limited to the failure to notify the defendant. There is no mechanism producing cooperation or to produce the parties to narrow the ambit of the dispute. Moreover, cooperation appears to be founded on the belief that the parties are able to adequately clarify common ground and core disputed issues without outside assistance. If this presumption is erroneous at least for a considerable part of disputants, then the expectations to the benefits of the pre-action stage would be unrealistic.
- 126 The dysfunctions of the preparatory stage in Norway have repercussions for the pre-action stage. Because case management is limited foremost to procedural aspects of the case and issues related to evidence, then the parties are not sufficiently incentivised to narrow the scope of the dispute until shortly before the main hearing. Their failure to cooperate and to narrow the dispute will have no direct implications for the court proceedings, and the only consequences are indirect, in the form of lengthy main hearings and costly production of evidence. Failures in the front end are invisible due to the malfunction of the preparatory stage.
- 127 Parties generally fulfil their obligations regarding seeking an amicable settlement, partly because court proceedings are very costly, partly the reason seems to be a culture of finding pragmatic solutions, and possibly also because a failure to negotiate is sanctioned.
- 128 In other countries, the pre-action duties are more fluid. In Slovenia and in Belgium, for example, the pre-action phase of litigation is not organized. There are no specific

¹⁶³ H H Fredriksen and M Strandberg (n 160) 152–164; I L Backer (n 160) 105–121.

¹⁶⁴ NOU 2020: 11, Den tredje statsmakt. Domstolene i endring. Utredning fra Domstolkommisjonen oppnevnt ved kongelig resolusjon 11 August 2017. Avgitt til Justis- og beredskapsdepartementet 30 September 2020, 243 ff.

obligations of the parties before starting an action. However, in Belgium the Civil Code prescribes that a creditor should formally give a notice of default before damages can be obtained for a failure to comply with contractual obligations. (Art 1139 j. 114 Civil Code).

8.2 Duty of Reasonable Inquiry Prior to Filing Lawsuit

8.2.1 *The Standards of Reasonable Inquiry*

129 Most legal systems eschew the filing of frivolous or abusive lawsuits and seek to assure truthfulness in pleading requests for legal redress. The duty of reasonable inquiry prior to filing a civil litigation may be set forth by statute, rule, or customary law. Different jurisdictions may impose a reasonable inquiry standard, or the equivalent of a reasonable inquiry standard, based either on subjective or objective standards, or some combination.

130 In Spain, all civil plaintiffs are expected to carry out by themselves a thorough private investigation of the facts and the evidence of the case they purport to bring to court. In the same manner, defendants are also expected to care about their own investigation. There are not special rules governing private investigations. Normally, these are conducted by lawyers essentially questioning their clients about the facts and the available evidence and sometimes by sending a private request to hand over information to the opposing party or to a third party. If a private detective is hired, then some special rules apply. Law 5/2014 and Royal Decree 2364/1994. Law firms rarely have their own private detectives or investigators. In Norway, under DA Sec 5-2 claimants are expected to investigate the legal and factual merits of their claim although the civil procedure act does not explicitly mandate parties to do so. The rules take for granted that civil litigation is a last resort and will only be carried out after a careful assessment of the merits of the case and the risks associated with litigation.

131 In contrast, the expectations of the pre-action duty to make inquiries are identified in detail in the United States. When an attorney or an unrepresented party presents the court with a pleading, written motion, or other paper, the attorney must certify that to the best of the person's knowledge, information, and belief formed after an inquiry reasonable under the circumstances that the pleading meets certain requirements, USFRCP 11(b). Specifically, an attorney or unrepresented party must certify to the court that

a pleading is not being presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation.

the claims, defences, or other legal contentions are warranted by existing law or by a non-frivolous argument for extending, modifying, or reversing existing law or for establishing new law.

the factual contentions asserted have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery.

the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on belief or a lack of information.

8.2.2 Sanctions for Failure to Comply with Reasonable Inquiry Standard

- 132 In the US, if, after notice and a reasonable opportunity to respond, the court determines that any attorney, law firm, or party has violated the standards for conducting a pre-filing reasonable inquiry, the court may impose an appropriate sanction on whomever is responsible for violation of the rule governing truthfulness in pleadings. Absent exceptional circumstances, a law firm may be held jointly responsible for a violation committed by a party, associate, or employee (USFRCP 11(c)(1)).
- 133 Motion for sanctions; safe harbour provision. A motion for sanctions must be made separately from any other motions and must describe the specific conduct that allegedly has violated the rules governing pleadings. The motion must be served on the party who is the alleged violator of the pleading rules. The motion should not be presented to the court if the opposing party withdraws or appropriately corrects the challenged paper, claim, defence, contention, or denial within 21 days after the service of the motion challenging the filing (USFRCP 11(c)(2)).
- 134 On the court's own initiative. A court may order an attorney, law firm, or party to show cause why the conduct specifically described in the order has not violated the rule relating to proper pleading (USFRCP 11(c)(3)).
- 135 Nature of the sanctions. A sanction imposed under the pleading rules must be limited to what suffices to deter repetition of the conduct or comparable conduct by other similarly situated. The sanction may include nonmonetary directives; an order to pay a penalty into the court; or an order directing payment to the movant of part or all of the reasonable attorney's fees and other expenses directly resulting from the pleading violation.
- 136 In many other countries, the parties will not be formally sanctioned for failure to do proper inquiries. However, they will risk the court ordering them to pay the costs of the opposite party, as is the case in Brazil¹⁶⁵ and Norway¹⁶⁶.

¹⁶⁵ As provided for in Art 82 § 2 and 85 of the Brazilian Code of Civil Procedure, the sentence will order the loser to pay the winner the legal expenses they anticipated, as well as the loser to pay fees to the winner's lawyer.

¹⁶⁶ A Nylund, 'Civil Procedure in Norway', *International Encyclopedia of Laws/Civil Procedure* (2nd ed, Wolter Kluwer 2022) 70–71.

8.3 Notice of Claims

8.3.1 Purpose of the Demand Letter

137 Prior to initiating a lawsuit or filing an official pleading in an action, in some jurisdictions an attorney may send the opposing party a ‘demand letter.’ The purpose of the demand letter is to inform the opposing party of a legal grievance and to solicit the possibility of an amicable resolution of the dispute without recourse to formal litigation. This is a conventional practice that is not governed by rules or statutes. Demand letters are the usual practice in civil litigation in the United States and are also used in some other jurisdictions for the same purposes.

138 In Norway, a party intending to bring a claim must send a notice of claim to the other party, who in turn must reply. There are no formal requirements for the notice and reply and the notice does not initiate court proceedings. This is mainly a way to put pressure on the other party in negotiations and a way to exchange information in order for the parties to identify the ambit (core) of the dispute before initiating court proceedings, which must be done by filing a statement of claim at court.¹⁶⁷

8.3.2 Content of the Demand Letter

139 In the US, a demand letter typically sets forth the main facts of the legal dispute in a concise fashion, in the order in which the events occurred. The demand letter also will set out applicable principles of law relevant to the resolution of the dispute. The letter encourages the other party to make a businesslike analysis of the dispute and to evaluate the time and expense of litigating a dispute, the risks of prevailing or losing a defence, and whether the opposing party wishes to have the dispute publicly decided. The demand letter will state exactly what the party is seeking from the opposing party and may indicate how the party has arrived at that demand or remedies. The demand letter will give the opposing party a specific date by which to respond to the demand letter, which is typically seven to ten days. The demand letter will inform the other party that the writer will promptly pursue legal remedies if the other party does not meet the requester’s demands. The demand letter may offer the other party the opportunity to amicably settle the dispute without recourse to judicial proceedings.

8.4 Duty to Attempt to Settle Amicably

140 Some jurisdictions, by statute, rule, or customary law, impose a duty on prospective parties to attempt to amicably resolve their dispute prior to initiating formal proceedings in a court of law. The United States has no formal requirement that parties seek to amicably resolve their dispute prior to filing a litigation. However, in the United States, one purpose of sending a prospective opposing party a demand letter is to suggest that

¹⁶⁷ Ibid 70–71.

the parties discuss amicable ways of resolving their dispute without resorting to formal litigation. If the potential parties decide to avoid formal litigation, they may propose and accept an array of alternative dispute resolution methods, such as mediation, conciliation, arbitration, or referral to an ombudsman.

- 141 In Belgium, lawyers are encouraged to inform their clients of the possibility of going to alternative dispute resolution auspices first (Art 444, 2nd para JC). There is, however, no general obligation to go to ADR first. In addition, there are instances of mandatory court-annexed mediation before an admissible action can be brought (Art 1345 JC concerning disputes regarding land lease and a few other issues in the agricultural and horticultural business), or before a case will be heard by a court (Art 734 JC concerning a number of labour disputes).
- 142 In Slovenia (except in some narrowly defined specific cases, such as claims in tort against the State), there is no mandatory pre-action mediation or obligation to formally communicate with the adversary. Pre-action voluntary mediation is possible, but it has not yet started to flourish. The Slovenian Civil Procedure Act was amended in 2002 to take into account court-annexed and other mediation schemes. Courts are empowered to stay civil proceedings for up to three months if parties voluntarily agree to try an ADR procedure, with or without court-annexed mandate.
- 143 In Spain, a rule on costs encourages claimants to formally seek an amicable solution with the defendant before filing a statement of claim with the court (Art 395 (1) LEC). In Norway, it is mandatory that the parties attempt to reach an amicable settlement through negotiation, mediation, or other ADR means. The failure to do so is sanctioned through costs (DA Sec 5-4). Negotiation is the primary method of dispute resolution.

8.5 Duty to Cooperate

- 144 Article 6 of the Brazilian Civil Procedure Code establishes a principle of cooperation, stating that ‘All who in any way participate in the proceedings shall cooperate in order to obtain, within a reasonable period of time, a fair and effective judgment on the merits’.
- 145 Article 5 of the Brazilian Civil Procedure Code states that ‘All who, in any way, participate in the proceedings shall act in good faith’.
- 146 In Slovenia there is no explicit rule on the duty of the parties to cooperate, but the principle is promoted by the Constitutional Court.¹⁶⁸ It is the mutual responsibility of the parties and the court to ensure both the substantive quality of adjudication as well as the trial within a reasonable time. The duty to act in good faith is explicitly set out in the

¹⁶⁸ Case U-I-164/09 (Constitutional Court, Slovenia), Judgment 4 February 2010 [ECLI:SI:USRS:2010:U.I.164.09].

introductory basic principles of the Private Law Code as well as in the Lawyers' Code of Ethics. In practice, however, adherence to professional standards is unsatisfactorily low. Not rarely attorneys engage in dilatory tactics, incomplete and misleading citation of case law, filing of motions which are known to be manifestly ill-founded, raising frivolous defences. Such unprofessional conduct is rarely sanctioned by the court or by internal proceedings within the bar.

- 147 In Spain, in the context of each party's own investigation there is no proper duty to cooperate; there is no proper mutual duty of discovery or disclosure. There are no pre-action or post-action disclosure duties directly enforceable between parties. There are not sanctions or negative consequences for the party ignoring private requests. If a party wants to get information or evidence from an opposing party, they must go to a civil court and ask for an order (Art 328 LEC).
- 148 In Norway, there is a duty to cooperate, but it is not enforced.¹⁶⁹ Norwegian legal culture is based on the idea of cooperation, and thus formal sanctions for failure to cooperate are not needed. There also is a duty to act in good faith, but this is not enforced either. The court is empowered to draw adverse consequences of it (facts) or apply cost sanctions. In a small country such as Norway, people are aware of their reputation and all lawyers wish to maintain a good relationship with local judges. Managing good relationships is paramount in rural areas (and to some extent in urban areas).
- 149 In Togo, there is a duty to cooperate through the obligation of simultaneous and spontaneous communication of documents. In addition, parties are obliged to cooperate with the investigative measures the judge orders. This obligation gives the judge the power to draw any consequences from an abstention of refusal (Articles 45, 49, 103 of the Code of Civil Procedure). The obligation to act in good faith is not expressly provided for in the Code of Civil Procedure; however, it can be implicitly deduced through the procedure of false civil incident in Article 94 of the Code of Civil Procedure.
- 150 In Germany, there is no duty to cooperate, but there is an ongoing discussion about this idea. There is a duty to act in good faith, but the limits are not clear cut.
- 151 In Spain, during the pre-action stage and prior to the filing of a statement of a claim, a claimant may apply to the court for an order of preliminary measures (*diligencias preliminares*; Art 256-263 LEC). These orders are aimed at obtaining information or evidence from the future defendant or a third party. It is required that the information is really necessary to prepare for the future proceedings, ie, clearly indispensable to identify the defendant or the essential elements of the action. Spanish civil courts generally are very restrictive when deciding on applications for preliminary measures. There are special and more flexible rules on preliminary measures that apply to

¹⁶⁹ H H Fredriksen and M Strandberg (n 160) 152–164; A Nylund (n 166) 83.

commercial cases on anti-trust law, business secrets, patents, trademarks, and unfair competition (Art 17-18 Law 1.2019; 123-126 Lawe24/2015; 283 bis(e) LEC).

9 INITIAL STAGE OF PROCEEDINGS

Linda Mullenix

9.1 Introduction to Pre-trial Proceedings

- 152 Most legal systems attempt to encourage parties to settle their disputes amicably before invoking the time-consuming and expensive legal apparatus of litigation. To this end, legal systems, including the United States, employ various judicial management techniques to encourage parties to resolve their differences. Even the United States, based largely in an adversarial system, has moved towards a judicially managed regime of pre-trial procedures intended either to encourage settlement or, if not, to streamline the scope of a dispute. The philosophical underpinning of the US Federal Rules of Civil Procedure is to administer the rules 'to ensure the just, speedy, and inexpensive' resolution of any civil action (USFRCP 1). To this end, judges in many systems encourage a collaborative approach to dispute resolution. As indicated above, there is a general duty of parties to attempt to amicably settle their differences after the commencement of a proceeding.
- 153 Consequently, the various stages of pre-trial procedure, from the initiation of a dispute through to trial, are intended to encourage settlement or dismissal of the litigation and to avoid trial of the issues. Hence, for example, pleading requirements in many countries typically are intended to narrow the scope of litigation or to dismiss untenable claims for relief at an early stage of proceedings. This function is counterbalanced by the concern that no dispute should be dismissed for technical pleading errors and that the object of the law is to decide cases on the merits, rather than on technical procedural mistakes.
- 154 Another important function of pre-trial proceedings is to apprise the parties of the fact of the litigation, or if they are a defendant, that they are being sued and are required to answer in a timely fashion. In the United States, such notice and the opportunity to be heard in a proceeding is a function of due process of law. All countries similarly recognize an obligation to provide notice to parties and the judicial tribunal concurrently with the commencement of legal proceedings. The notice and service of process requirements for most countries tend to be highly detailed in the specifications for providing adequate legal notice.

9.2 Pleading Requirements

- 155 As indicated in § 1.1.1 the United States rules delineate, in some detail, the formal requirements for submitting a pleading, motion, or other paper to the court for the pleading to comport with the requirements of the reasonable inquiry standard. Courts

may sanction parties or their representatives who fail to comply with the reasonable inquiry standards for pleading.

- 156 Unlike the formal pleading requirements in the US, most civil law countries have no necessity of pleading claims: the judge may infer or imply legal claims that arise from the allegations. Other countries have various pleading requirements: some have no particular form but may specify particular content requirements. Moreover, in most European countries there is no pre-stage requirement that parties or their attorneys conduct an investigation.

9.2.1 *Types of Pleadings*

9.2.1.1 Denomination of pleadings

- 157 If parties commence a civil action in court, they may pursue their case by filing pleadings, but these pleadings may be denominated by different names – although the pleading will serve the same or similar function in different jurisdictions. For example, in the US, the claimant's initial pleading is denominated as the 'complaint' and the defendant's responsive pleading is denominated as an 'answer'. In Brazil, the demand begins with a so-called 'initial petition' and the defendant's response is called a 'contestation.' In Spain, a proceeding begins with a written statement of a claim filed by the claimant with the competent court. The statement of the complaint is known as the 'demand'. Similarly in Norway, the claimant's initial pleading is denominated as a 'statement of the case'. In both Spain and Norway, the defendant's responsive pleading is denominated as the 'statement of the defence'. In Togo, the pleading initiating an action is denominated as a petition. In Slovenia the claimant's and the defendant's initial pleadings are named 'claim' and 'answer to the claim' respectively.

9.2.1.2 Limitations on pleadings

- 158 Under the old English common law system, pleading was a complex undertaking, involving the counsellor to allege the proper form of action using an appropriate writ. This system of pleading permitted litigants multiple responsive rounds of pleadings including: a claimant's declaration; a defendant's demurral to the claimant's declaration; dilatory pleas; pre-emptory pleas, confession and avoidance; pleas in replication; rejoinders; surrejoinder; rebutter; and surrebutter, etc. The complicated system of common law pleading resulted in extended delay, impeding the ability of a tribunal to adjudicate the merits of a case. A mistake in pleading at any successive round of pleading could result in the dismissal of an action. In addition, the common law pleading rules forbade the joinder of multiple claims or multiple parties in a civil action. In the mid-nineteenth century – recognizing the defects of the common law pleading system – accomplished a reform of the pleading rules.

9.2.1.3 Types of modern party pleadings

- 159 The nineteenth century pleading reform accomplished in England was replicated in the United States at the same time. Under its modern pleading regime, the US federal courts do not permit unlimited rounds of pleading and recognize only three basic types of pleadings: these are a claimant's complaint; a defendant's answer to a claimant's complaint; and a claimant's reply to any counterclaim that a defendant may assert in their answer to a complaint (USFRCP 7(a)). If the defendant does not assert a counterclaim, then the claimant has no right to issue a reply, unless the court orders on (USFRCP 7(a)(7)).

9.2.1.4 Pleadings involving third-party practice

- 160 Litigants involved in third-party practice have a right to issue pleadings or responsive pleadings. Thus, a party may file an answer to a counterclaim that is designated as a counterclaim; an answer to a crossclaim; a third-party complaint; and an answer to a third-party complaint (USFRCP 7(a)(3)-(6)).

9.2.1.5 Mistaken designation

- 161 If a party mistakenly designates a defence as a counterclaim, or a counterclaim as a defence, the court must, if justice requires, treat the pleading as though it was properly designated, and may impose terms for doing so (USFRCP 8(c)(2)).

9.2.1.6 Merger of law and equity

- 162 Some jurisdictions have different systems for actions at law or actions in equity; in which case pleadings will follow different rules and standards for alleging and defending claims at law or in equity. Other systems, such as the US, have merged their law and equity systems into a unified system of justice (USFRCP 2; 'There is one form of action – the civil action'). Consequently, in the US a pleader may set forth claims or defences at law or in equity in the same pleading.

9.2.2 Content of Pleadings

- 163 Most jurisdictions have rules or statutes that specify or provide guidance for the content and scope of pleadings. Judicial decisions have, in some jurisdictions, provided additional guidance concerning the application of pleading rules and standards.

9.2.2.1 Pleading a claim for relief

- 164 In the US, the civil rules generally prescribe a system of notice pleading, as opposed to a system of fact pleading. Thus, the purpose of a claimant's pleading is to give notice to the defendant of the lawsuit. A claimant is not expected to have every fact relating to

the claims and defences at the time of filing a lawsuit; there is an expectation that facts underlying the claims may subsequently be discovered through the US system of discovery devices. Thus, a claimant's pleading just needs to set forth a claim for relief containing a short and plain statement of the grounds for the court's jurisdiction, unless the court already has jurisdiction and the claim needs no new jurisdictional support; a short and plain statement of the claim showing that the pleader is entitled to relief; and a demand for the relief sought, which may include relief in the alternative or different types of relief (USFRCP 8(a); USFRCP 8(d)). Each allegation must be simple, concise, and direct. No technical form is required (USFRCP 8(d)). All pleadings must be construed so as to do justice (USFRCP 8(e)).

- 165 In Brazil, an action is commenced with the filing of a complaint. There is no specific form for a complaint, but the complaint shall inform the court to which it is addressed; the qualifications of the claimant and defendant; the factual and legal grounds of the claim; the claim and its specifications; the value of the legal claim; the evidence with which the claimant intends to prove the truth of the alleged facts; and the claimant's option to have, or not, a conciliation or mediation hearing.
- 166 In Slovenia, an action is commenced with the filing of a claim. There are no specific forms for pleading and no mandatory structure for pleadings. The claim must contain a specific prayer for relief (for example, if it is a monetary claim, a specific sum of money must be claimed) as well as the facts and evidence upon which it is based. The system of fact pleading applies and thus the claimant is expected to provide a rather extensive reasoning of its case (although it will still be allowed to adduce further evidence and assert further facts without restrictions before the first session of the main hearing). The rule of *iura novit curia* applies (the court knows the law) and so it is not mandatory to refer to legal rules in the claim.
- 167 In Spain, the civil courts generally follow a fact pleading system (as opposed to notice pleading). The pleading standard is not fully conceived as a requirement that must be met for the initiation of proceedings. The claimant's statement of the claim (demand) must identify the competent court, the parties with their relevant contact details, the specific relief or remedy sought (the so-called 'petition'), and the factual and legal grounds supporting the entitlement to such relief (both grounds forming the so-called cause of action or *causa petendi*) (Art 399 LEC). The failure to comply with the rules on the content of the statement of a claim or the submission of written or inanimate and tangible evidence do not necessarily make the defective statement of claim inadmissible. Only when it is impossible to identify the party or the essential elements of a cause of action, or the judicial relief sought will the claimant be required to complete the statement of the claim. If no completion occurs, the case will be dismissed on the basis of a procedural obstacle known as 'defective statement of claim'. Art 404(2)(2), interpreted in light of Art 424. Art 403(1) LEC provides that 'statements of a claim shall be inadmissible only in cases and for the reasons expressly provided for in the law'. Generally, the laws aim to reduce the power of the court to declare a statement of claim

inadmissible; the principled approach is that it is preferable that proceedings be initiated and that both parties be heard on the evidence presented).

- 168 Similar to Spain and many other jurisdictions, Germany follows a fact pleading regime. A proceeding is initiated with a claim. On the basis of the claim, the judge has to decide how to proceed during the interim phase of proceedings, which may entail either an exchange of written submissions or an oral hearing. In Togo, a proceeding is initiated with a petition and on the day set by the petition, the parties appear in person or by a representative. If proof of facts requires investigative measures, these are ordered by the court, at the joint request of the parties, or even *ex officio*.
- 169 In Norway, there are no specific forms of pleadings. The law provides only for a mandatory list of contents. An action is commenced when the claimant files a statement of the claim, and the court investigates whether the statement fulfils all the requirements. The claimant is required to give a brief explanation of the factual and legal background of the case. The description of claims, prayers for relief and the factual and legal grounds must be stated in detail enough to enable the defendant to file a statement of defence (to rebut). The claimant's argumentation shall not go further than necessary to satisfy these requirements. The court will determine the ambit of the dispute but will not describe all the details of the case. A tentative list of evidence must be provided (not the evidence itself, only a list of evidence, documents, and key witnesses). The parties must inform one another of important evidence if there is reason to believe that the other party is not aware of the evidence. In small claims disputes where the value is less than NOK 250,000 (approximately EUR 25,000) the initial stage of proceedings is exclusively written, and courts must conduct a final hearing within three months of filing of the case.
- 170 In Togo, the Code of Civil Procedure does not require a particular form. However, in practice the respective submissions of the parties observe certain formalism in the interests of the parties themselves and of the courts in order to facilitate a good understanding of the claims of the parties to the proceedings. A proceeding is initiated by way of a bailiff's writ or by claim, or petition (individual or joint). In the document instituting the proceedings it is not required that the claimant present all the pleas in law that he intends to invoke. Article 67 only states that the claimant shall make a summary statement of the claim and the pleas in law relied upon. The subject matter of the dispute is determined by the respective claims of the parties. The claims are determined by the document initiating the proceedings and by the observations or submissions in defence. The legal system provides for a procedure of *mise en état* (pre-trial phase) during the preparatory phase of the pleading hearing in all matters. A case is in *mise en état* when, having been investigated, it is ready to come to a hearing to be pleaded. The pre-trial procedure consists of various hearings known as pre-trial hearings at which the parties will file their written submissions and exchange exhibits. Once the parties have filed all their written submissions and have had the opportunity to put

forward their arguments and reply to the arguments of the opposing party, the court ends pre-trial proceedings.

9.2.2.2 The plausibility pleading standard

- 171 By judicial interpretation of USFRCP 8, the US Supreme Court has determined that a claimant's complaint is sufficient to avoid dismissal if the allegations satisfy a test of 'plausibility'. The plausible pleading standard requires that a claim be more than possibly true but does not need to rise to the level of being probably true. The standard not only specifies that a complaint must be plausible on its face but must allege sufficient facts that nudge a claim from conceivable to plausible.¹⁷⁰

9.2.3 Form of Pleadings and Signature Requirements

- 172 Various technical rules may govern the structure of pleadings including captions, designation of parties, paragraphs, separate statements, adoption by reference of allegations, and exhibits (USFRCP 10). Every pleading, written motion, or other paper must be signed by at least one attorney of record in the attorney's name – or by a party personally if the party is unrepresented. The paper must state the signer's address, email address, and telephone number. Unless a rule or statute specifically states otherwise, a pleading need not be verified or accompanied by an affidavit. The court must strike an unsigned paper unless the omission is promptly corrected after being called to the attorney's or the party's attention (USFRCP 11(a)).
- 173 In Slovenia claims are filed in paper form and an original signature must be provided. No e-filing is possible in ordinary civil proceedings. A court fee must be paid (upon the court's order), otherwise the claim is deemed to be withdrawn.
- 174 In Spain there is no specific provision on the structure of the written statement nor any mandatory form. In practice, however, most claimants use the traditional structure that is frequently used for any written brief submitted the court. According to traditional structure, the statement will be divided into two parts. The first part will include an introductory section, a section devoted to facts, and a section dedicated to legal grounds. The second part will specify the exact mandate of the judgment that the claimant is expecting from the court. The claimant is to submit all written and inanimate tangible evidence with the written statement of the claim. This includes documents, CDS, pen-drive, reports of party-appointed experts.

¹⁷⁰ USFRCP 8(a); *Bell Atlantic Corp. v. Twombly* (Supreme Court, US) 550 US 544 (2007); *Ashcroft v. Iqbal* (Supreme Court, US) 556 US 662 (2009).

9.2.4 Electronic Filing of Pleadings and Service of Process

- 175 In the US, the Federal Rules permit the electronic filing of pleadings, motions, and papers. A person represented by an attorney must file electronically, unless nonelectronic filing is allowed by the court for good cause or is allowed or required by a local rule (USFRCP 5 (d)(3)). An unrepresented party may file electronically only if allowed by court order or by local rule and may be required to file electronically only by court order or by a local rule that includes reasonable exceptions (USFRCP 5(d)(3)(B)(i)-(ii)). Service of process may be accomplished by sending it to a registered user by filing it with the court's electronic filing system or by sending it by other electronic means that the person has consented to in writing. In either event, the service is complete upon filing or sending, but it is not effective if the filer or sender learns that it did not reach the person to be served (USFRCP 5(b)(2)(e)). A paper filed electronically is a written paper for all purposes under the civil procedure rules (USFRCP 5(d)(3)(D)).
- 176 In Spain, the statement of a claim will be filed with a competent court online via a technology program the court is using. If there is evidence that the pleader cannot submit online, the pleader is required on the day after submission of the statement online to submit to the court physical items of evidence. Three days after the submission of a statement online the pleader must supply the court with a hard copy of the statement of claim as well as a physical copy of all items of evidence that have previously been submitted online. If there are multiple defendants, the claimant is required to bring one hard copy of the entire dossier for each defendant. If the claimant is not represented by an advocate or a procurator, there is no requirement to file the statement of the claim and the relevant items of evidence online. The claimant may then appear before the court and file the dossier in its physical form.
- 177 In Norway, attorneys are required to use electronic filing and case management systems. *Pro se* litigants are allowed to use the electronic system but are not mandated to do so. In Germany electronic means for the receipt of claims and written submissions as well as for service of documents is well established. An electronic file and case management system is being set up. There is a fully automated procedure for dealing with undisputed claims; for example, a creditor gets an enforcement title without the intervention of any human being.
- 178 In Togo, electronic means are only allowed in commercial courts. No electronic filing is available in regular private law cases in Slovenia. Exceptions apply in bankruptcy as well as in certain types of enforcement and payment order procedures.
- 179 In Brazil, the electronic practice of procedural acts is not only permitted but has also been encouraged in the last decade. The result is that, in 2022, only 1.6% of the total number of new claims were physically filed. In the Federal, Electoral, and Labour Courts the rate of new cases with digital records reaches 100%. And the records of old processes also underwent digitalization. In 2022, the percentage of electronic records of all existing

judicial proceedings was 98.4%. There is a series of rules regulating electronic procedural acts in the Brazilian Civil Procedure Code and specific statutes. In urban centres and in Brazilian Courts, practically all records and procedural acts are electronic, with there not even being any traces of physical records.¹⁷¹

9.3 Service of Process

9.3.1 General Considerations

180 In most jurisdictions a civil action is initiated or commenced with the filing of a complaint or petition with a court of appropriate jurisdiction and venue. In most jurisdictions the burden is on the claimant to file the action with the court and to give notice to the defendant that the defendant is being sued. Different jurisdictions have differing rules concerning commencement of an action and the duty to serve process on the defendant to inform the defendant of the action and the need to defend. Service of process rules and requirements in many jurisdictions are highly detailed concerning the appropriate means for providing notice to different types of persons, business associations, and governmental entities and agencies. In the United States, providing notice to the defendant of the commencement of a civil lawsuit is a due process right mandated by the US Constitution (Art V, Amend XIV US Constitution).

9.3.2 Commencement of an Action and Summons

181 In the United States, an action is commenced by filing a complaint with the court (USFRCP 3).

182 On or after filing a complaint, the claimant may present the clerk of the court with a summons for signature and a seal so that the claimant may serve a copy of the complaint on the defendant. A summons must contain the name of the court and the parties; be directed to the defendant; state the name and address of the claimant's attorney or if unrepresented, the name of the claimant; state the time within which the defendant must appear and defend; notify the defendant that a failure to appear and defend will result in a default judgment against the defendant for the relief demanded in the complaint; be signed by the court clerk; and bear the court's seal (USFRCP 4). A summons must be served with a copy of the complaint; it must be served within the time limits set forth in the rules; and the pleader must furnish the necessary copies to the person who will be accomplishing service of process (USFRCP 4(c)(1)).

183 In Belgium, an action may be commenced in multiple ways. The claimant may serve a citation (subpoena) by a bailiff; a citation is the principle means to start an action and this service of a citation does not run through the courts. A legal action may be

¹⁷¹ Cf <https://www.cnj.jus.br/wp-content/uploads/2023/08/justica-em-numeros-2023.pdf> 176–184 accessed 5 July 2024.

commenced by *requête contradictoire* (petition): convocation by way of a court letter where the law expressly provides for it. The applicant introduces a petition with the competent court. The registry then sends a letter to the defendant by ordinary mail requiring them to appear in court. An action may be commenced by *requête unilatérale* (a unilateral petition): the claimant files a petition with the court, but the registry does not send a letter to the counterparty. This method is often used in seizure proceedings or other proceedings where surprise of the court's actions is important for its effectiveness. Finally, an action may be commenced by voluntary appearance.

- 184 In Slovenia, a claim is filed with the court and the court will then serve it on the defendant (as a rule, by using universal postal service).
- 185 In Norway, a party intending to bring a claim must send a notice of claim to the other party, who in turn must reply. There are no formal requirements for the notice and reply and the notice does not initiate court proceedings. This is mainly a way to put pressure on the other party in negotiations and a way to exchange information in order for the parties to identify the ambit (core) of the dispute before initiating court proceedings, which must be done by filing a statement of claim at court.
- 186 In Brazil, the judicial process begins with the initial petition's filing before the judicial body. As a rule, the initial petition is filed electronically. In the knowledge process, if the initial petition meets the essential requirements and it is not the case that the request is initially dismissed, the judge will fix a conciliation or mediation hearing. That is one of the innovations of the 2015 Code of Civil Procedure. As a rule in the knowledge process, the first procedural act to be carried out, with the participation of the claimant and defendant, is the conciliation and mediation hearing. The CCP provides for only two hypotheses for not holding the conciliation and mediation hearing: a) if both parties expressly express a lack of interest in the consensual composition, b) when self-composition is not possible.

9.3.3 Methods of Service of Process

- 187 Different jurisdictions specify by statute or rule how service of process may be accomplished and by whom. In the US, service may be accomplished by any person who is at least 18 years old and who is not a party to the lawsuit (USFRCP 4(c)(2)). If a claimant requests, the court may order that service be made by a United States marshal or deputy marshal or a person the court appoints. Service of process by a marshal or other court officer is required for cases in which the claimant is proceeding in forma pauperis (as an indigent pauper), or a seaman (USFRCP 4(c)(3)). Service of process also may be effectuated by electronic means (USFRCP 5(d), (e)). See discussion *above* at 2.2.4.
- 188 In Spain, service may be undertaken by the court or by the procurator of the claimant, if a specific request is included in the written statement of the claim. When performing service, the procurator hired by the claimant is acting as a court official (Art 161 LEC).

Failing this petition, the court that has received and admitted the claim will undertake service. When the court serves process, it must be made by parcel post with a hard copy of the court decision initiating proceedings, with a hard copy of the statement of the claim and physical copies of the evidence the claimant has submitted (Art 155.1, 155.2 and 273.4 LEC, in conjunction with Art 24 LEC). Ordinary post or email are not legally acceptable. The court clerk is responsible for service of process and for instructing the civil servants of the judicial office to implement service of process. If service by post fails completely, the court will use a second method of service, such as notification by delivery of sending a court official to the defendant's address. If this method fails, the court clerk will conduct an additional investigation as to where the defendant may be located (Art 161 (4) and Art 156 LEC). If the clerk is unable to locate the defendant, service may be made by publication (by 'edicts'), on the noticeboard of the court (its own website), or at the claimant's request in an official gazette or in the press.

189 In Spain, typically the person served is the defendant. The law also permits service on persons legally representing the defendant (such as a procurator) or on persons who are professionally or personally close to the defendant (known as a subsidiary recipient) (Art 161 (3) LEC; Art 161 (1) LEC). Service on the defendant's procurator shall be made electronically, either by the claimant's procurator or the court (Art 152 (2) and 162 LEC and Art 33 (5) of Law 18/2011).

190 The Brazilian Code of Civil Procedure provides that the summons will preferably be made electronically, within up to two business days, counting from the decision that determines it, through the electronic addresses indicated by the summoner in the Judiciary database, in accordance with the regulations of the National Council of Justice. In case of lack of confirmation, within three business days, counting from receipt of the electronic summons, the summons may be carried out by post, by a court official, by the clerk or head of the secretariat, if the person summoned appears at a notary's office or by notice, with the publication of the notice on the world wide web, on the website of the respective court and on the notice platform of the National Council of Justice.

9.3.4 *Waiving Service of Process*

191 In the US, an individual, corporation, or association that is the subject of service has a duty to avoid unnecessary expenses of serving process. The claimant may notify a defendant to an action that the action has been commenced and request that the defendant waive service of the summons. The notice and request must be in writing and addressed to the individual defendant, officer, managing agent, or person authorized to receive service; the court where the complaint was filed; copies of the complaint and the waiver form; the date when the waiver request was sent; provide the defendant a reasonable time to return the waiver; and be sent by first class mail or other reliable means (USFRCP 4(d)).

9.3.4.1 Consequence of filing a waiver of service of process

- 192 When a claimant files a waiver, proof of service is not required, and the rules apply as if a summons and complaint had been served at the time of filing the waiver (USFRCP 4(d)(4)). Waiving of a summons does not waive any objections to jurisdiction or venue (USFRCP 4(d)(5)).

9.3.4.2 Failure to waive service of process

- 193 If a defendant located in the US fails without good cause to sign and return a waiver of process requested by a claimant, the court may impose on the defendant the expenses incurred in making the service and the reasonable expenses, including attorneys' fees, of any motion required to collect those service expenses (USFRCP 4(d)(2)).

9.3.5 *Service of Process of Individuals in a Foreign Country*

9.3.5.1 By Internationally Agreed Means

- 194 Unless federal law provides otherwise, an individual may be served at a place not within any judicial district in the US by any internationally agreed means of service such as those authorized by the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents (USFRCP 5(f)(1)).

9.3.5.2 Without Internationally Agreed Means

- 195 If there is no internationally agreed means for service of process abroad, or if an international agreement allows but does not specify a means, an individual may be served by a method reasonably calculated to give notice as prescribed by the foreign country's laws for service in that country in an action in its courts of general jurisdiction; as the foreign authority directs in response to a letter rogatory or letter of request; or, unless prohibited by the foreign country's law, by delivering a copy of the summons and of the complaint to the individual personally; or using any form of mail that the clerk addresses and sends to the individual and that requires a signed receipt; or by any other means not prohibited by international agreement or court orders (USFRCP 4(f)).

9.3.6 *Service of a Minor or Incompetent Person*

- 196 A minor or an incompetent person in a judicial district of the United States must be served by following state law for serving a summons or like process on such a defendant in an action brought in the courts of general jurisdiction of the state where service is made (USFRCP 4(g)).

9.3.7 *Service of a Corporation, Partnership, or Association*

- 197 A domestic or foreign corporation, or a partnership or other unincorporated association that is subject to suit under a common name, must be served in a judicial district of the United States in the manner prescribed for serving an individual; or by delivering a copy of the summons and of the complaint to an officer, a managing or general agent, or any other agent authorized by appointment or by law to receive service of process and—if the agent is one authorized by statute and the statute so requires—by also mailing a copy of each to the defendant (USFRCP 4(h)).

9.3.8 *Service of Governmental Agencies*

- 198 Special rules apply to serving process on the US as a party, or to government agencies, official sued in their official capacity, and officers or employees sued in their individual capacity.

9.3.8.1 *Service on the U.S. Government*

- 199 To serve the United States, a party must deliver a copy of the summons and of the complaint to the United States attorney for the district where the action is brought—or to an assistant United States attorney or clerical employee whom the United States attorney designates in a writing filed with the court clerk—or send a copy of each by registered or certified mail to the civil-process clerk at the United States attorney's office; send a copy of each by registered or certified mail to the Attorney General of the United States at Washington, D.C.; and if the action challenges an order of a non-party agency or officer of the United States, send a copy of each by registered or certified mail to the agency or officer (USFRCP 4(i)(1)).

9.3.8.2 *Service on a U.S. Agency, Corporation, or Officer or Employee Sued in an Official Capacity*

- 200 To serve a United States agency or corporation, or a United States officer or employee sued only in an official capacity, a party must serve the United States and also send a copy of the summons and of the complaint by registered or certified mail to the agency, corporation, officer, or employee (USFRCP 4(i)(2)).

9.3.8.3 *Service on an officer or employee sued individually*

- 201 To serve a United States officer or employee sued in an individual capacity for an act or omission occurring in connection with duties performed on the United States' behalf (whether or not the officer or employee is also sued in an official capacity), a party must serve the United States and also serve the officer or employee under the applicable general service of process rules (USFRCP 4(i)(3)).

9.3.8.4 Service on a state, a municipal corporation, or any other state-created governmental organization

- 202 A state, a municipal corporation, or any other state-created governmental organization that is subject to suit must be served by delivering a copy of the summons and of the complaint to its chief executive officer; or serving a copy of each in the manner prescribed by that state's law for serving a summons or like process on such a defendant (USFRCP (j)(2)).

9.3.9 Service on a Foreign State

9.3.9.1 Service on a Foreign State

- 203 A foreign state or its political subdivision, agency, or instrumentality must be served in accordance with the provisions of 28 USC § 1608, setting forth extensive requirements for service on a foreign government (USFRCP (j)(1)).

9.3.10 Proving Service of Process

- 204 Unless service is waived, proof of service must be made to the court. Except for service by a United States marshal or deputy marshal, proof must be by the server's affidavit. Service not within any judicial district of the United States must be proved as provided in the applicable treaty or convention; or by a receipt signed by the addressee, or by other evidence satisfying the court that the summons and complaint were delivered to the addressee. Failure to prove service does not affect the validity of service. The court may permit proof of service to be amended (USFRCP 4(l)).
- 205 In Spain, if service is made by the claimant's procurator, the procurator has to certify the identity and condition of the recipient of the service with a copy that contains a reliable record of the receipt, the date and time of receipt and the contents of the communication (Art 152.1 LEC). This certification shall be transmitted to the court and will serve as proof of service.

9.3.11 Time Limits for Service of Process

- 206 If a defendant is not served within 90 days after the complaint is filed, the court—on motion or on its own after notice to the claimant—must dismiss the action without prejudice against that defendant or order that service be made within a specified time. But if the claimant shows good cause for the failure, the court must extend the time for service for an appropriate period. This does not apply to service in a foreign country (USFRCP 4(m)).

9.4 Third Parties

- 207 At the initiation of proceedings, it is possible in most jurisdictions to join third parties into a litigation. The subject of the role of the parties and their representatives is addressed more fully in subsection E of this chapter. The purpose here is to indicate that third parties may be drawn into a litigation, the types of third parties, and briefly the methods for joining third parties.
- 208 In Spain, after the claimant's filing of a statement of the claim and the defendant's filing a written statement of defence, the claimant may 'extend' its statement of claim to assert new claims or to bring third parties as new defendants into the proceedings (Art 401 LEC). If the court finds that the outcome of the proceedings might affect third parties, the court on its own motion shall provide service of the statement of the claim on third parties who are concerned (Art 152.2 LEC). After a third party has been served, the third party will be entitled to intervene in the pending proceeding and align with the claimant or defendant as appropriate, by filing an application (Art 13 LEC). If a third party knows of the proceeding unofficially (ie, has not been served) the third party is still entitled to intervene provide the third party holds a direct and legitimate interest in the outcome of the proceeding.
- 209 The Brazilian Code of Civil Procedure has a title for third party intervention, subdivided into five chapters, each of them designed for each of the types foreseen: assistance, third party impleader, call of the co-debtor to the process, incident of disregard of legal personality, and *amicus curiae*.
- 210 Assistance is applicable when a legally interested third party intends to act in the process to assist one of the parties who are litigating. It is possible in any procedure and jurisdiction.
- 211 A third party impleader, promoted by either party, is admissible: I – to the immediate alienator, in the process relating to the thing whose ownership was transferred to the third party, so that they can exercise their rights resulting from the eviction; II – anyone who is obliged, by law or contract, to compensate, in a recourse action, the loss of the losing party in the process.
- 212 It is permissible to call the co-debtor to the proceedings, requested by the defendant: I – the principal debtor in the action in which the guarantor is a defendant; II – the other guarantors in the proposed claim against one or some of them; III – other joint debtors, when the creditor demands payment of the common debt from one or more of them.
- 213 The incident of disregarding the legal personality will be initiated at the request of the party or the Public Prosecutor's Office when it is appropriate to intervene in the process.

- 214 The judge or the judge-rapporteur, considering the relevance of the matter, the specificity of the subject matter of the demand or the social repercussion of the controversy, may, by non-appealable decision, *ex officio* or at the request of the parties or anyone wishing to speak out, request or admit the participation of a natural or legal person, body or specialized entity with adequate representation, as *amicus curiae*.

9.4.1 Definition of a Third Party

- 215 A third party typically is an individual or other entity who, by virtue of substantive law, may owe some legal obligation or duty to a party who is already named as a claimant or defendant in a lawsuit. The substantive law provides the basis for joining an individual or entity that has not been named or sued in an original lawsuit; statutes or procedural rules provide the basis for accomplishing joinder of third parties into an existing lawsuit. When a party to a lawsuit joins a third party into an existing lawsuit, in the US this procedure is known as impleader. A common form of impleader occurs, for example, when an individual or entity has a right to legally pursue a third party who has caused a loss for which the defendant might be held responsible in a lawsuit by a claimant. Subrogated claims are illustrations of the types of claims that would give rise to the impleading of a non-party to an existing lawsuit. Third parties who are joined in an action are subject to and entitled to all the same rules regarding notice and service of process in order to affect the joinder of the third party.
- 216 In Spain, under certain provisions of substantive law that govern specific contracts and legal relationships, particular parties may be notified of the pendency of the proceeding and called to intervene in case those contracts or legal relationships are brought to court. Spanish law provides a detailed procedural framework for regulating this call for intervention or provoked intervention (Art 14 LEC). In Germany, the rules permit joinder of third parties to conduct the proceedings in an efficient way. The rules for third party notice intend to avoid problems which might result from the fact that the *res judicata* effect is limited to the parties of the proceedings. A similar system of 'intervention' applies in Slovenia.
- 217 In Togo, there are specific rules for joinder of third parties in the interests of the proper administration of justice and with a view towards extending *res judicata* to all interested parties. For example, if an interested third party intervenes in the proceedings before the close of the hearing with an incidental or related claim, the case may be adjourned to a later hearing and the measures of inquiry extended.

9.4.2 Philosophy of Joinder of Third Parties

- 218 Some jurisdictions have very strict or limiting rules concerning the joinder of third parties into an existing litigation. The US, on the other hand, has rejected old common law rules restricting the joinder of parties in a unified civil action and has instead adopted a liberal or permissive approach to the joinder of parties (USFRCP 20).

- 219 In Slovenia, intervention is possible if one of the parties, usually the defendant, believes that it might have a claim against a third person, should it lose in the first litigation. Third party notice has important procedural consequences. If a third party ignores joinder, it will be bound by all relevant factual findings and legal standpoints.

9.4.2.1 Permissive joinder of claimants

- 220 Persons may be joined as claimants in one action if they assert any right to relief jointly, severally, or if in the alternative with respect to or arising out of the same transaction, occurrence, or series of transactions or occurrences; and any question of law or fact common to all claimants will arise in the action (USFRCP 20(a)(1)).

9.4.2.2 Permissive joinder of defendants

- 221 Persons may be joined in one action as defendants if they assert any right to relief jointly, severally, or if in the alternative with respect to or arising out of the same transaction, occurrence, or series of transactions or occurrences; and any question of law or fact common to all claimants will arise in the action (USFRCP 20(a)(2)).

9.4.3 Types of Third Parties Who May Be Joined

9.4.3.1 Defending Party Brings in a Third Party; Third Party Defendants Defences and Claims

- 222 A defending party may, as a third party-claimant, serve a summons and complaint on a non-party who is or may be liable to it for all or part of the claim against it. But a third-party claimant must, by motion, obtain the court's leave if it files the third-party complaint more than 14 days after serving its original answer (USFRCP 14(a)(1)). In the US, this procedure is called 'impleader'. The third-party defendant must assert any defence against the third-party claimant's claims, any counterclaims, or any cross claims against another third-party defendant. The third-party defendant may also assert against the claimant any claim arising out of the transaction or occurrence that is the subject matter of the claimant's claim against the third-party defendant (FRCP 14(2)(A)-(d)).

9.4.3.2 Claimant's Claims Against a Third-Party Defendant

- 223 The claimant may assert against the third-party defendant any claim arising out of the transaction and occurrence that is the subject matter of the claimant's claim against the third-party claimant. The third-party defendant must then assert any defence and any counterclaim, or cross claim against other parties (USFRCP 14(a)(3)). When a claim is asserted against a claimant, the claimant may bring in a third party if the rules would allow a defendant to do so (USFRCP 14(b)).

9.4.3.3 Third party defendant's claims against a nonparty

- 224 A third-party defendant may proceed against a non-party who is or may be liable to the third party for all or part of any claim against it (USFRCP 14(a)(5)).

10 STAGES BETWEEN INITIATION OF PROCEEDINGS AND CLOSURE OF PROCEEDINGS: THE MID-PHASE

Anna Nylund and Enrique Vallines

10.1 Introduction

10.1.1 Methodological Strategy for Studying the Stages Between the Initiation and the Closure of the Proceedings

- 225 For this contribution, we will refer to the stages between the initiation and the closure of the proceeding as the 'mid-phase' of civil proceedings. During the mid-phase, the case will be delineated, discussed, and, eventually, fully ready to be disposed of. To this end, both parties are granted the possibility to present their arguments and evidence, to bring the proceedings to an end by way of an amicable solution and, as appropriate, to have the relevant evidence taken.
- 226 Yet, the particular stages in which this mid-phase unfolds vary considerably among the jurisdictions studied. In some jurisdictions, the mid-phase of the proceedings consists of two or more distinct stages or steps; in other jurisdictions, the contents of this phase cannot be separated into distinct entities. In addition, the balance between oral and written procedural elements varies. In some jurisdictions, the proceedings are fixed by the letter of statutory law; in others, they are flexible and vary upon the discretion of the court hearing the case.
- 227 This contribution interrogates the structure as an entity and its components, how these components, or blocks of procedural activity, are conceptualised and sequenced, and their function(s) and importance in their respective systems. Thus, in this contribution, *tertium comparationis* (the object of comparison) is the structure of court procedure as such and its components. The first level of comparison investigates the structure as such. It describes how cases are processed in the jurisdictions studied, all of which appear to aim at the same goal: putting the judge or panel of judges hearing the case in a position to dispose of the case in a satisfactory legal manner and within a reasonable time. The structural analysis allows us to draw a taxonomy of procedural systems. This taxonomy feeds into a second level of functional comparison: not only does this 'mid-phase' of civil proceedings, as such, serve specific functions, but the particular stages that the different modalities of this phase consist of serve specific subfunctions. Cognate blocks could have both similar and different functions and vice versa. Thus, we engage in a two-layer functional comparison. The functional analysis is a fertile ground for analytical or

conceptual (deep-level) comparison¹⁷² of selected aspects of the proceedings, especially the various conceptualisations of hearings.

228 This part examines the ‘full’, ‘normal’ course of proceedings as they unfold from the initiation phase to the moment the court considers the case is ripe for closure, thus covering all steps of the ordinary course of proceedings. Taking the entire litigation process as the starting point of the structural analysis is, in our mind, a fruitful approach to the understanding of procedural structure. The manifold ways cases are resolved without proceeding through the ‘full’ proceedings are discussed in Chapter 4 and will not be considered here.¹⁷³ Similarly, although a case might sometimes undergo additional steps (eg, jurisdiction is contested, or the court holds a hearing to secure evidence), we have decided not to include this kind of ‘diversions’ in our analysis.

229 Studying the complete structure facilitates a holistic perspective of civil procedure and enables us to zoom out of the details and move to a macro level. Consequently, detailed descriptions of each jurisdiction are not included in the analysis, and the conceptual comparison concentrates on a few selected elements.

10.1.2 The Apex Hearing as a Dividing Factor

230 The structural comparisons are based on reports from Belgium, Brazil, Germany, Iran, Japan, Norway, Slovenia, Spain, Togo, and the US. The taxonomy of procedural structures is based on these systems and does not aspire to provide an accurate and comprehensive categorisation representative of all jurisdictions worldwide, with all jurisdictions belonging to one or the other category. On the contrary, because it is based on a limited sample, there are likely to be additional categories, and the categorisation presented here might not adequately account for other existing structures. Moreover, the taxonomy hinges on the factors employed when systematising and the relative weight of each element. The taxonomy recognises the fluid, porous nature of legal categories. Relatively small legal changes, such as a change of legal practices or a relatively minor shift in the analytical lens applied, could result in a country migrating from one category into another.

231 The taxonomy arising from comparing the procedural structures we analysed leads to the distinction between two groups of procedural systems: apex hearing and non-apex hearing. In the first group, court proceedings culminate in a single principal (‘apex’) hearing, during which the arguments and the evidence are presented orally to the judge or panel of judges who decide the case. In this regard, the principles of orality (allegations and arguments must be presented – or at least recapped – verbally), concentration (all case materials to be presented in the same hearing), and immediacy

¹⁷² M van Hoecke, ‘Deep-level Comparative Law’ in M van Hoecke (ed), *Epistemology and Methodology of Comparative Law* (Hart 2004) 165–195.

¹⁷³ See Chapter 3 part 6.

(direct contact between decision-makers and oral presentations) form the foundation for the apex hearing systems.¹⁷⁴

- 232 Using the apex hearing as the dividing factor, the other group, the non-apex category, comprises the systems where the case is not meant to be presented to the adjudicators in a single hearing but rather in a series of scattered procedural acts that occur within a - often relatively long - period. Thus, this category will inevitably be heterogeneous. Generally, it might be argued that systems of the non-apex hearing category may be classified into two subcategories: written systems and hearing-based systems. First, some jurisdictions have mainly written proceedings, where hearings are often not held and are not a material element of the proceedings. These written systems form a category of structures of their own because many components and tenets found in the apex hearing group (like concentration, immediacy and orality) are deemed irrelevant. Second, while there are jurisdictions with hearings as a regular element of proceedings (which shows a preference for oral communication as a tool to achieve a better result), not all of them have an apex hearing because none of the hearings forms a true culmination of court proceedings where the whole case is presented to the adjudicators (which shows that, for these systems, concentration and immediacy are not considered of paramount importance).

10.1.3 The Difficulties of Categorising Legal Systems

- 233 Categorising legal systems according to this taxonomy might not be an easy task. A crucial challenge is the definition of apex hearing. Here, we have decided to consider not only the structure of the proceedings but also the rationales underpinning it. Accordingly, as pointed out above, an apex hearing is here defined as the hearing where the case is presented based on the importance given to oral communication (orality) in a concentrated manner (concentration) and with direct contact between the adjudicator who will decide the case – who cannot be replaced – and the oral presentations (immediacy). Yet, we have included in this category the systems (eg, Brazil) that, under exceptional circumstances (eg, the sudden death of the judge), allow for adjudication made by a judge different from the judge who had direct contact with the oral statements provided at the apex hearing.
- 234 Another challenge is whether jurisdictions should be classified according to law in action or law in books. Indeed, a categorisation based on an analysis of the legislation and its underpinning rationales and aspirations is likely to yield different results for some countries than a categorisation based on the law as it is practised. Ultimately, to the extent possible, our choice here has been to categorise systems based on how courts

¹⁷⁴ Although these specific terms – principles of ‘orality’, ‘concentration’ and ‘immediacy’ – very much belong to the procedural jargon of civil law jurisdictions, the notions behind them are also present in common law jurisdictions. For an in-depth comparative analysis of these notions, see Chapter 1 subdivisions 2 and 4.

generally proceed in practice rather than on how the proceedings are regulated in the corresponding code of civil procedure. We have also tried to interrogate why a theoretical model is – or is not – finally implemented in a given context. As an illustration, the case of Slovenia is worth mentioning here. Looking at the law in the books, one may conclude that Slovenia belongs to the apex hearing category, as its Code of Civil Procedure has aspired to introduce an apex hearing structure resembling the structure in Germany, Norway or Spain. But the truth is that practices have not changed accordingly, and from a law-in-action perspective, the Slovenian system falls within the non-apex hearing category.

10.1.4 Terminology

- 235 Finding appropriate terminology for describing the different procedural ‘blocks’ of procedural activity that occur – or might occur – between the initiation and the closure – during the ‘mid-phase’ – of a civil process in a given system has been challenging. We have decided to use the words ‘phase’, ‘stage’, ‘part’, ‘step’, or ‘unit’. We strive for using ‘phase’ for distinct blocks of procedural activity that are relatively big, ‘stage’ for the smaller blocks into which a phase may be divided, and ‘step’ for the individual procedural actions that may occur within a stage. Thus, for example, in the US system, the trial would be considered a ‘phase’, the examination of witnesses as a ‘stage’ and the instructions to the jury as a ‘step’.
- 236 Previously, the term ‘piecemeal’, coined mainly by Damaška¹⁷⁵, has been employed as a category of procedural systems. However, the work piecemeal often denotes an unsystematic, fragmentary way of handling cases, not just a system consisting of partial measures taken over some time. While some procedures consist of several steps, they can still be highly structured, with phases and stages that are coherent and well-integrated. Therefore, we have opted not to use piecemeal as a term.
- 237 Furthermore, to avoid legal-culturally contingent terminology such as a ‘trial’ or ‘main hearing’, we have chosen to use the expression ‘apex hearing’. The word ‘trial’ is loaded with legal-historical and legal-cultural connotations referring to a specific type of hearing deeply embedded in common law. Although only a fraction of civil cases is decided by a jury in the US, a trial by a civil jury is still likely to epitomise how the ‘day in court’ is conceptualised, at least in the minds of citizens. Thus, this legal cultural notion of ‘trial’ is likely still an impetus for upholding the trial as a critical feature of civil litigation. In contrast, civil proceedings were mainly or almost exclusively written in continental Europe and Scandinavia in the nineteenth century, and oral elements were revived

¹⁷⁵ M Damaška, *The Faces of Justice and State Authority. A Comparative Approach to State Authority* (Yale University Press 1986).

later.¹⁷⁶ Reforms at the turn of the century brought hearings aimed at introducing a model which could be characterised as the ‘main hearing’ model,¹⁷⁷ which rests on the assumption that presentation of all the aspects of the case (ie, factual and legal arguments and the presentation of evidence) should be delivered directly to the judge or panel of judges deciding the case in a single concentrated hearing. This assumption may be seen in the German *Hauptverhandlung*, the Norwegian *hovedforhandling*, the Swedish *huvudförhandling* the Finnish *pääkäsittely*, the Spanish *juicio*, or the Brazilian *audiência de instrução e julgamento*.

- 238 For historical reasons, the ‘main hearing’ conception of hearings differs from that of a common law ‘trial’, the latter being connected to the jury and the right to a day in court, and the former linked to more technical reasons highlighting the importance of oral communication, concentration and immediacy with a view to a better disposition of cases. However, we believe that both models share common features in terms of culminating the proceedings in an apex hearing where the case is presented orally and in a concentrated manner to those who are meant to decide it. This conclusion appears to be supported by the ALI/UNIDROIT Principles of Transnational Civil Procedure, as they foresee a ‘final hearing’ encompassing the ultimate or sole hearing in any type of civil procedural structure, this hearing being inspired by the common-law trial and the civil-law systems that ‘employ a concentrated final hearing’.¹⁷⁸ In a similar vein, the ELI/UNIDROIT Model European Rules of Civil Procedure (ERCP) also use the expression ‘final hearing’, which, although appearing to be much closer to the main hearing existing in several European countries, could also qualify as a common-law trial before a jury.¹⁷⁹
- 239 Finally, despite the ALI/UNIDROIT Principles and the ERCP using the expression ‘final hearing’, we prefer using ‘apex’ rather than ‘final’. In this regard, ‘final hearing’ appears to refer simply to a hearing that is to occur at the peak or end of the proceedings. In our understanding, the expression ‘apex hearing’ is more illustrative, as it suggests not only a hearing that is chronologically located at the end of the proceedings but also a hearing that is of paramount importance for the whole procedural structure.

¹⁷⁶ For the history of Scandinavian civil procedure, cf M A Hjort, ‘Sources of Inspiration of Nordic Procedural Law: Choices and Objectives of the Legal Reforms’ in L Ervo, P Letto-Vanamo and A Nylund (ed), *Rethinking Nordic Courts* (Springer 2021), 69–88.

¹⁷⁷ The English expression ‘main hearing’ has been put forward by R Stürner, ‘The Principles of Transnational Procedure. An Introduction to Their Basic Conceptions’ (2015) *RabelsZ* 224, 224.

¹⁷⁸ Cf Principle 9.4 and comment P-9C of the ALI/UNIDROIT Principles of Transnational Civil Procedure.

¹⁷⁹ Cf Rule 64 ERCP. Also, cf Comment 1 on Rule 65, which suggests that the ERCP are broad enough to be used either with professional judges or with juries.

10.2 The Apex Hearing Structure

10.2.1 The Apex Hearing Structure: a Preparatory Stage Followed by an Apex Hearing

- 240 As mentioned above, for this contribution, apex hearing structures are those in which the arguments and evidence of the case are to be presented in a single principal hearing through verbal communication (principle of orality), in a concentrated manner (concentration) and directly before the decision-maker(s) (immediacy).¹⁸⁰ These principles appear to be founded on the belief that concentrating the presentation of disputed legal and factual issues, as well as the evidence supporting the facts, to a single hearing where there exists a direct contact between the judge (or panel of judges or jury) and the arguments and evidence forms the ideal basis for reaching the best possible solution to the case. Moreover, the apex hearing encapsulates the principle of orality, the importance of oral communication and oral hearings as the stage during which justice is enacted. The apex hearing is also the site for the 'day in court' in the popular imagination. It forms the primary forum where parties exercise their fair trial rights. Apex hearings maintain their central position in civil procedure thinking even if most cases would be resolved before the apex hearing.
- 241 Ideally, the apex hearing will happen in one day and session. However, the apex hearing may be extended into consecutive sessions if the case requires it. In Norway, for example, hearings in large cases might last three or more days. When this is the case, the court might opt to have one day without a hearing before the day the parties (their counsel) deliver their final arguments. If the case lasts longer than a week, having one day 'off' each week is common. Nevertheless, the hearing will be considered a single event, even if it lasts several days.
- 242 The apex hearing is preceded by a preparatory ('interim', 'preliminary' or 'pre-trial') stage, which could be oral, written, or both. During the preparatory stage, the court and the parties attempt to prepare the case to be solved, to get it ripe to be disposed of adequately. This adequate disposition is usually considered the judgment on the merits delivered after an apex hearing where the arguments and the evidence have been presented to the court. However, the preparatory stage has a dual function since it also aims to enable early disposition through settlement, dismissal, withdrawal, or so forth, when appropriate.¹⁸¹ Thus, during the preparatory stage, the court and the parties pinpoint disputed issues of fact and law (both procedural and substantive law), identify the relevant evidence, explore the possibility of an amicable solution, and, unless the parties settle their dispute, ensure that the case is ready to be presented at the apex hearing.

¹⁸⁰ See Chapter 2 subdivision 4.2.4.

¹⁸¹ This is discussed in more detail in Chapter 3 Part 6.

- 243 Furthermore, the apex hearing structure usually rests on the assumption that facts and law are entangled — the facts of the case influence which legal arguments and provisions are relevant and vice versa. Of course, in some cases, the issues in dispute, the relevant arguments and evidence are obvious already when the action is brought, or only facts or law are disputed. In other cases — especially in complex cases — the disputed facts and law, the relevant factual and legal arguments, and the evidence might not be firmly established at the initial phase and are crystallised during the mid-phase. Thus, in many apex hearing jurisdictions, case management is considered instrumental in making this crystallization, ie, in identifying the central disputed elements and the evidence related to them.¹⁸² This identification occurs typically during the preparatory stage that precedes the apex hearing. It is not unusual that, in light of the identification process results, the parties decide to settle the case and avoid an apex hearing and a judgment. In the US, for example, discovery lies at the core of the preparatory stage and serves to clarify the case; and, in most cases, the material disputes of fact are resolved, and no jury trial is finally called for.
- 244 Thus, the apex hearing model requires the mid-phase to be divided into two consecutive stages: the preparatory stage and the apex hearing. As the decision of the case requires focussing on *disputed* factual and legal aspects of the case and the evidence needed to prove those facts, the court needs to ensure that the disputed aspects and evidence are ripe for being presented at the time of the apex hearing. This requires both substantive and procedural case management during the preparatory stage: setting appropriate time limits for the exchange of written submissions, sharing information between the parties (eg, on the evidence they intend to present or requiring them to share key documents) and so forth.¹⁸³ The preparatory stage forms an arena for case management, facilitating and negotiating an amicable solution and, ultimately, getting the case ready to be decided by the court.
- 245 The principle of proportionality is also entangled with the division between the apex hearing and the preparatory stage of case management. Identification of key disputed issues and what is at stake for the parties, such as the amount in dispute and the relative importance of the case (eg, whether the case is of particular significance for one or both parties, or it could provide clarification of a legal issue) influences how much resources should be devoted to the case, such as the length of the proceedings, the number of hearings and exchange of written submissions, and the cost and type of evidence.

10.2.2 Comparing the Apex Hearing Structures of Germany, Norway, Spain, Brazil and the US

- 246 Five variants of proceedings culminating in an apex hearing have been identified in this contribution: Brazil, Germany, Norway, Spain and the US. In the five systems, the mid-

¹⁸² See also Chapter 4.

¹⁸³ See Chapter 4 subdivision 3.

phase has a structure consisting of a combination of written and oral elements taken in preparation for the case before the apex hearing and of an apex hearing itself – the US trial, the main hearing in Brazil, Germany, Norway or Spain – during which the parties present their cases, their legal and factual arguments and their evidence directly to the judge or panel of judges who will make the final ruling.

- 247 The comparison of the systems indicates that the US system is particularly distinct despite sharing an apex-hearing structure with the Brazilian and the European systems. First, the jury trial, although rarely used in practice, significantly influences how proceedings are structured and differs from the main hearing found in the other four systems. The Brazilian, German, Norwegian and Spanish systems do not operate with the distinction of jury and bench trials; the evidence does not have to be prepared with the jury, and there is a sharp division between law and facts in mind. Second, the US discovery system may require significant judicial involvement, as the court may be called to decide whether the parties have the right to access evidence, the extent and format of the access, as well as disputes regarding the admissibility of evidence. In contrast, Brazilian and European judges are required to make decisions regarding evidence only to a limited degree, if at all, during the preparatory stage. The reason is that parties have a more limited duty to disclose the existence of and give access to evidence and less strict rules on the admissibility of evidence. Finally, there are differences in the requirements the statement of claim and defence must fulfil regarding the identification of the scope of the proceedings, ie, in the pleading standards.¹⁸⁴ In US Federal litigation, the general rule continues to be the notice pleading standard, as Rule 8 of USFRCP still reads that the claimant must provide ‘a short and plain statement of the claim showing that the pleader is entitled to relief’. The notice pleading standard is one of the ‘prominent features’ of the so-called ‘American [procedural] exceptionalism’. Indeed, most procedural systems – like the other four apex hearing systems that we have analysed in this contribution – follow a ‘fact pleading standard’.¹⁸⁵ For what matters to this contribution, it is worth noting that the choice between one type of pleading standard and the other influences the structure of civil proceedings – and particularly in the structure of the mid-phase - as it affects the degree to which the parties are required – and allowed – to specify and amend the legal and factual aspects of the dispute along the proceedings, as well as it affects the scope and the moment of disclosure.
- 248 Considering these differences, the apex hearing jurisdictions in our study form two subcategories: the US trial category and the main hearing category that can be found in Brazil, Germany, Norway or Spain.

¹⁸⁴ As to the different types of pleading standards, see Chapter 2 subdivision 3.2.

¹⁸⁵ S Dodson, ‘Comparative convergences in pleading standards’ (2010) 158 University of Pennsylvania Law Review 411, 443. Also, on the ‘American exceptionalism’, cf O Chase, ‘American ‘Exceptionalism’ and Comparative Procedure’ (2002) 50 (2) American Journal of Comparative Law 277; and R Marcus, ‘Putting American Procedural Exceptionalism into a Globalized Context’, (2005) 53 (3) American Journal of Comparative Law 709.

10.2.3 The Preparatory Stage

- 249 Significant differences exist between the preparatory stages of the five apex hearing systems examined.
- 250 Some of those differences follow directly from different pleading standards. With a strict fact pleading standard, as in Spain, the claimant is mainly required to investigate the facts and file disclosure applications before the initiation of proceedings; thus, once the proceedings have reached the mid-phase, there is less room for disclosure or for amending allegations, claims and reliefs. However, with a lax notice pleading standard, as in the US, the preparatory stage is a suitable time for delving into the details of the case and using discovery tools. Consequently, in the apex structures that follow a notice pleading standard the preparatory stage tends to be much ‘thicker’ and more complex, with a much greater deal of procedural activity aiming at the specification or amendment of previous pleadings and the gathering of evidence.¹⁸⁶
- 251 Furthermore, many differences follow from the tenets and design of the preparatory stage alone. In the US, the court may assign the case to a magistrate or special master, which is impossible in the other four countries. If the case is not dismissed on preliminary motions, the defendant will ‘answer’ the complaint, asserting defences and as appropriate, any counterclaims. Parties will then engage in discovery. The US rules on pre-trial discovery have a tangible impact on how the proceedings unfold because discovery and the collection and production of evidence require the court to rule on whether and how access to evidence should be given. Judges perform gatekeeping functions regarding the assessment of the expertise of party-appointed experts. Moreover, US judges have ample discretion to conduct pre-trial and settlement hearings and to form the proceedings. Finally, it should be noted that while a jury trial is a constitutional right, jury trials are waivable, and if neither party requests a jury trial, the case will be heard in a bench trial. Most cases are resolved before the trial through settlement or other forms of early resolution.
- 252 In Brazil, Germany, Norway and Spain, there seems to be a standard structure of the preparatory stage, albeit with some flexibility. In these systems, civil defendants must show their arguments and indicate their evidence in a written statement of defence that mirrors the content and structure of the statement of claim. Similar to the terminology used in US Federal procedure (‘answer to the complaint’), the statement of defence is here understood as an ‘answer’ to the statement of claim (*contestação*, *Klageerwiderung*, *tilsvar*, *contestación a la demanda*). In addition, the Brazilian, German, Norwegian and Spanish preparatory stage is composed of one or more hearings (known as ‘preliminary’, ‘case management’ or ‘settlement’ hearings), with relatively clear goals regarding the organization of the procedure, the clarification of procedural issues, substantive issues and evidence (necessity of evidence, problems of access to evidence,

¹⁸⁶ For pleadings standards, see Chapter 2 subdivision 3.2.

taking of evidence before the apex hearing), and the exploration of the possibilities of an amicable solution.

- 253 Spanish law mandates a single mandatory *audiencia previa al juicio* (preparatory hearing) and a few subsequent steps, whereas the German and Norwegian structures are more flexible, giving courts discretion to shape the proceedings to the peculiarities of the case. In Germany, *früher erster Termin* (a preparatory hearing) is not mandatory, so the court may order the whole preparatory stage to be conducted entirely in written form (as a *schriftliches Vorverfahren*). Furthermore, the judge may assign the case to a *Güterichter* ('settlement judge') for *Güteverhandlung* (a settlement hearing). This 'settlement judge' – who is not allowed to make a ruling – is entitled to use a broad range of dispute-resolution techniques, including mediation. In Norway, *planmøte* (case management hearings) are held with few exceptions. Courts may conduct other *saksforberedende rettsmøte* (preparatory hearings) if they find it suitable. A considerable share of cases is diverted to *rettsmekling* (in-court mediation), where a judge serves as a mediator in a mediation hearing. In addition to hearings, the court oversees the exchange of written submissions, the number and content of which the court has the discretion to decide. The Brazilian Civil Procedure Code allows for two consecutive hearings within the preparatory stage, namely a conciliation hearing – the *audiência de conciliação ou de mediação*, where the parties are expected to attempt an amicable solution – and a hearing for the correction of procedural defects and case management – the hearing to adopt *providências preliminares e do saneamento* –; yet, in practice, these two hearings – conciliation and case management – are very often not held, causing the process to be conducted in writing, in large part or entirely. Eventually, the extent to which evidence is taken before the apex hearing and to which courts are involved in appointing experts or ruling on issues related to evidence, such as access to evidence, varies between these countries. Yet, it is considerably more limited than in the US.
- 254 Moreover, the timing and 'strictness' of preclusion is a crucial difference between Germany and Norway, on the one hand, and Spain and Brazil, on the other. Here, 'preclusion' refers to the parties being prohibited from bringing new submissions, that is, invoking new claims, allegations or evidence, after a certain stage of the proceedings or a time limit set by law or by the court. Under Spanish procedural law, the law itself – not the court – sets the right moments for the different submissions and procedural actions. Thus, in Spain, the combination of a rigorous fact-pleading standard right at the beginning of the civil process (whereby the law requires the claimant and the defendant to exhaust their fundamental facts, legal perspectives and documentary evidence in their initial briefs) with a very rigid system of legal preclusion (whereby, as a rule, any fundamental facts, legal perspectives or documentary evidence that have not been mentioned in the initial briefs cannot be introduced at a later stage), results in a smaller need for clarification of the points in dispute, as they become fixed at a relatively early stage. A similar approach (rigorous fact-pleading standard and strict preclusion) may be

found in Brazil, although this approach may be altered by an agreement of the parties (cf Articles 190 and 329-II of the Brazilian Code of Civil Procedure).

255 Meanwhile, preclusion is very lenient in Norway: it only occurs at the end of the preparatory stage. It is usually contingent on one of the parties opposing new evidence, circumstances or claims. Even if the other party opposes it, the court may still allow the amendments and, in some cases, must do so. In practice, courts take a very lenient stance to amendments, and it is not uncommon that these are made even during the main hearing. In Germany, where traditionally courts were also very liberal in allowing late submissions, the reforms in the late 1970s and 2001 attempted to require the defendant to put forward all the relevant defences as early as possible; however, § 296 of German Code of Civil Procedure (GCCP) still grants courts the power to accept submissions of new arguments or new evidence after the preparatory stage if the late submission will not delay the termination of the lawsuit or if the defendant has ‘sufficient excuse’ for the late submission.¹⁸⁷ Thus, there is far less leeway and need for letting the case unfold during the preparatory stage in Spain than in Germany and Norway. In Spain, the case can only become ‘leaner’ during the preparatory stage so long the contours of the dispute drawn by the initial briefs are respected, whereas, in Germany and Norway, the case can change shape in manifold ways. There is thus also likely to be more need for and room for discussions on amendments of and additions to the allegations and evidence.

10.2.4 The Apex Hearing

256 As to the apex hearing itself, in the five systems that have been analysed, the apex hearing allows the parties an opportunity to address the decision-maker(s), present their claims and defences and explain the evidence upon which those claims and defences are supported; it allows the court and the parties a last chance to engage into a dialogue and to clarify any issues of fact, evidence or law; and, eventually, it provides the necessary time and means for the evidence to be taken and examined.

257 However, there is significant variation in how apex hearings are played out in practice, such as the duration of the hearing, the extent to and how evidence is presented, particularly the examination of witnesses, and the length and structure of the arguments of the parties. Particularly, the apex hearing unfolds differently in the US than in the other four jurisdictions that were studied. The hearing format varies in the US depending on whether it is a jury or a bench trial. In contrast, there is only a single format in the other countries, regardless of whether there is any material dispute related to facts. While witness statement depositions are made before the trial in the US, there is no way of ‘fixing’ the content of witness statements before the main hearing in the other systems. Also, while parties call witnesses in all five jurisdictions, there are differences in how witness examination unfolds. In Germany and Norway, witnesses are first

¹⁸⁷ P L Murray and R H Stürner, *German Civil Justice* (Carolina Academic Press 2004).

requested to explain their observations of the relevant circumstances and, only once the witness has been allowed to do so, does the questioning start; this first ‘free’ account delivered by the witness is believed to be the core. However, in Spain and the US, there is no such a ‘free’ account, as witnesses are directly confronted with questions by the parties; this is also the general rule in Brazil.

- 258 Significant variations appear when leaving the US aside and focusing on the apex hearing systems. For example, the actual content and style of the apex hearing seem to depend on the structure and scope of the previous stages and any previous hearings. For instance, if the parties have extensively discussed the case with a judge (either the one presiding their case or another judge), this could reduce the length and scope of the apex hearing. The same is likely to apply, for instance, in jurisdictions in which the author of a document does not need to be called a witness when the relevant information can be retrieved from, for example, a private document or expert opinion. Moreover, how orality is interpreted is likely to influence the unfolding of the apex hearing: in some systems, such as Spain, a general reference to a document suffices, whereas, for example, in Norway, parties are required to read all relevant parts of the document aloud. In addition, there is considerable variation among the systems regarding whether judges are mostly passive observers, like in Spain, or active participants, like in Germany or Norway; for their part, Brazilian judges could be placed somewhere in between passive observation and active participation.
- 259 Furthermore, how the contents of the apex hearing are organized and how the hearing unfolds in practice differs. Although going in-depth into the ‘script’ of hearings has not been possible in a study such as this, some differences can still be identified. Whereas the Brazilian and the Spanish Codes of Civil Procedure set out the order in which the apex hearing should unfold in a more or less fixed manner, the German and Norwegian systems are more flexible, and the court has more discretion to adapt the unfolding of the apex hearing to the particular circumstances of the case.¹⁸⁸

10.3 Structures Without an Apex Hearing

10.3.1 General Remarks

- 260 The non-apex hearing category contains systems in which the proceedings do not culminate in an apex hearing upon which the court is to rule. Instead of (fully) abiding by the principles of orality, immediacy and concentration, when deciding the case the court may consider all allegations and evidence, regardless of the moment when they were presented. Whereas in apex systems one can get a full view of the basis for the decision of the court by attending the apex hearing and reading documents (such as written evidence and relevant case law and doctrinal writings) that are referred to during the

¹⁸⁸ The ELI/UNIDROIT Model European Rules of Civil Procedure (cf Rule 64(5)) also follow this flexible approach.

hearing, in non-apex systems this is not the case as hearings (and written elements) form a continuum.

- 261 As pointed out above, the non-apex hearing category includes two subcategories of systems. One category is that of hearing-based systems where one or more non-apex hearings, often combined with written elements, form the procedural structure. The other category consists of systems where oral hearings rarely occur, and procedural activity primarily consists of a succession of written briefs by the parties (to which documented evidence might be attached) and written decisions by the court. Naturally, ascribing a system to one of the subcategories depends on the preponderance and importance of written and oral elements in the system at hand. The hearing-based subcategory can be divided into two further sub-categories: one in which hearings are mainly specialised by law - with a limited, pre-determined scope set out by law - and the other in which hearings are primarily non-specialised by law, that is, they may be general in scope, or limited in scope upon the court's discretion.

10.3.2 Non-Apex Models with Hearings

10.3.2.1 Systems with Specialised Hearings

- 262 Belgium qualifies as a hearing-based non-apex system. This system has a structure comprising successive hearings, which appear to have clear pre-assigned functions. But none of the hearings could be deemed as 'apex' for presenting legal and factual arguments and evidence directly before the judge or panel of judges ruling on the case.
- 263 In the Belgian system, hearings primarily allow the parties to present and discuss the case. However, no hearing is designated as the 'apex' hearing, and parties will not know in advance whether a hearing will be the final because the court may reopen the case before rendering its ruling even if the proceedings have been closed.
- 264 In simple cases, Belgian courts may deal with the substance of the case during the first introductory hearing. If the court does not deal with the substance during the first hearing, a schedule for written exchanges, a subsequent hearing (that is, a second hearing of the proceedings) and, if appropriate, evidence-taking sessions will be set. After some written exchanges, the parties are to present their cases orally in the subsequent hearing. If the oral examination of witnesses is required, it will be conducted in a separate or a series of follow-up individual sessions.
- 265 It should be noted that the principle of immediacy does not apply, as illustrated by the rule allowing for the examination of a witness to be conducted before a judge different from the judge who is to decide the case. Moreover, even when the case is meant to be ripe for decision, reopening is common in Belgium, which allows the court to take more evidence or hear new arguments in new hearings.

10.3.2.2 Systems with Non-Specialized Hearings

- 266 Slovenia is, from a law-in-action perspective, an example of structure with non-specialised hearings. Although the Slovenian Code of Civil Procedure aspires to a procedural model with active case management and a concentrated apex hearing, in practice, court proceedings unfold in a manner in which there is no single ‘apex’ hearing.
- 267 In the Slovenian Code, the intended structure of civil proceedings is that the initial phase is followed by a preparatory stage consisting of a written part during which the parties exchange a maximum of two briefs. In these briefs, the parties would be required to address specific issues according to the court's instructions. Subsequently, a ‘preparatory hearing’ is to take place. The envisioned objective of this preparatory hearing is mainly to let the court and the parties cooperate and draft a plan for the proceedings, a plan including the number and dates of hearings, and the number of briefs and issues addressed in them that the parties will submit before the start of the main hearing. Also, it allows them to identify the legal and factual basis of the dispute, separate disputed issues from undisputed issues and establish the relevant pieces of evidence (including witnesses). Furthermore, the court should promote settlement during the preparatory hearing.¹⁸⁹ Eventually, the main hearing is envisioned as a single, concentrated hearing, where the parties present their arguments and evidence and witnesses, experts and parties testify. In practice, however, civil proceedings unfold as a series of hearings. Although the goal is that the parties bring forth all factual allegations and evidence needed to prove them at an early stage of the proceedings, the parties often introduce new facts and evidence until the theoretical main hearing commences, which is very frequently the first of a series of main hearings that follow one another. The reason is that preclusion (the expiry of the time limit for bringing forward new facts and evidence) occurs only at the beginning of the first main hearing, and even after this moment, courts shall allow evidence if the party has a valid excuse or if the court proceedings are not delayed.¹⁹⁰ Courts are very lenient in applying these rules, so the parties are seldom precluded from introducing new facts or evidence. In addition, preclusion does not apply to legal arguments: The parties may refer to new legal arguments and case law, legal scholarship and similar documents that support those

¹⁸⁹ A Galič, *Civil Procedure Slovenia* (Wolters Kluwer 2020) para 240.

¹⁹⁰ A Galič, ‘The Preparatory Stage of Civil Proceedings in Slovenia, the Czech Republic and Slovakia: Halfway There Yet?’ in L Ervo and A Nylund (ed), *Current Trends in Preparatory Proceedings: A Comparative Study of Nordic and Former Communist Countries* (Springer 2016) 111, 122.

arguments until the last main hearing is closed. Consequently, the central line of argument may be altered even at the very late stages of the proceedings.¹⁹¹

- 268 Similarly, the rule that limits the exchange of written briefs to a maximum of two only applies *before* the preparatory hearing. Nevertheless, parties may exchange as many briefs as they wish *after* the preparatory hearing. The preparatory and the main hearings do not work as intended, either. The preparatory and the first main hearing are often scheduled back-to-back on the same day and, consequently, cannot be used as intended to draft a schedule for efficient case management, such as creating a tentative schedule for a sole main hearing.¹⁹² Moreover, problems with summoning witnesses hinder the court from arranging a single, concentrated main hearing.
- 269 As indicated, the Slovenian main hearing is usually not a single hearing but two or more short hearings with at least two weeks passing between each hearing. Hearings are often a formality and an opportunity to exchange briefs. Still, it is considered a single event.¹⁹³ The parties file written submissions between the hearings in which they comment on evidence and assert legal arguments. The content of these submissions is not reiterated orally in a hearing; it is only presented in written format. Thus, hearings are not primarily a forum for presenting oral arguments directly in front of the judge(s) who will rule on the merits. In practice, because of the leniency with which courts apply the rules on preclusion, the parties often adduce new facts and evidence throughout the proceedings. Therefore, ‘surprises’ in the form of new legal and factual arguments and evidence are presented late in the proceedings, either because the parties have not prepared the case sufficiently or because they deliberately apply ‘ambush’ tactics.¹⁹⁴ The principle of *audiatur et altera pars* requires the court to provide the other party with an opportunity to respond and to offer counterarguments and evidence supporting them, which may amount to additional hearings and further delays.
- 270 Consequently, in Slovenia, the preparatory stage and its preparatory hearing do not function as intended and still largely conform with a non-apex hearing-based structure. Considering the actual structure of the proceedings, using the expression ‘main hearing’ to describe the Slovenian system is misleading both because it is often difficult to pinpoint which of the hearings is the ‘main’ one and because the divide between the preparatory stage and the main hearing is diluted in several ways, as explained above.

¹⁹¹ The system of so called ‘preclusions’ (time limits for bringing forward new facts and evidence) was introduced in the Slovenian Code of Civil Procedure in 1999 and further amended in 2008; it is based on the German model, explained above. Furthermore, the idea of an active substantive case management by the judge also follows the German model. A Galič, ‘(In)compatibility of procedural preclusions with the goals of civil justice: an ongoing debate in Slovenia’ in A Uzelac (ed), *Goals of Civil Justice and Civil Procedure in Contemporary Judicial Systems* (Springer 2014) 221–243.

¹⁹² A Galič (n 189) para 256, 258.

¹⁹³ Ibid para 259, 263.

¹⁹⁴ A Galič (n 191) 221, 236.

- 271 The gap between theory and practice cannot be attributed to the lack of reforms. After the initial reform in 1999, the Slovenian Civil Procedure Act was amended in 2002, 2008 and again in 2017. The reason seems to be that the novel ideas and tools introduced, particularly preclusion, partly contradict pre-existing beliefs and tenets of civil procedure law. Many practitioners believe strict time limits contradict civil justice's paramount goal – finding the truth.¹⁹⁵ Preclusion hinders the court from discovering the truth because relevant facts and evidence are excluded, and parties risk losing their cases because their lawyers fail to act promptly and diligently.¹⁹⁶ Strict rules regarding preclusion can be draconic unless the court assists the parties in clarifying inconsistencies and incomplete submissions and encourages – or even requires – them to clarify or elaborate. However, according to Aleš Galič, many lawyers fail to recognize how the combination is conducive and leads to just and expedient procedures and outcomes.¹⁹⁷
- 272 Like the Slovenian system, Japanese civil litigation consists of a non-apex hearing-based structure consisting of a preparatory stage and a decision stage. While purely written preparation is common, courts may also schedule preparatory hearings. There are two types of preparatory hearings, one of which is tailored to judges facilitating settlement. The settlement part of the process is held with only those with a direct interest in the case present. Courts may take written evidence during a preparatory hearing. There is no strict preclusion in Japanese civil procedure law; consequently, courts may base their decision on evidence and arguments presented during several hearings whose content lies upon the court's discretion and is not set out strictly by law.¹⁹⁸

10.3.3 Predominantly Written Proceedings

- 273 While the rules of civil procedure foresee oral hearings in all systems, in Iran and Togo, courts often forego hearings. Thus, the systems can be characterised as primarily written proceedings; that is, the parties exchange written submissions, and evidence adopts a predominantly written form, even if hearings are held in some cases. The hearings often have a very limited scope, such as examining selected witnesses or experts or deliberating one or a few selected issues. The court decides the case based on the materials collected throughout the proceedings. The case, arguments, and evidence develop throughout the mid-phase. Courts may, of course, develop guidelines for the structure, such as the number of written exchanges and the timeline of such exchanges.

¹⁹⁵ A Galič (n 191) 226–228 and A Galič (n 190) 111, 117.

¹⁹⁶ A Galič (n 191) 221, 223.

¹⁹⁷ Ibid 221, 223 and A Galič (n 190) 124–127.

¹⁹⁸ Y Taniguchi, 'The Development of an Adversary System in Japanese Civil Procedure' in D H Foote (ed), *Law in Japan: A Turning Point* (University of Washington Press 2007) 80–98; Y Taniguchi, 'The 1996 Code of Civil Procedure in Japan: A Procedure for the Coming Century' (1997) 45 *American Journal of Comparative Law* 767, 772–775; S Ota, 'Reform of Civil Procedure in Japan' (2001) 49 *American Journal of Comparative Law* 561, 568–570.

10.4 Comparative Insights From the ‘Mid-Phase’

10.4.1 Various Types of Hearings

- 274 The comparison between the mid-phases of the different systems leads to interesting reflections. First, it reveals how diverse hearings are in scope, number and sequence. The term ‘hearing’ is often, as such, too generic to encapsulate the material differences among different types of hearings and their function in civil litigation.
- 275 The palpable differences in the format and contents of the ‘apex’ hearing illustrate different understandings of hearings. Even in countries having a relatively similar structure and based on similar ideas of the functions of the apex hearing, such as Brazil, Germany, Norway and Spain, the way the apex hearing unfolds differs. There are differences as to the time when the parties (their counsel) present a summary of their claims, allegations, arguments and so forth, that time being either at the beginning and at the end of the apex hearing, as is done in Germany and Norway, or only at the end, as is the case in Spain and Brazil. There are also differences as to the form in which such presentation occurs, either as a more or less open dialogue with the court, as in Germany and Norway, or mainly as a monologue, as in Spain and Brazil. Furthermore, the way evidence is presented differs in many aspects: whether many witnesses and experts are common; how long each interrogation typically takes; whether the witness starts by speaking freely or she must simply respond to questions; who is to lead the examination of the witness; how common is some kind of ‘cross-examination’; and so forth. The way written evidence is dealt with in the context of an apex hearing is also different. In Spain, documents are mostly alluded to in the course of the apex hearing by mentioning their name or reference number in the case file, as the law assumes that the court may always go to the file and analyse the document in question. In Norway, the parties must, at the hearing, introduce orally – and often read aloud – at least the relevant passages of the written evidence. Additionally, the role of the judge(s) in the apex hearing varies: in Spain, the court is often a passive administrator of the process, while, in Germany, it has a much more active involvement by putting questions to the parties, witnesses and experts.
- 276 Hearings during the preparatory stage in apex-hearing jurisdictions are also interesting. Spain formally has only one type – a ‘general’ – preliminary hearing. In contrast, Brazil, Germany, Norway and the US have different kinds of hearings, such as general preparatory hearings, settlement conferences and case management hearings. Many issues related to the hearings during the preparatory stage have thus far received limited attention in comparative civil procedure research. Among those issues are: the variation among the different hearings regarding their intended functions and the flexibility of those functions (eg, whether various functions can be combined in the same preparatory hearing); the timing of the hearings in relation to other activities taking place between initiation and the ‘apex’ hearing and relative to the initiation and conclusion of hearings; who conducts the preparatory hearings (eg, a judge, magistrate judge, or clerk); and

whether the hearing is conducted in ‘open court’ or is closed to the public, and whether it is conducted in a regular courtroom, particular courtroom or the judge's chambers. The differences among rationale for – and implications of – having a system based on general or ‘specialised’ hearings, remains a significant research gap. So does the differences in how hearings unfold in practice among countries with relatively similar structures. Moreover, the interlinkages between the structure, hearings, and the role of the parties and the judge, has not yet been fully accounted for.

- 277 In general, the apex hearing group seems to share a common understanding of the goals that need to be achieved for a reasonable preparation of the case to be disposed of, those goals being clarifying disputed issues of fact and law (both procedural and substantive law), identifying the relevant evidence, exploring the possibility of an amicable solution and, as appropriate, ensuring that the case is ready to be presented at the apex hearing. However, the form in which these goals are achieved varies. The Spanish system prefers to concentrate the preparatory activity aiming at these goals in a single hearing, the potential contents of which are thus diverse and heterogeneous. The Norwegian system is more open to dealing with the different goals in separate hearings. Therefore, judges have the discretion to divide the preparatory activity into separate hearings, which will consequently have a narrower scope.
- 278 Turning to the non-apex hearing group countries, we found that they have a range of hearings, some of which have pre-assigned functions, and some are more general. Non-apex hearings without pre-assigned functions are found in Japanese and Slovenian law, with a somewhat fluid boundary between preparatory and ‘main’ hearings. In contrast, Belgium has hearings with pre-assigned functions focused on of the presentation of the parties’ arguments.

10.4.2 The Organization of the Mid-Phase: by the Law or by the Court?

- 279 From a more general perspective, an interesting observation of our analysis has to do with the different approaches to the question of who should be in charge of organizing the mid-phase of civil proceedings. Most systems, including Belgium, Germany, Japan, Norway and the US, rely primarily on their judges' discretion, experience and legal knowledge to organize the different stages and steps of the mid-phase in each case. In a way, these systems assume that, since every case is different, the procedural structure must be adaptable to the particular case. Since it is not possible to predict the potential differences, the lawmaker finally entrusts judges with the decision to adapt the procedural structure to the specific case. This is also the approach adopted by the ERCP, which also emphasize the role of the court as a case manager and the need to play this

role in cooperation with the parties.¹⁹⁹ The flip side of flexibility is variation among individual judges in how they organize the proceedings and, thus, reduced foreseeability.

280 In contrast, the Spanish and, to a lesser extent, the Brazilian system rely heavily on the Code of Civil Procedure to regulate in detail the particular stages and steps of the mid-phase. In this setting, the discretion of the judge(s) to organize the procedural activity is very limited; the court is expected to guard the correct application of the structure described in the statute. It is the ‘law’, that is, written statutory law, that shall drive the procedure; judges should simply apply the law to enable the development of the procedure as the Code states. It is remarkable how, in these systems, the lawmaker believes that it is indeed possible to design a procedural structure that fits almost all cases or, at least, to establish the vast majority of this structure and, thus, very much limit the scope of judicial discretion to alter it. With this approach, our interpretation is that these systems mostly try to emphasize the importance of legal certainty and equality in court proceedings. The more specific and detailed the procedural structure is, the easier it is for the litigants to foresee how the proceedings will unfold and what will happen as the proceedings unfold. Additionally, the more specific and detailed the procedural structure is, the lesser the likelihood of similar cases being structured differently and, thus, similar litigants being treated differently.

281 Relying on the judges to define procedural structure may create uncertainty and inequality, whereas depending on statutory law may create unreasonable situations regarding a lack of adaptability of the procedural structure to the particular case. We believe both approaches are appropriate and that the prevailing approach depends on the legal culture in which it is embedded. Of course, all systems that refer to their judges for the organization of the mid-phase of civil proceedings require that their judges are duly educated and trained in such responsibilities. But even assuming that all judges have the necessary legal education and training to tailor the different procedural stages, legal cultures emphasizing certainty and harbouring suspicion of discretionary powers might still be far more fertile soil for a structure of proceedings based on detailed regulation than on judicial discretion.

10.4.3 The Role of ‘Preclusion’ and the Principle of ‘Concentrated Presentation of Facts and Offers of Evidence’

282 Furthermore, it is interesting to highlight how the rules on preclusion influence the procedural structure. As pointed out above, the term ‘preclusion’, which is understood completely differently in numerous jurisdictions, refers here to the parties being prohibited from bringing new submissions, that is, invoking new claims, allegations or evidence, after a particular stage of the proceedings or a time limit set by law or by the court. As indicated above in Chapter 1 subdivision 2, the notion of preclusion is

¹⁹⁹ Rules 2 and 4 of the ELI/UNIDROIT Model European Rules of Civil Procedure; cf also Rules 5–8, on proportionality.

intimately connected to how strict the principle of ‘concentrated presentation of facts and offers of evidence’ is understood. Where this principle is understood strictly, several strict legal provisions on preclusion allow for the prohibition of late submissions. On the contrary, where the concentration of facts and evidence is understood more flexibly, the preclusion rules appear less in number and less strict.

- 283 The comparison of the mid-phase reveals that most systems employ a flexible understanding of preclusion and the principle of concentrated presentation. What matters is that the procedural structure leads to a fair and correct outcome of the case, no matter how many submissions or actions are required to achieve this goal; thus, for the sake of justice, late submissions must not be, as a rule, forbidden. A clear exception to this general trend is Spain, where preclusion and the principle of concentrated presentation are very rigid. The rigid approach may put at risk the fairness and correctness of the outcome, but, on the other hand, it provides stability to the procedural structure – as it avoids the proceedings going back and forth after each new late submission – it discourages the parties to use delaying tactics and, eventually, contributes to a faster disposition of the case.
- 284 These two different understandings are reflected in the way preclusion operates. In most systems, for preclusion to apply – ie, for establishing that a party is prohibited from taking a particular action – a court decision is required; in other words, preclusion only occurs *ope iudicis*. This enables the parties to try any submission at any time, as they know that the court will then need to assess whether the submission is admissible or not in terms of contributing to a fair and correct outcome of the case. On the other hand, a rigid system may provide for preclusion by mere operation of the law (*ope legis*). This is the case of Article 136 of the Spanish Code of Civil Procedure, under which, once the moment foreseen in the Code to make a submission has elapsed, ‘preclusion will occur, and the opportunity to carry out the act in question will be lost’. A similar rule may be found in Article 223 of the Brazilian Code of Civil Procedure, although the law allows the parties to agree otherwise.
- 285 The comparison between the two approaches and their rationales suggests that both are valid regarding efficiency and adaptation to a particular legal culture. In a system with mandatory legal representation in civil cases – which is normally the case in Spain – and where dilatory tactics are expected, it does not seem unreasonable that a lawyer’s lack of timely action leads to preclusion and bars the party from late submissions. In this way, a lawyer’s neglect does not negatively impact how the procedural structure unfolds in practice because it does not force the court to go back and forth in the proceedings. Thus, it allows the proceedings to unfold relatively linearly and fluently. Simultaneously, it prevents dilatory tactics from having repercussions on the other parties’ strategy, the court’s workload and the duration of the process. In other legal cultures, where self-representation is frequent or where abuses are not generally expected to occur, showing greater compassion for the parties committing mistakes and having greater leniency

with late submissions also seems to be a perfectly workable approach in terms of facilitating that the outcome of the proceeding is as fair as possible.

10.4.4 Propelling Proceedings Forward

- 286 Another interesting general factor influencing the mid-phase structure is how proceedings are ‘boosted’ or pushed forward. A distinct feature of the US procedure is that the process is driven by ‘motions’ filed by the parties rather than by a court machinery that runs irrespective of whether the parties are actively requesting the court to take a step. The term ‘motion’ used in US law seems to suggest that the machinery of justice needs to be ignited and put in motion by one or both parties; otherwise, the court will remain passive. However, it should be noted that the emergence of ‘managerial judges’ and settlement conferences has produced a more active participation of judges in the US. The English scholar Neil Andrews has characterised ‘pure and unmodified’ adversarial proceedings as proceedings in which the parties ‘dictate at all stages the form, content and pace of litigation’.²⁰⁰ This idea still seems to be an undercurrent of the US litigation system where, despite the emergence of ‘managerial judges’, judges appear to remain passive umpires, and the parties continue to be the ‘motor’ of the proceedings.
- 287 In the other apex hearing systems we have examined, the main hearing systems of Brazil, Germany, Norway, and Spain, court proceedings have a steady flow, with the court or the court and the parties serving as the engine that propels the proceedings. There is, more or less, a pre-determined, standard process. A schedule is set with hearings and time limits for exchanging written proceedings. Parties may still file unilateral or joint ‘applications’ – rather than ‘motions’ – to change the course of the proceedings or to gain access to or refuse evidence, on which the court then decides. Still, these applications and decisions are part of the grinding of the procedure, of the bureaucratic process, that leads to a ruling. At least in some instances, it seems as if terminology encapsulates rich contextual information. This includes differences such as ‘trial’ versus ‘main hearing’ or ‘motion’ versus ‘application’ or ‘request’.²⁰¹

²⁰⁰ N Andrews, ‘A New Civil Procedure Code for England: Party-Control Going, Going, Gone’ (2000) 19 *Civil Justice Quarterly* 19.

²⁰¹ Interestingly, the ELI/UNIDROIT European Rules of Civil Procedure shows a preference for the term ‘application’ (cf eg, Rules 18(1), 28, 50(1) or 57). The word ‘motion’ is found in the ERCP in the expression ‘on its own motion’, referring to what the court may or must do without the parties having to act. The exception is the ‘extraordinary motion for review’ in Rules 181–183. It is unclear whether this terminological choice is intentional or results from the rules on appeals being drafted only at the end of the project. Thus, it might have escaped the group’s attention on coherence and consistency. The English Civil Procedure Rules do not use the term motion.

10.4.5 Manifestations of Theoretical Models and Challenges of Changing the Structure of Proceedings

- 288 A final reflection after the comparative analysis of the mid-phase of civil proceedings relates to the difficulty of implementing a novel procedural structure. Whereas enacting a new law that establishes a new structure might be simple, changing workflows and legal thinking, including the assumptions they are built on, is difficult. Successful reform requires that all elements of the civil procedure rules and beyond adequately support the novel structure. The Slovenian civil procedure rules, as practiced, illustrate the power of habits, the existing ‘script’ for the structure of proceedings and hearings, and beliefs regarding the aims and principles of civil litigation. Novel procedural rules should thus be fine-tuned to bridge the gap between the existing and the aspired practices and beliefs when reforming civil procedure to produce the intended structures and practices. Otherwise, the reform risks becoming a paper tiger.
- 289 Civil procedure research still poorly understands the gap between goals and ideals propelling the reforms, on the one hand, and the post-reform realities, on the other hand. The observed gulf, found in several jurisdictions compared, could shed light on the prerequisites and mechanisms of change in legal practices and factors facilitating and hampering reforms. We still do not understand whether some reforms have been more successful, at least in terms of the level of actual implementation, and if so, why they have been more successful. Apart from the frequent reluctance of human beings to make significant changes, we still wonder whether there are any additional drivers of resistance or susceptibility to procedural reforms common to the different legal systems.
- 290 One could even reflect on what should be the primary means to overcome the resistance to necessary procedural reforms. In this regard, it might be interesting to take account of the Austrian, Norwegian, Spanish and Swedish experiences when these systems transitioned from a written procedure to an oral one.
- 291 As to the Austrian experience, it took three years until the *Zivilprozessordnung* (Code of Civil Procedure), elaborated by Franz Klein in 1895, entered into force. Judges and lawyers were trained to apply the new law in those three years. In addition, once the new rules entered into force, the Minister for Justice sent its ‘judicial inspectors’ to courts and tribunals around the country to ensure that practice would conform to the new procedural rules.²⁰² Similarly, but much more recently, in 2000, Spanish civil procedure abandoned the written procedure that had been in place since the Middle Ages. The Spanish lawmaker gave one year of *vacatio legis*, during which many courses, seminars and sessions on the new law occurred. Also, many publications shed light on how the new provisions should be applied. After the entry into force, no particular

²⁰² Cf F Cipriani, ‘Nel centenario del regolamento di Klein (Il processo civile tra libertà e autorità)’ (1995) *Rivista di diritto processuale* 969–970; N Picardi, ‘Le riforme processuali e social di Franz Klein’ (2012) 2 (16) *Historia e ius* 8.

judicial inspectors were hired to ensure the new oral model was respected. However, an efficient tool favouring scrutiny was implemented, namely the deployment of video cameras in every courtroom to comply with the new provision requiring all hearings to be video recorded.

292 Thus, the Austrian and the Spanish reforms appear to have succeeded by using similar instruments: (i) a reasonably long *vacatio legis* that permitted practitioners to study the reform thoroughly with the help of seminars and courses; (ii) and the implementation of control mechanisms.

293 A comparison of efforts to modernize Norwegian and Swedish civil proceedings in the past decades highlights the importance of adjusting reforms. It is said that old habits die hard, and this applies to judges and lawyers, too. Even a fairly long time to study the new norms and develop new protocols and working methods might not always suffice. The 2008 civil procedure reform was based on a law committee report published in 2001, and the reform was enacted in 2005. Thus, judges and legal counsel had abundant time to prepare for the changes. A study conducted in 2013 revealed that the reforms were only partially successful. For instance, it found that judges spend very little time in preparatory hearings because these focus mainly on procedural case management, which has repercussions for the duration and lack of focus of the main hearing. However, these shortcomings were not addressed shortly after the findings were published. On the contrary, until today, very few changes have been enacted, despite recommendations on specific reforms given in a 2020 government report. In contrast, Swedish civil procedure has undergone not only several larger reforms every 10-20 years but also smaller reforms in which provisions have been adjusted to bring about the intended changes in practice. For instance, summaries of the claims, reliefs, allegations, and evidence were first introduced as a tool that courts could use to crystallise the case and separate disputed factual and legal arguments from undisputed ones. Later, summaries became mandatory unless the relevant disputed issues are straightforward.²⁰³

294 Based on these examples, it seems that paraphrasing the American poet T S Eliot: who noted that traditions ‘cannot be inherited, and if you want it you must obtain it by great labor’, that procedural reforms cannot be enacted, they must be obtained by great labour.²⁰⁴ It requires giving judges adequate training and time to prepare for reforms,

²⁰³ M Strandberg M and A Nylund, ‘Utsikt til innsikt: En komparativ tilnærming til reform av reglene om anke til lagmannsretten over dommer i sivile saker’ (2020) *Lov og Rett* 59(2) 84–102; A Nylund, ‘Case Management in a Comparative Perspective: Regulation, principles and practice’ (2019) 292 *Revista do processo – RePro* 377–398; A Nylund, ‘The Structure of Civil Proceedings – Convergence Through the Main Hearing Model’ *Civil Procedure Review* (2018) 2(9) 13–39.

²⁰⁴ T S Eliot, ‘Tradition and the Individual Talent. Part I’, *The Egoist*, September 1919, 54, 55.

and when necessary, adjustment of some provisions as well as continuous efforts to improve and refine work processes and protocols.

11 CLOSURE OF THE PROCEEDINGS AND FINAL JUDGMENT

Enrique Vallines

- 295 There is a moment in the proceedings where the dispute is deemed to have been sufficiently argued and the case is found to be ripe for a final judgment. When this moment arrives, legal systems usually establish that the proceedings are ‘closed’ and, accordingly, no additional pleas, allegations or evidence are to be submitted. In the procedural structure, this moment may be called the ‘closure’ of the proceedings.
- 296 In the apex hearing systems that have been analysed in this contribution, the moment of closure of the proceedings follows naturally from the ‘dramaturgy’ of the apex hearing, normally when the parties finish presenting and, eventually, discussing their cases for the last time. In Germany, Norway and Spain, the judge presiding the main hearing formally declare the closure of the proceedings after the parties have submitted their final arguments and the court is satisfied that the matter is ripe for decision. In US jury trials, the closure of the proceedings occurs in the same ‘natural’ way, but without any formal declaration: at the trial, when the defendant finishes her closing argument and the court moves on to jury instructions, the proceedings are deemed to be closed in a very similar manner as they are formally declared closed in Germany, Norway and Spain. The same approach may be found in Brazil, where the law deems the case to be closed after the parties have ‘offered their final reasons’, which, as explained in the previous subchapter, is something that is expected to occur normally at the end of the apex hearing. However, in complex cases, Brazilian judges are allowed to establish that final arguments shall be provided in writing after the apex hearing has finished; in this case, the closure will occur as the last brief with final arguments is submitted or, alternatively, once the time-limit to submit this brief has elapsed.
- 297 In non-apex systems, there are different variants of closure. Sometimes, there is a formal declaration of closure by the court. This is the case of Slovenia, where presiding judge announces the ‘conclusion of the main hearing’ and informs the parties that ‘the judgment will be rendered in written form’. Another variant is that the proceedings are deemed to be closed after a particular procedural stage has been fulfilled, unless the court decides otherwise and provides for the continuation of the proceedings with new procedural stages. This happens in Belgium: after the hearing where the parties have presented their case, the court studies the possibility of issuing the final judgment; if it finds that there is no need for further discussions and evidence-taking, it will simply proceed to final judgment; if, on the contrary, it comes to the conclusion that further procedural activity is necessary, it will provide accordingly, normally scheduling a new hearing. Indeed, it is not unusual that Belgian courts call these additional hearings, so

that there are several new hearings after the court finally decides to proceed to final judgment.

298 From the descriptions above, it follows that, in many systems (eg, Germany, Norway, Spain, Slovenia or Belgium), the closure of civil proceedings happens *ope iudicis*, ie, by way of a formal court order or a particular conduct of the court implying that the proceedings have been closed. However, there are systems (eg, US, Brazil) where the closure of proceedings occurs *ope legis*, once a particular procedural step has occurred.

299 After closure, the proceedings will move forward to the final judgment. Where the court is formed by a single judge, this judge could issue the judgment immediately (even in oral form) or after a period of reflection. Where a panel of judges forms the court, or a jury has intervened, there is a more or less long period of time (some minutes, hours, days, weeks or months) between closure and final judgment. Within this period of time, a number of activities shall or may happen, including deliberation and, in jury proceedings, verdict delivery. In some jurisdictions, the period to render the judgment is limited by statute,²⁰⁵ although non-compliance with these time limitations is normally tolerated and does not invalidate the judgment.

300 An important question is whether proceedings might still be reopened in the period that runs between the closure and the final judgment. The general answer to this question is in the negative because, as indicated above, it is at the essence of the closure of the proceedings that no additional pleas, allegations or evidence are to be allowed. However, most systems foresee exceptions – ‘scape valves’ – to this strict general rule with a view to achieve a fairer and more correct judgment. Here are some examples:

- a) In Belgium, civil cases may be reopened at the request of a party when discovering a new fact or issue of importance; also, the court may of its own motion determine that the case is to be reopened when it is of the conviction that the case should be decided on another legal ground or that the factual grounds should be enlarged.

In Germany, a reopening of the main hearing may be ordered if the court determines that there was a material procedural error such as a violation of the judicial duty to give hints and feedback or a denial of the right to be heard during the just-closed proceeding or if the court becomes aware of a circumstance that would sustain a post-judgment motion to reopen the proceedings.

In Norway, a reopening of the main hearing is possible when the court considers that a sound basis for the ruling is needed; this may happen if the court and the parties have overlooked important issues, in particular legal arguments that the court finds

²⁰⁵ Eg, 30 working days in Brazil, three weeks in Germany, two weeks in Norway, 30 calendar days in Slovenia, 20 working days in Spain.

applicable but that have not been explicitly discussed during the main hearing; also, a change of circumstances could be a reason for reopening the main hearing.

In Slovenia, the case may be reopened 'if this is necessary for supplementing the proceedings or for clarification of some important questions'.

In Spain, no reopening of the main hearing is allowed. However, even after the closure of proceedings the parties may submit

judgments of a court or decisions of an administrative authority, issued or notified at a date not prior to the time of the formulation of the final arguments, provided that the judgments or decisions could be conditioning or decisive for the judgment on the case at hand.

In addition, the parties may also request a 'final' taking of specific evidence, provided that the fact that the specific evidence was not taken at the main hearing does not come as a consequence of a lack of diligence of the party making the request.

In the US, the judge may grant a losing party's request for a new trial, in which case the jury's verdict is set aside and the losing party is entitled to a new trial on its claims (although the party that is subject to the new trial decision may appeal that to a higher court, in which instance the new trial will be delayed until resolution of the appeal).

301 In any event, the court will ensure that the final judgment is communicated to the parties. Some jurisdictions (eg, Germany) require that the judgment is read aloud to the parties in a public hearing. Other jurisdictions (eg, Norway, Spain, Slovenia) simply require that a written copy of the judgment is served on the parties or their legal representatives. In these latter jurisdictions, publicity of proceedings is deemed to be ensured by way of establishing the right of any person to obtain a copy of the judgment (although, sometimes, only a redacted copy will be provided, in order to comply with data protection requirements).

CHAPTER 3 – EARLY RESOLUTION, CASE MANAGEMENT AND SETTLEMENT

1 INTRODUCTION

- 302 The previous chapter discussed the ‘regular’ course of proceedings recognising that many cases, in some jurisdictions – most cases, are resolved early, that is, without undergoing all the steps described and discussed. This chapter discusses the manifold methods by which cases are resolved early. Some grounds for early resolution are formal: the case is not admissible due to procedural grounds, or one of the parties fails to act in a timely manner. Other early resolution methods follow from the parties' right to dispose of the case, through withdrawal, by admitting or relinquishing claims and defences, and through settlement. This process could be facilitated by the court actively engaging in case management, thus assisting the parties in identifying points of agreement, estimating the prospects of prevailing, and the risks and costs of litigation, which could induce them to terminate the process early.
- 303 Case management is linked with the structure of hearings, more specifically, the apex hearing model (for this, see Chapter 2 subdivision 4.2), because both procedural and substantive case management requires the court to engage with all aspects of the case early. Active case management also requires a clear yet flexible structure which is moulded to ensure that the case at hand is processed expeditiously and adequately and a forum for the court and the parties to discuss the case. Hence, the room for case management is linked to the principles on which civil litigation is embedded in, and the structure of the proceedings, including the avenues for early resolution.
- 304 In recent decades, settlements have been a focal point of policymakers in many jurisdictions because it is an avenue to early, and thus faster and cheaper, dispute resolution. Settlements hinge on both the structure of the proceedings and active case management. They can create constellations which facilitate settlement both by elucidating, even crystallizing, the case and the steps and evidence needed to prevail, and paths to, and fora for, negotiations.
- 305 This chapter first discusses early resolution of cases, as a continuum of the previous chapter (part 2). It then proceeds to explore the role of case management (part 3). Part 4 offers views on the role of settlement as a form of early resolution and how settlement is entangled with case management.

12 POWERS OF THE COURT FOR RESOLVING THE DISPUTE AT AN EARLY STAGE

Anna Nylund, Aleš Galič with the support of Janek T Nowak

12.1 Introduction to Early Resolution

- 306 While the structure of court proceedings described above in Chapter 2 outlines how cases are processed in the jurisdictions studied, a significant number, or in some of the jurisdictions, even the majority of, court cases never proceed to the final stage. They are resolved during an early stage. Hence, the structures presented in Chapter 2 are not necessarily an accurate description of how court proceedings unfold in practice.
- 307 At least five different modalities of early resolution can be identified. First, cases can be dismissed on procedural grounds if they do not fulfil the criteria for admissibility. Second, the absence of a party or failure of a party to comply with time limits could result in a ruling against the non-compliant (absent) party on formal grounds. Third, one party could be allowed to end the proceedings unilaterally, or the parties could make a joint decision to terminate the case through withdrawal or other means. Fourth, in many jurisdictions, there are expedited proceedings for cases manifestly lacking reasonable prospects of success. Fifth, many cases end in settlement, either during regular court proceedings or after the case has been diverted to court-connected ADR.
- 308 In addition to or as a supplement to these five methods, some jurisdictions have enacted rules to combat frivolous litigation. This will be discussed separately.
- 309 Prior to discussing each of the five modalities of early resolution, some statistics on the methods of resolution will be presented to establish how common early resolution is in the jurisdictions studied and the variation across the jurisdictions.

12.2 Statistical Data on the Resolution of Civil Cases

- 310 This section presents statistical data on how courts in the jurisdictions studied resolve civil cases. Although the numbers are not fully comparable, they give some indication of the ratio of cases resolved on the merits after the full course of proceedings, the settlement rate and the use of various methods of early resolution. The data available varies from only scarce data in found on the US systems, which can be largely attributed to the lack of a single uniform court system, to fairly detailed data available from some countries with a uniform court system and a practice of publishing such data. Even when data is available, the numbers might not be fully comparable. One reason is that the categories used might not fully correspond with each other. As will be explained below, countries operate with different rules regarding withdrawal, which is likely to influence under which heading the case is resolved. Procedural rules, such as the pleadings standard and the extent to which the parties have access to evidence before and after having filed the action, could influence the litigation and early settlement rate. Thus, in some places, the parties could be incentivised to sue first and negotiate then; in other

places, the opposite could be true. Similarly, many factors could influence whether parties are inclined to record their settlement as an in-court settlement, in which case the case would be classified as settled or to prefer to withdraw the case after settling it, in which case it would be considered as a withdrawal or similar.²⁰⁶

- 311 In Germany, in 2021, 42% of the civil cases brought before one of *Landgerichte* (the District Courts) were resolved through a contentious decision, 24 % by court settlement, 1,7% through a judgment based on acknowledgment or renunciation of the claim; 8% by default judgment and 10 % were withdrawn. Concerning the civil cases brought before one of the German *Amtsgerichte* (Local Courts), 27% were resolved through a contentious decision, 15 % by court settlement, 20% by default judgment, 6,5% through a judgment based on acknowledgment or renunciation of the claim and 12% were withdrawn.
- 312 In Norway, in 2018, 41 % of civil cases were resolved through a judgment of the merits, 24 % by a court settlement, 13 % after settlement in in-court mediation, 5 % were dismissed, 2 % withdrawn and 1 % through other means.²⁰⁷
- 313 In Norway, cases with a judgment on the merits have been heard in a main hearing. Also, there is reason to believe that quite a few settlements are concluded during the main hearing. Therefore, estimating that approximately half of all cases proceed to the main hearing stage is appropriate. Even if this is not an exact figure, it gives some idea to assess whether ‘the vanishing trial’ is an accurate description of Norwegian civil procedure.
- 314 In Brazil, most legal proceedings finish with the resolution of the merits by the judicial bodies. The settlement rate is traditionally low. In 2015, the percentage was 11.1% in the general framework of the Judiciary, 13.6% in 2016, 13.5 in 2017, 12.8% in 2018, 12.4% in 2019, 11% in 2020 and 11.9% in 2021. In Labor Courts, in 2021, consensual solutions reached 20.5% of cases, in State Courts 11.5%, and in Federal Courts 9.3%. However, a great effort has been made to change this reality, especially with the provision contained in the current civil procedural statute, in force since 2016, in the sense of establishing the mandatory holding, with few exceptions, of a prior mediation and conciliation hearing, preceding the defendant's response. There are no official national data on the number and percentages of judgments on the merits or merely terminating the process, as well as an indication of the number of withdrawals, resignations or acceptance of requests. However, as a parameter, the numbers obtained in the Judiciary Section of the State of Rio de Janeiro, within the scope of Federal Justice,

²⁰⁶ On how to establish settlement rate, cf Y Chang and D Klerman, ‘Settlement Around the World: Settlement Rates in the Largest Economies’ (2022) 14(1) *Journal of Legal Analysis* 80–175 <https://doi.org/10.1093/jla/laac006> accessed 5 July 2024.

²⁰⁷ NOU 2020: 11, Den tredje statsmakt. Domstolene i endring. Utredning fra Domstolkommisjonen oppnevnt ved kongelig resolusjon 11 August 2017. Avgitt til Justis- og beredskapsdepartementet 30 September 2020, Sec 5.4.2.

can be pointed out. In this, 80% of the sentences handed down in 2022 judged the merits, and 20% ended without a judgment on the merits, due to the lack of a procedural requirement or the author's withdrawal.

- 315 In Japan, in practice more than 30% cases are finished by settlement in the first instance of District Court.
- 316 Data regarding the US is not available. The main reason for this is the complexity of the court system: there are both federal and state courts with tangible variations among the systems. Thus, there is no comprehensive data available. In the twelve-month period ending 31 March 2023, only 0.7 % of the civil cases terminated by US District Courts reached trial.²⁰⁸ Data on litigation in civil cases in state courts covering 19 states²⁰⁹ in 2021, the jury trial rate was 0.06 %, and in 2020 data for 17 state court systems²¹⁰ found the same jury trial rate. The bench trial rates were, on average, 11,1 % in 2021 in the 20 states and territories²¹¹ included in the statistics and 10,3 % in 2020 in the 20 states and territories²¹² included.²¹³ The states in these statistics are only partially overlapping and might not be representative of all US states. Although the data is incomplete and might not fully correspond to the reality in all US states and territories, it still gives an indication of how rare jury trials are in civil cases and that the majority of cases are disposed of before reaching the (bench) trial.

12.3 Early Resolution Based on Formal Criteria

- 317 Courts in all jurisdictions in this study have the power to resolve cases based on formal criteria. The criteria that need to be fulfilled for a case to be allowed vary across jurisdictions. Differences in pleadings standards have been discussed above. Cases must

²⁰⁸ Table C-4. US District Courts–Civil Cases Terminated, by Nature of Suit and Action Taken, During the 12-Month Period Ending 31 March 2023 <https://www.uscourts.gov/statistics-reports/caseload-statistics-data-tables> accessed 11 July 2023.

²⁰⁹ California, Florida, Georgia, Hawai'i, Indiana, Michigan, Minnesota, Missouri, Nevada, New Jersey, New York, North Carolina, North Mariana Islands, Ohio, Rhode Island, Texas, Utah, Vermont, and Wisconsin.

²¹⁰ Alaska, California, Florida, Georgia, Hawai'i, Indiana, Michigan, Minnesota, Missouri, Nevada, New Jersey, North Carolina, Ohio, Rhode Island, Texas, Vermont, and Wisconsin.

²¹¹ California, Florida, Georgia, Hawai'i, Indiana, Iowa, Michigan, Minnesota, Missouri, Nevada, New Jersey, North Carolina, North Mariana Islands, Ohio, Puerto Rico, Rhode Island, Texas, Utah, Vermont, and Wisconsin.

²¹² Alaska, California, Florida, Georgia, Hawai'i, Indiana, Iowa, Michigan, Minnesota, Missouri, Nevada, New Jersey, North Carolina, Ohio, Puerto Rico, Rhode Island, Texas, Utah, Vermont, and Wisconsin.

²¹³ All data from Court Statistics Project. S Gibson, B Harris, N Waters, K Genthon, M Hamilton, E Bailey, M Moffett and D Robison (ed), Last updated 5 June 2023 CSP STAT. <https://www.courtstatistics.org/court-statistics/interactive-caseload-data-displays/csp-stat-nav-cards-first-row/csp-stat-civil> accessed 11 July 2023. This data mirrors the findings of a comprehensive study on state courts. According to it, in 2002 only 0.6 % of the dispositions are resolved by jury trial and 15.2 % by bench trial (National Center for State Courts, 'Trial Trends and Implications for the Civil Justice System' (2003) 11(3) Caseload Highlights 1). Many state court systems do not publish data on the method of disposition.

also meet other requirements, such as being filed with a competent court, the parties must have legal and procedural capacity, and the claim(s) must not be *res judicata*. The nature of these requirements varies across jurisdictions. For instance, legal standing is a procedural requirement for admissibility in Norwegian law and a substantive requirement in Spanish law.²¹⁴ Similarly, the categorisation of estoppel effects of rulings might vary across jurisdictions;²¹⁵ nevertheless, attempts to relitigate cases result, as a rule, in early dismissal. Thus, this section uses the terms ‘formal’ rather than ‘procedural’.

- 318 The extent to which courts must investigate formal criteria also varies. Scandinavian civil procedure doctrine operates with two types of criteria for admissibility: absolute and relative. The court must investigate and enforce the presence of absolute criteria on its own motion. Legal standing and functional jurisdiction are among these criteria. Territorial jurisdiction is an example of a relative criterion. In Norway and, for example, Germany and Spain, the court becomes competent if the defendant tacitly accepts its jurisdiction by entering an appearance without raising the issue of territorial jurisdiction.²¹⁶ This applies to international cases when the Brussels Ibis Regulation²¹⁷ or the Lugano Convention²¹⁸ is applicable. There are exceptions for cases with mandatory jurisdiction, such as cases related to immovable property. In consumer cases, the court must raise the issue of jurisdiction on its own motion in the members of the EU and the European Economic Agreement. In Belgium and Spain, several rules on territorial jurisdiction are of public order and should be raised by the courts of their own motion.²¹⁹
- 319 Not all formal errors result in dismissal or other forms of early resolution. In Belgium, if an action is filed with the hierarchically wrong court, the court must refer the case to the ‘*Tribunal d'arrondissement*’. The Tribunal will decide the issue and refer the case to the competent judge.²²⁰ In Norway, District Courts must transfer cases in which the Conciliation Boards have sole jurisdiction to the competent Conciliation Board.²²¹ If the court lacks territorial jurisdiction, it may transfer the case to the competent court. In

²¹⁴ For Norway, cf A Nylund, ‘Civil Procedure in Norway’, *International Encyclopedia of Laws/Civil Procedure* (2nd edn, Wolter Kluwer 2022) 58–62; for Spain, cf A de la Oliva Santos, *Curso de Derecho Procesal Civil I. Parte General* (4th ed, Editorial Universitaria Ramón Areces 2019) 444 ff.

²¹⁵ Cf Part 8 of this compendium.

²¹⁶ § 39 Code of Civil Procedure (Germany) (GCCP); LEC Art 56 (although not applicable to cases under EUR 15,000 or on a number of special subject-matters; cf LEC Art 54(1) and 250). This does not follow directly from statutory law in Norway but from the fact that territorial jurisdiction is not considered an absolute requirement for admissibility.

²¹⁷ Regulation on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, 1215/2012 of 12 December 2012 (EU), Art 26.

²¹⁸ Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ L 339, 21.12.2007, p 3–41 (EU), Art 24.

²¹⁹ Art 632–633 *decies* and Art 640 Belgian Judicial Code; LEC Art 52 and 54.

²²⁰ Art 640, 660 Belgian Judicial Code.

²²¹ § 4-2 Dispute Act (Norway) (DA).

Germany, the defendant may request that the court transfers the case to the competent court.²²² In Norway, Slovenia and Spain, the court shall transfer the case on its own motion.²²³ In the meantime, the case remains *lis pendens*.

- 320 Expedient justice requires that courts decide on admissibility at the earliest possible occasion. When the case is manifestly inadmissible, and the deficiencies cannot be rectified by amending or supplementing the pleadings, in some jurisdictions, including Norway, Slovenia and Spain, the court may dismiss it without serving it upon the defendant.²²⁴ This saves time and costs for both the court and the intended defendant. However, Norwegian courts are reluctant to proceed in this manner because the statement of defence could contain relevant arguments that allow the court to assess admissibility in a broader fashion.
- 321 When rectification is possible, Norwegian and Spanish courts must set a time limit and provide necessary guidance to parties to enable them to make the required additions and amendments.²²⁵ In Slovenia and Spain, the Constitutional Court has held that it is a disproportionate restriction of effective access to a court if the claim is dismissed immediately without allowing the claimant to rectify it. The type and extent of guidance depend, among other things, on whether the party is self-represented or has a lawyer and whether it is obvious or difficult to determine how the error or omission can be rectified.²²⁶
- 322 Formal deficiencies can often be dealt with in written proceedings based on the statement of claim and defence. Sometimes additional briefs might be necessary, and if the issues are complex, a court hearing, or both, might be needed to enable the parties to elucidate their arguments.
- 323 Sometimes formal deficiencies are deeply entangled with the substantive aspects of the case. This constitutes a dilemma in at least those systems that rely on a concentrated final hearing. If the court hears most of the case to determine whether the formal requirements are fulfilled, it risks hearing the case twice, ie, first to determine whether the formal requirements are fulfilled. Then, unless the case is dismissed, the court hears it on its merits. German law seeks to maintain the separation between procedural and substantive issues. If there are clear aspects that might lead to the inadmissibility of the claim, the court may schedule a hearing only for the purpose of determining

²²² Art 281 GCCP.

²²³ § 4-7 DA, Slovenia Civil Procedure Act, Art 23, Spain LEC Art 58, 65(5).

²²⁴ § 11-5 DA, Slovenia Civil Procedure Act, Art 274, Spain LEC Art 9, 31(1), 37, 38, 48, 254(4) or 269(2), among other provisions.

²²⁵ § 16-5 DA, LOPJ Arts 11(3) and 243(3), and LEC Art 404(2)(2), 231, 73(3), 254(4), 273(5), 275 and 418.

²²⁶ Case U-I-200/09 (Constitutional Court, Slovenia), Judgment 20 May 2010 [ECLI:SI:USRS:2010:U.I.200.09]; Case 2710-2001 (Constitutional Court, Spain), Judgment 182/2003 of 20 October 2003 [ECLI:ES:TC:2003:182] para 5.

admissibility. However, the court may also hear any other issues that it finds suitable to be heard during that hearing. Similarly, Spanish law devotes a distinct part of the ‘pre-trial hearing’ to analysing and deciding on ‘procedural questions’ before delving into issues that relate to the merits of the case.²²⁷ Norwegian law prefers courts to hear the case on substantive grounds for dismissal.²²⁸ If it is unclear whether the criteria for admissibility are fulfilled in Norwegian law, and the unclear procedural matter has strong linkages to disputed substantive issues, the court proceeds to hear the case on the merits, as if the procedural requirements are fulfilled. Once the parties have argued their cases or at least parts relevant to the procedural issue, it rules on the procedural issue.²²⁹ A ruling on the merits is more favourable, as it will be *res judicata* and thus enforceable and an effective bar against attempts to relitigate the case.

324 In contrast, in Slovenia, formal issues should be determined first. Yet there is no cut-off deadline for invoking procedural irregularities; thus, it is not rare that the claim is dismissed on formal grounds at a rather late stage of proceedings (eg, for lack of standing or *lis pendens*). Belgian procedural law is very liberal, and this issue is not formally regulated in the Belgian Judicial Code.

325 The effects of rulings to dismiss the case on formal grounds vary across legal systems.²³⁰ Some countries have some *res judicata* (estoppel) effects and are enforceable to some extent; in other countries, such as Slovenia or Spain, they are not *res judicata* or directly enforceable. In Slovenia, rulings dismissing a case on formal grounds have no *res judicata* effects.²³¹ In Norway, this depends on the content of the ruling. If the deficiency can be rectified, the *res judicata* effects do not apply. This would be the case if the court found the action was filed too early, ie, before the time limit of the obligation at stake had lapsed, the claimant is allowed to file the case once the time limit has passed and the defendant has not fulfilled the obligations. In the US, the court has the power to dismiss a claim with prejudice, which bars the claimant from resubmitting the claim.

12.4 Default Judgments and Other Rulings Based on Non-Compliance or Non-Appearence

326 Sometimes parties fail to meet time limits set by statutory law or the court, such as filing a statement of defence or written submissions or entering an appearance at a court hearing.

²²⁷ Spain LEC Art 414, 416–425.

²²⁸ § 9-6 (3) DA.

²²⁹ Ibid.

²³⁰ Cf also *Gothaer Allgemeine Versicherung AG and Others v Samskip GmbH*, Case C-3456/12 (CJEU), Judgment 15 November 2012 [ECLI:EU:C:2012:719].

²³¹ Slovenia, Art 319 Civil Procedure Act; Spain, as to the lack of *res judicata* effects cf eg, A de la Oliva Santos, *Curso de Derecho Procesal Civil II. Parte Especial* (3rd ed, Editorial Universitaria Ramón Areces 2016) 330 and 334–335.

- 327 In some jurisdictions, the sanction for non-compliance or non-appearance is that the court will find against the non-compliant party unless the claims are unjustified. In Norwegian law, in addition to time limits that are always sanctioned as non-appearance (notably, paying the court fee, filing the statement of defence, and presence at hearings), courts have the discretion to use this sanction for other time limits when the procedural act is of material importance for the opposite party or conducting litigation in an expeditious manner.²³²
- 328 In Germany and Slovenia, the absent party is considered to have admitted to the facts of the case;²³³ thus, the court must still examine whether these facts, if true, would disclose a legally recognisable claim against the defendant (German: *die Schlüssigkeitprüfung*). In other jurisdictions, including Norway, the court engages in a broader *prima facie* examination of whether the claim is well founded. However, while the examination includes the fact and the law, it is only a *prima facie* evaluation, whereas the German *Schlüssigkeitprüfung* entails a full legal evaluation, with the facts claimed being considered true or proven.
- 329 In contrast, in Belgium, a party who fails to appear at a hearing other than the initial hearing but has submitted written submissions is not in default (Art 804 Belgian Judicial Code). This underscores the written nature of Belgian civil procedure. In the Netherlands, the principle is that 'once appeared, remains appeared'. Thus, it is not possible to obtain a default judgment against a party who initially entered an appearance but failed to appear later on. The court must check whether the claim is not contrary to public order or any other rule a court can apply *ex officio*.²³⁴ Moreover, the Supreme Court has held that awarding a manifestly unfounded claim contradicts public order.²³⁵ Further, a judge must check compliance with the rules implementing the EU Directive on Unfair Contract Terms.²³⁶ In practice, it is unclear whether such checks occur systematically since the number of cases in which the defendant defaults are very high due to the lack of a payment order procedure. The requirement to control whether the claim complies with the Unfair Contract Terms Directive applies in all EU Member States and EEA/EFTA States.
- 330 In Japan, if both parties fail to appear or leave the court without presenting oral arguments, and the court finds it appropriate, the court may render a final judgment. If

²³² § 16-9 DA.

²³³ Art 331 GCCP and Slovenia Civil Procedure Act Art 318.

²³⁴ Art 806 Belgian Judicial Code.

²³⁵ Cass 23 December 2016, Rechtskundig Weekblad 2016-17, 1090.

²³⁶ *Karel de Grote – Hogeschool Katholieke Hogeschool Antwerpen VZW v Susan Romy Jozef Kuijpers*, Case C-147/16 (CJEU), Judgment 17 May 2018 [ECLI:EU:C:2018:320].

only one party is absent, the court makes a ruling at the request of the party present at the hearing.²³⁷

- 331 In contrast, in Spanish law, failure to file the statement of defence is not sanctioned with a default judgment which ends the court proceedings. Instead, the proceedings will continue without the presence of the defendant. The claimant will still have to prove their claim, and the defendant may join the proceedings at any time - although, as a general rule, the defendant will not be entitled to introduce defences or written evidence nor to do anything that they were meant to have done at an earlier stage. Thus, in Spain, a 'default judgment' is never an *early* judgment but a judgment given after the whole proceedings have unfolded with the only participation of the claimant.²³⁸
- 332 Involuntary dismissal in US law is similar to default judgments. When the claimant fails to comply with the rules of civil procedure or court order, the defendant may move to dismiss the action. Involuntary dismissal operates as an adjudication on the merits.
- 333 German courts may issue default judgments against the claimant and the defendant.²³⁹ In Norwegian law, default judgments are the sanction for defendants only: the court will dismiss the claim if the claimant is absent.²⁴⁰ This is also the case in the Netherlands.²⁴¹
- 334 Default judgments can be challenged more easily than other types of judgments in many countries. In German law, the recourse against a default judgment is reinstatement. The party against whom the default judgment was issued files an application for reinstatement without giving reasons for the absence, and the court grants reinstatement whereby the proceedings may continue.²⁴² In Norway, the application for reinstatement must be filed within a month, and reinstatement is contingent upon lawful absence (eg, serious illness or other reason why attendance at the hearing or compliance with the time limit would have been unreasonably burdensome). The court may also grant reinstatement if rejecting the application for reinstatement would be unreasonable.²⁴³ The same applies in Slovenia.²⁴⁴ Belgium is an exception: default judgments are challenged through ordinary appeals procedure unless no ordinary appeal is available, not including cassation.²⁴⁵

²³⁷ Act Art 244 Code of Civil Procedure (Japan) (JCCP).

²³⁸ LEC Arts 496(2) and 499.

²³⁹ Art 330 and 331 GCCP.

²⁴⁰ §§ 16-9 and 16-10 DA.

²⁴¹ Cf Art 123(2) Dutch Code of Civil Procedure.

²⁴² Art 338, 341, 342 GCCP.

²⁴³ §§ 16-12 and 16-13 DA.

²⁴⁴ Slovenia, Civil Procedure Act (CPA), Art 116.

²⁴⁵ Belgian Judicial Code Art 1047, first para, 1048 first para, 1050 first para and 1051, first para.

12.5 Withdrawal and Other Ways to Voluntarily End Litigation

- 335 According to the basic principles of civil litigation, only a party to a dispute has the power to initiate litigation, and the parties to court proceedings determine the scope of the court proceedings by selecting which claims and defences they invoke, the relief sought, and which allegations they present in support of their claims and defences.²⁴⁶ As a corollary, the parties shall be allowed to end litigation before the final ruling. Parties may wish to end litigation early when they realise that the other party is likely to prevail or that the risks, costs and delay of litigation are disproportionate.
- 336 Parties can end litigation in two ways. First, if the claimant relinquishes a claim or the defendant admits it, the court will normally rule accordingly. In Spain, *allanamiento* (admittance) by the defendant and *renuncia* (relinquishment) by the claimant certainly lead to a judgment on the merits that will become *res judicata*. Courts in Slovenia may decide the case based on the admittance by the defendant or relinquishment on the part of the claimant; the court will then rule on the merits, finding for the opposite party.²⁴⁷
- 337 In countries having default judgments, the parties may opt to remain passive, in lieu of admitting or relinquishing the claim, because non-appearance also results in a ruling that ends the litigation.
- 338 The second way is withdrawal. Withdrawal differs from admitting and relinquishing a claim in that it does not signify that the party admits the claim's existence or non-existence; it only implies that the party wishes to discontinue the litigation. Withdrawal could be a result of a settlement. It does not preclude the parties from bringing an action regarding the same claim later.
- 339 At the early stages of the proceedings, the claimant can withdraw the action unilaterally without being precluded from bringing a new action concerning the same dispute later. At some stage of the proceedings, when defendants have vested resources in the litigation or filed a counterclaim or claimed setoff, they have gained a strong interest in the court ruling on the merits. Therefore, withdrawal is contingent upon mutual consent or the court's discretion in many countries. In Belgium, the limit for unilateral withdrawal applies until the defendant files submissions.²⁴⁸ In Norway and Spain, the claimant can withdraw the case until the statement of claim is served on the defendant.²⁴⁹ In the US, a claimant may dismiss an action without a court order by filing a notice of dismissal before the opposing party files either an answer or motion for summary judgment or a

²⁴⁶ See Chapter 4 subdivision 3.

²⁴⁷ Slovenia CPA Art 316, 317

²⁴⁸ Belgian Judicial Code Art 825 Belgian Judicial Code.

²⁴⁹ § 18-4 DA, Spain LEC Art 20(2).

stipulation of dismissal signed by all the parties appearing in the case.²⁵⁰ The unilateral right to withdrawal is in place in Germany until the first hearing.²⁵¹

- 340 In Belgium and Spain, withdrawal is contingent on the consent of the court: The court will decide whether the claimant is allowed to withdraw the claim even if the defendant does not consent.²⁵²
- 341 In Norway, the defendant is entitled to a ruling on the merits once, and thus, if the defendant does not consent to withdrawal, the claimant is considered to have abandoned the claim.²⁵³ In the US, the claimant may request that the court order dismissal. When the defendant has pleaded a counterclaim to the claimant's claims before being served with the claimant's motion to dismiss the case, the court may dismiss the action over the defendant's objection only if the counterclaim can remain pending for independent adjudication.²⁵⁴ In Spain, *desistimiento* (withdrawal), whether it is unilateral or consented by the defendant, always leads to an order bringing the proceedings to an end but allowing the claimant to refile their claim.²⁵⁵
- 342 An admittance, relinquishment or withdrawal can be partial. In this case, the court proceedings will be continued for the rest of the claims.

12.6 Settlement

- 343 As explained, basic principles of civil litigation establish that only the parties decide whether to initiate court proceedings, which claims are included in the proceedings and the scope of the proceedings. Consequently, parties should not only be allowed to withdraw the action but also to end it or any claims through settlement. As noted above, sometimes the parties settle their case but, instead of disclosing the settlement to the court, they bring the proceedings to an end by way of withdrawal, admittance or relinquishment. In this way, they keep the terms of the settlement confidential.
- 344 In countries such as Spain, settlements that are submitted to the court for approval must be entered into court records and thus become public. This is, for many litigants, an incentive to withdraw the case rather than to settle formally. Even when the parties can choose between a regular settlement (ie, one that is binding as a contract and not directly enforceable) and a court settlement that is recorded and enforceable, some parties prefer withdrawal because the court will not be involved in the settlement. While

²⁵⁰ USFRCP 41(1)(A).

²⁵¹ § 269 GCCP.

²⁵² Belgian Judicial Code Art 825 Belgian Judicial Code, and LEC Art 20(3).

²⁵³ § 18-4 DA.

²⁵⁴ USFRCP 41(a)(2).

²⁵⁵ Spain Art 19(1) 20(1) and 21 LEC and Art 6(2) CC.

Norwegian litigants have the option of not recording their settlement, court statistics show that almost all litigants opt for a court settlement.

345 Settlement is discussed in more detail below.

12.7 Early Ruling on the Merits

346 In some countries, courts have the power to issue a ruling on the merits before the final stage if a claim or defence manifestly lacks a reasonable prospect of success. In some countries, they have the power to make an early ruling if the pleadings are insufficient or if the case can be resolved based on limited evidence. There is significant variation in the extent to which courts have the power to dispose of claims and actions early.

347 Early ruling on the merits is available for all cases in the US and Norway. In the US, a defendant may move to dismiss a claimant's pleading (the complaint) for failure to state a claim upon which relief can be granted ('dismissal for insufficient pleadings').²⁵⁶ First, if the court grants the motion 'with prejudice', that ends the case, and the claimant may not replead their complaint. If the court grants the motion 'without prejudice', the pleader may re-plead their complaint. Sometimes if a judge grants the motion to dismiss for failure to state a claim, the judge may offer suggestions to the claimant concerning the deficiencies in the pleadings and how to cure those defects upon re-pleading the case. Second, either party may ask the court to dismiss the litigation after all the pleadings have been filed with the court ('dismissal for judgment on the pleadings').²⁵⁷ The court will grant the motion if the pleadings taken together satisfy the elements of the claim and there would be no purpose for a trial. On the contrary, if the pleadings present a viable defence to the claimant's claims, the court will grant the motion in the defendant's favour. Motions for judgment on the pleadings occur before formal discovery has occurred. Third, after discovery but before trial, either party may request that the court grant *summary judgment* on any claim or defence.²⁵⁸ The parties moving for summary judgment will submit to the court materials obtained through the discovery process. The court will grant the summary judgment if the movant shows no genuine dispute about a material fact. The movant is entitled to a judgment as a matter of law regarding the entire case or partial summary judgment as to specific claims or defences in the litigation. If the court grants the summary judgment motion, this constitutes a final judgment, the litigation ends, and there is no trial.²⁵⁹

348 In Norway, courts have the power to rule on the merits in a simplified process at the request of a party if a claim or an issue manifestly lacks a reasonable prospect of success. The court can either rule based on written submissions or when it is necessary to grant

²⁵⁶ USFRCP 12(b)(6).

²⁵⁷ USFRCP 12(c).

²⁵⁸ USFRCP 56.

²⁵⁹ USFRCP 56(c).

the right to a fair trial, or at the request of a party, after a brief hearing during the preparatory stage.²⁶⁰ The decision to rule on the merits in simplified proceedings is not subject to appeal. However, parties can challenge the procedural decision as part of the ruling on the merits.

- 349 In Spanish law, a lack of prospect of success is not a ground for early dismissal. However, an early judgment on the merits may still occur in two situations. First, when there are no disputed facts, the parties agree on the facts of the case and disagree on the legal consequences of those facts.²⁶¹ Second, when no oral evidence needs to be taken, and no audio/video recordings of oral evidence need to be heard at the court hearing, ie, when all the evidence consists of written evidence only, ie, documents, written expert reports, or both.²⁶²
- 350 In Germany, there are no such proceedings. However, if the evidence is exclusively in writing, the claimant can select *Urkundenprozess* (the documentary procedure) for simplified proceedings.²⁶³ If the defendant contests the proceedings, the case will be held in regular proceedings. In Slovenia, no mechanism for early dismissal of clearly unmeritorious claims and defences exists, which is considered a serious shortcoming of the procedural model in force. In Belgium, no early dismissal procedure exists. However, if the parties agree to the 'short debate' procedure, courts may easily dispose of cases without going through the ordinary course of proceedings.²⁶⁴

12.8 Dealing with Frivolous Litigation – Abuse of Court Proceedings

- 351 Some people abuse court proceedings by filing frivolous cases due to serious mental health issues, which do not amount to the person lacking legal capacity; others do so willingly to distract or pressure the opposite party.²⁶⁵ To combat abusive or frivolous litigation, courts have been given powers to reject actions, motions and petitions manifestly vexatious, abusive or fraudulent.²⁶⁶ This rule in Norway is limited to the same claimant repeatedly bringing frivolous claims.²⁶⁷
- 352 The US Federal Rules embrace several different sanctioning provisions and mechanisms. There are separate sanctioning rules for pleading violations and separate, detailed rules for abusive discovery practices. Parties also may be sanctioned under a general federal

²⁶⁰ § 9-8 DA.

²⁶¹ Spain Art 428(3) LEC.

²⁶² Spain Art 429(8) LEC.

²⁶³ § 592 ff GCCP.

²⁶⁴ Art 735 Belgian Judicial Code.

²⁶⁵ Proposal for a Directive of the European Parliament and of the Council on protecting persons who engage in public participation from manifestly unfounded or abusive court proceedings ('Strategic lawsuits against public participation') COM/2022/177 final.

²⁶⁶ Art 256 GCCP, Spain Art 11(1) and (2) LOPJ and Art 247 (1) and (2) LEC.

²⁶⁷ § 2-2 (5) DA.

statutory provision for vexatiously and needlessly multiplying proceedings. Sanctions may include fines, fees assessed to pay the other party's costs, and causing an allegation to be deemed admitted. In addition to rule and statutory sanctions, judges have inherent powers to discipline attorneys appearing before the court, including contempt sanctions as well as incarceration for non-compliance. Finally, attorneys may be sanctioned by their state bar licensure entity: letters of reprimand, censure, suspension, or disbarment.

- 353 However, rejecting abusive, frivolous, and fraudulent claims is exceptional in many systems. In Belgium, frivolous litigation can still be penalized in the following ways: cost orders, fines, damages, and limitation of interests claimed.

12.9 Comparative Observations

- 354 While these six forms of early resolution can be found in most countries studied, and all countries have at least some mechanisms for early resolution, there are also clear differences. In some countries, including Belgium, Slovenia and, to some extent, Spain, once court proceedings have been put in motion, the machinery of litigation strives to produce a ruling on the merits, and litigants have limited opportunity to stop the process. It is as if the conveyor belt runs until the process is finished. In the US, the parties are the masters of the proceedings, and early dismissal is contingent mainly on litigants making motions to dismiss the case or other forms of early resolution. Countries such as Germany and Norway operate with multiple exit routes from the process during the proceedings, some of which litigants may use based on a unilateral decision to terminate litigation, while others require the consent of the litigants.

13 CASE MANAGEMENT

Aleš Galič with the support of Anna Nylund and Janek Nowak

13.1 Case Management and the Preparatory Proceedings

- 355 A strong interdependence link exists between case management and a structure of civil proceedings consisting of a final hearing and a preparatory stage leading up to the final hearing(s). More precisely, there is a strong linkage between case management and the apex hearing structure, in which the 'mid stage' of proceedings consists of a 'preparatory stage' and the apex hearing (see Chapter 2, subdivision 4.2). A key element to ensure a successful preparatory stage of proceedings is active judicial case management – both procedural and substantive. The preparatory stage of proceedings requires an active judge involved in case management and clarification of the case and, by extension, in developing the case.

- 356 Thus, the idea of active case management fits well into civil procedure structures with an apex hearing, especially the *main hearing model* of civil procedure.²⁶⁸ The main hearing model namely distinguishes between preparatory proceedings ('pre-trial') and the main hearing (apex hearing, 'trial'). Judicial case management (in cooperation with the parties²⁶⁹) is the most important tool of the preparatory proceedings, whereas well-prepared preparatory proceedings are the precondition for a successful and concentrated (focused) main hearing.²⁷⁰ In this manner, the best overall achievement of the goals of civil procedure can be achieved: rendering justice on the merits in each individual case, however, within a reasonable time and with a proportionate use of judicial resources.
- 357 Worldwide trends and policies in developing civil procedure law support adopting the apex hearing model.²⁷¹ The central part of civil proceedings is the apex, or main hearing, which is based on the principles of immediacy, orality and concentration.²⁷² However, a prerequisite for achieving this goal is a well-prepared preparatory stage of civil proceedings (following the initial stage), enabling case management, clarification of issues and concentration of the case on the disputed questions. The role of the preparatory proceedings is to ensure early disposal of cases, timely hearings, and a single concentrated apex hearing where the parties present their claims, arguments and evidence directly to the court deciding the case.
- 358 Undoubtedly, the distinction between the preparatory stage and the main hearing can clearly be maintained. This, however, is not the case for the *distinction between the initial phase* (the first phase of the procedure) and the preparatory stage. Unless one operates with a similar approach as in this study, namely one in which merely the initial acts of the parties (the claim and the defence plea (the reply to the claim) falls within the initial phase, the boundary between the initial stage and the 'mid stage', more precisely, the preparatory part of it, will be blurred. The reason is that some of the most important decisions concerning both procedural as well as substantive case management refer to a decision on how many further rounds of submissions (if any at all) after the filing of the claim and the defence plea will be admitted and what the time-limits for them will be (and whether they are limited in scope and admissible contents).

²⁶⁸ See Chapter 2, subdivision 4.2.

²⁶⁹ About principle of cooperation cf eg, L Cadiet, *Droit judiciaire prive* (3rd edn, Litec 2000), para 1100.t

²⁷⁰ Cf H Woolf, *Access to Justice. Final Report, to the Lord Chancellor on the Civil Justice System in England and Wales* (Lord Chancellors Dept 1996), 2; G Díez-Picazo, 'Procedural Reform in Spain' in Trocker N and Varano V (ed), *The Reforms of Civil Procedure in Comparative Perspective* (Giappichelli editore 2005), 32-66, 43. For Finland and Sweden L Ervo, 'Swedish-Finnish Preparatory Proceedings: Filtering and Process Techniques' in L Ervo and A Nylund (ed), *Current Trends in Preparatory Proceedings: A Comparative Study of Nordic and Former Communist Countries* (Springer 2016), 21, 25.

²⁷¹ Cf the comparative analysis in A Nylund, 'The Structure of Civil Proceedings – Convergence Through the Main Hearing Model' *Civil Procedure Review* (2018) 2(9) 13, 18-33.

²⁷² For this terminology, see Chapter 1 subdivisions 2 and 4.2.

359 It is difficult to maintain *the traditional divide* between two types of case management – *procedural* case management on the one hand and *substantive* case management on the other. The former is supposed to comprise organizational measures and scheduling (for example, determining the time-table for submissions and hearings, deciding on bifurcation or consolidation of cases, determining formal aspects for submissions of parties' briefs and documentary evidence, ordering payment of advances of costs, checking procedural prerequisites for admissibility of claims and defences and so forth). The latter is designed to assist the parties in the responsible pursuit of their cases, in particular with the judge's responsibility to seek clarification of legal and factual issues,²⁷³ to establish a proper dialogue between the judge and the parties, and, at least in some jurisdictions, such Austria, Germany and Slovenia, to provide feedback, hints and observations.²⁷⁴ Yet, the judge can only effectively and adequately implement measures of procedural case management, such as setting the time limits for submissions and dates of hearings as well as determining the number of rounds of exchanges of parties' briefs, if they know the file and the main characteristics of the individual case sufficiently well and if measures of substantive case management (such as seeking clarification of parties' positions and determination of which facts are in dispute and are material for the determination of the case) have been duly implemented. Numerous case management tools, in fact, have both organizational and substantive purposes.²⁷⁵

13.2 Case Management, Flexibility of Procedure and Judicial Discretion

360 There exists an *inherent link* between promoting judicial case management on the one hand and the preference for a flexible procedural regime, which leaves much space for judicial discretion on the other. Judicial discretion is essential to the idea of case management. The goal of civil procedure (ensuring justice on the merits, however, in a reasonable time at a reasonable and proportionate cost) cannot be pursued through the same model of procedure rigidly conceived as applicable in every case.²⁷⁶

²⁷³ Eg, Norway DA Section 11-5.

²⁷⁴ Eg, Slovenia Art 285 CPA, Germany § 139 GCCP, Austria § 180(3) Civil Code of Procedure (Austria) (ATCCP). In contrast, Scandinavian judges consider direct hints and suggestions unlawful as this would compromise the impartiality of the judge. Feedback must thus be far less direct. Judges give feedback by asking an open question, or the tone of voice or subtle body language of the judge could be a vehicle for communicating that a certain line of argumentation surprises the judge or needs to be elaborated, while they would still avoid communicating their views regarding the outcome of the case.

²⁷⁵ The concept of 'case management' is rarely used in numerous civil law jurisdictions. Rather, the term of *Prozessleitung* ('steering proceedings') is used, whereby *Materielle Prozessleitung* ('substantive steering of proceedings') would roughly correspond to substantive case management, whereas *formelle Prozessleitung* ('formal steering of proceedings') could be compared to procedural case management. Cf A Perez Ragone, 'An Approach and General Overview to Framing the Structure of the Court System and Case Management - General Report' (2017) International Association of Procedural Law Meeting, 4.

²⁷⁶ Eg, V Trocker and V Varano, 'Concluding Remarks' in V Trocker and V Varano (ed), *The Reforms of Civil Procedure in Comparative Perspective* (Giappichelli editore 2005), 247.

- 361 The aforementioned goal of civil procedure rather needs flexibility and different models of procedure to be adopted depending on the peculiarities of each case. The proceedings should preferably be tailored to each case to achieve a proportionate use of resources. Procedural rules must therefore be flexible, and the judge should have ample discretion to adjust the unfolding of the case to its individual characteristics.
- 362 Rigid ('one-size-fits-all') procedural rules are not preferred. Cases can differ greatly – some are easily resolved, some involve complex questions of law, some involve complicated questions of facts and a time-consuming process of taking evidence, and highly qualified attorneys participate in some (sometimes in a mutually cooperative manner, sometimes in a rather hostile atmosphere), while in others lay parties represent themselves (unless there exists mandatory representation by lawyers).
- 363 Therefore, a *flexible* system (in which it is left to the judge to decide, for example, whether to request that further information be provided in written briefs and, if so, within what time limit) is more appropriate than a rigid system of time limits imposed by law. It is also plausible that a judge can decide, in accordance with the particularities of the given case, whether a written preparatory procedure (requiring parties to file further written briefs) or a case management (preparatory) hearing during which the judge can discuss the case with the parties, is the best way to proceed.²⁷⁷
- 364 The above corresponds to the idea of *differential case management* (the practice of assigning cases to *different tracks*²⁷⁸, each with its own particularised process based on the complexity of the case and other variables).

13.3 Substantive Case Management

- 365 Substantive case management refers to a process in which the parties and the judge, ideally in cooperation, are able to pinpoint the legal and factual issues that are 'still matters of serious dispute', as ELI/UNIDROIT Rule 64(3) puts it. This entails separating disputed from undisputed issues and distinguishing between core, peripheral and irrelevant legal and factual arguments and circumstances. Thus, the case should be concentrated - condensed - to the central disputed issues. Additionally, the evidence

²⁷⁷ Eg, Germany § 275 GCCP, Norway DA Section 9-4, and 276 CCP, Slovenia, Art 286a CPA. For Sweden cf L Ervo, 'Swedish-Finnish Preparatory Proceedings: Filtering and Process Techniques' in L Ervo and A Nylund (ed), *Current Trends in Preparatory Proceedings: A Comparative Study of Nordic and Former Communist Countries* (Springer 2016), 30.

²⁷⁸ Eg, France, Art 759 Code of Civil Procedure (FCCP) 'conference du president', England Rule 26(5) UKCPR, Track allocation.

should also be concentrated and include only what is necessary to prove disputed factual circumstances.²⁷⁹

- 366 While the parties should preferably have identified the matters in dispute prior to filing the case (ie, during the pre-action stage) and no later during the initiation stage (ie, in the statement of claim and defence) this is often not the case. One reason is incomplete or unclear communication or misunderstandings, such as when a party addresses the assertions of the opposite party only partially. Legal or factual complexity could also result in unclear pleadings. Strict rules on preclusion could force the parties to front-load the case, thus making completeness rather than clarity and stringency of the pleadings their primary concern.
- 367 Redundant or irrelevant arguments and facts could render the case more complex and weaken the stringency and alignment of legal and factual arguments and evidence. Moreover, as the parties gain access to evidence and a more profound understanding of the arguments and evidence of the opposite party during written and oral preparation of the case, they should have the opportunity to adjust, recalibrate and reiterate the framing of the case. The court should be a catalyst by raising questions, identifying ambiguities, and, in complex cases, assisting the parties in organising the information.²⁸⁰
- 368 Substantive case management is important for many procedural goals. Understanding what is at stake and what the disputed issues are, facilitates proportionality and expedience. The parties can assess the costs and risks of litigation more accurately, which could create incentives for early resolution. The parties could also make more informed decisions regarding whether and on what terms to settle the dispute. Similarly, substantive case management puts the court in a better position to exercise procedural case management and assess whether and how to facilitate settlement. Moreover,

²⁷⁹ These goals are clearly identified in the Swedish Code of Judicial Proceedings 42 Chapter 6 § ss. 2, which identifies five goals for the preparatory stage: (1) to clarify the parties' claims and defences and the grounds these are based on, (2) to identify the extent to which the parties disagree on the circumstances invoked, (3) the evidence the parties intend to present and what disputed facts each piece of evidence is intended to prove, (4) the need to induce additional information and other necessary measures to render the case ripe for the ruling, and (5) the prospects of settlement or other forms of consensual resolution.

²⁸⁰ Eg, N Andrews, 'Case Management and Procedural Discipline in England & Wales: Fundamentals of an Essential New Technique' in C H van Rhee and Y Fu (ed), *Civil Litigation in China and Europe Essays on the Role of the Judge and the Parties* (Springer 2014), 338; S S Gensler, 'Judicial Case Management: Caught in the Crossfire' (2010) *Duke Law Journal* 669, 692; R Greger, '§ 139' in C Althammer, *Zöller Zivilprozessordnung* (34th ed, Otto Schmidt 2022), 599-604; A Nylund, 'Oral Proceedings during the Preparatory Stage' (2022) *12 International Journal of Procedural Law* 57, 57-74; T Sourdin, 'Facilitative Judging: Science, Sense and Sensibility' in T Sourdin and A Zariski, *The Multi-tasking Judge. Comparative Judicial Dispute Resolution*, (Thomson Reuters 2013), 238-243; R van Rhee, 'Judicial Case Management and Loyal Cooperation: Towards Harmonized Rules of European Civil Procedure' in R Aarli and A Sanders (ed), *Courts in Evolving Societies: A Sino-European Dialogue between Judges and Academics*, (Brill Nijhoff 2021), 183; A Wallermann Ghavanini, 'Procedural Autonomy in Sweden: Is Materielle Prozessleitung the Answer?' in B Krans and A Nylund (ed), *Procedural Autonomy Across Europe* (Intersentia 2020), 208-209.

substantive case management, in the context of legal issues, is an important tool for preventing undue surprise and for safeguarding effective parties' right to be heard – for example when both Parties argue the case from a certain legal perspective, the judge however intends to rely on a different legal basis (which, insofar the rule *iura novit curia* / the court knows the law is also the decisive one). Hence, the judge may need to warn parties in advance about the possibility to rely on a rule of law, which parties did not invoke and in such case enable the parties to reflect on it.²⁸¹

369 In some jurisdictions, such as in the Nordic countries, the court or the parties synthesise the main arguments and disputed issues in advance of the main hearing. In Sweden, this is usually done both before the preparatory hearing. The document is adjusted after the hearing, and later, when necessary.²⁸²

370 The methods which the judges may use in the process vary. For instance, in Germany, judges are expected to give hints and advice to the parties regarding the likely litigated outcome and how the judge views the case;²⁸³ in the Nordic countries, this kind of 'intensive' substantive case management is considered inappropriate because the judge will no longer be perceived as impartial.²⁸⁴ The extent and manner in which judges can exercise substantive case management also depends on how proceedings are structured, including the scope of initial pleadings, and the timing, scope and duration of preparatory (case management) hearings, rules regarding the identification, disclosure and submission of evidence and so forth.

13.4 Case Management and the Judge's Power to Disregard Facts and Evidence Submitted Late (So-Called 'Preclusions')

371 The role of 'preclusion' (here in the sense of debarring/disallowing of new claims, arguments and evidence, submitted late/'cut-off' dates for new submissions/arguments²⁸⁵) is central both to effective case management as well as to any meaningful distinction between the preparatory stage and the main hearing. There cannot be a well-prepared, focused, and concentrated main hearing without a precise time limit when the parties may bring forward new facts and evidence. A clear time limit, within which the claims, and the factual basis (knowing what is both relevant and contested) for the case

²⁸¹ Germany, Art 139(2) GCCP; Austria, Art 182a ATCCP; France, Art 16 FCCP, for England: Lord Diplock in *Hadmor Productions Ltd. v Hamilton* [1983] 1 AC 191; for Slovenia: Constitutional Court, Judgment Up-603/13, 16 February 2016; for the Netherlands: R Verkerk, 'Powers of the Judge: The Netherlands' in R van Rhee, *European Traditions in Civil Procedure* (Intersentia 2005), 281 (289); R van Rhee, 'European traditions in civil procedure', 1999 *Nederlandse Jurisprudentie* 269.

²⁸² Swedish Code of Judicial Procedure, 42 Chapter 16 §.

²⁸³ § 139 GCCP. Eg, R Greger, 'Art 139' in *Zöller Zivilprozessordnung* (34th edn, Otto Schmidt 2022); the same in Slovenia, Art 285 CPA. Up-998/15, Ur. l. 5/2018.

²⁸⁴ A Nylund, 'Case Management in a Comparative Perspective: Regulation, principles and practice' (2019) 292 *Revista do processo – RePro* 377, 377-398.

²⁸⁵ Eg, Slovenia, Art 286 CPA, Austria, §§ 179, 180 ATCCP, Germany, § 296 GCCP.

should be ‘fixed’ before the main hearing, is essential. The parties and the court will know which pieces of evidence will be presented and which persons will be heard during the main hearing. To allow for clarification and identification of central issues, the limit should be set at the end of the preparatory stage.²⁸⁶

372 To avoid excessive ‘frontloading’ and comply with the parties’ *right to be heard*, the rules on debarring new arguments, facts and evidence should not be too harsh. The Parties should have a reasonable opportunity to present their cases, including the opportunity to adapt their pleadings and arguments to the development of the case during the preliminary stage of proceedings.²⁸⁷ Judicial responsibility to seek clarification and, in some jurisdictions, to offer feedback (as a part of substantive case management) namely goes hand in hand with the requirement that the parties should have a right to reflect on these activities adequately and, if necessary, supplement their factual assertions and adducing of evidence. Too strict limitations without adequate exceptions could thrust the parties to frontload the case and to an excessive preparatory stage and thus inefficiency, which is the case in Finland.²⁸⁸

373 The question of the *proportionality* between state resources offered for the resolution of a single dispute and the social and economic importance of this dispute (‘proportionality between the case and the procedure’) is clearly emphasised in the context of this procedural instrument.²⁸⁹

374 The role of the judge in setting binding time limits (and applying sanctions, including debarring facts and evidence submitted late if these are not complied with) as a part of case management tools does not mean that there cannot be any regulation in this regard already in civil procedure law. The law should provide a general outline and framework of binding time limits that define the moment in the proceedings up until the parties are free to bring forward new facts and evidence. However, there should ideally be enough place for judicial discretion and the possibility for the judge to tailor the procedure, including the discussed issue, to the characteristics of each individual case. For example, if the judge believes that the parties should reflect, adapt, or supplement certain points,

²⁸⁶ Switzerland, Art 229 CCP. Norway DA section 9-16.

²⁸⁷ Eg, Slovenia, Art 286 CPA, Austria, §§ 179, 180 ATCCP, Germany, § 296 GCCP. Finland, Chapter 6 Section 9 CJP.

²⁸⁸ A Nylund, ‘The Structure of Civil Proceedings – Convergence Through the Main Hearing Model’ Civil Procedure Review (2018) 2(9) 13.

²⁸⁹ See Chapter 2.

it should be enabled to order them to do so – including setting the binding time limits for that purpose.²⁹⁰

375 This being said, there is, as experience shows in some states, one major drawback if the legislature opts for a too broadly framed regime of ‘preclusions’ or if it leaves too much space for relief from sanctions. For example, if instead of a firm cut-off date for bringing forward new facts and evidence, the law adopts general clauses such as that the parties ‘must present facts and evidence in such timely manner that corresponds to a diligent preparation of the case’ or if a very lenient concept of ‘fault’ or ‘proper excuse’ is applied (whereby allowing the party always to submit new arguments which it failed to submit before ‘without considerable fault’ on her side etc, there exists a real danger that the first instance *judges will be too reluctant to use sanctions* of debarring new facts and evidence, fearing that their judgment will fall on appeal for a gross procedural violation of the right to be heard.²⁹¹ This is especially so where the mentality still prevails that applying any sanction of ‘preclusion’ is not in line with the goal of doing justice on the merits and if appellate courts do not genuinely embrace the idea that the primary purpose of sanctions, as explained above, is to ensure a diligent and substantive preparation of the case. In addition, if rules relating to ‘preclusions’ are too ambiguous and broadly framed, that could give rise to a substantial amount of *satellite litigation* on the discussed procedural issue.²⁹² For the above reasons, the question is put, whether it is not better to set already in the law a system of a relatively firm legislatively predetermined firm cut-off moment (at the end of the preparatory stage of proceedings) for the presentation of new facts and evidence.²⁹³

376 The time limits for bringing forward new arguments serve a purpose of a *thorough and diligent preparation* of the case, which can only be beneficial from the perspective of rendering just results on the merits.²⁹⁴ They can also contribute to the clarification or partial resolution of the case. The same goes for another purpose of this procedural instrument, namely *preventing ‘ambush tactics’* in the main hearing. The system of cut-off dates for bringing forward new arguments enables for a better exercise of the right to be heard and rights of defence in general, as it ensures that each party shall know the

²⁹⁰ Cf Sweden Chapter 42 Sec 22 CJP. The parties are generally free to submit new facts and evidence during the preparatory stage. But the judge may order the party, who has already breached some requirements, to submit what was required, within the set time limit, under the sanction that a later submission will be disregarded. In Finnish law, there is less discretion, and thus judges have attempted to circumvent the strict preclusion by holding several preparatory hearings, Finland, Chapter 5 Sec 22 CJP. Cf L Ervo, ‘Swedish-Finnish Preparatory Proceedings: Filtering and Process Techniques’ in L Ervo and A Nylund (ed), *Current Trends in Preparatory Proceedings: A Comparative Study of Nordic and Former Communist Countries* (Springer 2016), A Nylund, ‘The Structure of Civil Proceedings – Convergence Through the Main Hearing Model’ *Civil Procedure Review* (2018) 2(9) 13.

²⁹¹ Eg, Slovenia, Art 285 CPA.

²⁹² This is the case in Norway, DA Section 9-16, which allows for (excessive) discretion and limits the power of the judge to resort to preclusion.

²⁹³ Such is the case in Switzerland, Art 229 CCP.

²⁹⁴ Decision of the Slovenian Constitutional Court No. Up-2443/08 of 7 October 2009.

relevant arguments of its opponent at a reasonably early stage, thus enabling sufficient time to reflect and reply. Moreover, if the parties know ‘what is in the hands’ of their opponent early enough, this can serve as the most crucial *incentive to settle*.²⁹⁵

377 The introduction of the system of ‘preclusions’ (the judge’s power to disregard facts and evidence submitted late) *goes hand in hand with strengthened powers of case management*. This relates to procedural case management (such as setting the time limits for the parties’ submissions and/or determining the round of exchanges of parties’ briefs, where new facts and evidence may be brought forward, and, furthermore, to the judge’s powers to apply sanctions (and to relieve parties thereof) as a part of the case management tools. It, however, strongly relates also to substantive case management – as there is an inherent link between the judge’s powers and obligation to seek clarification and the parties’ right to be allowed to reflect and react to such requests duly.

13.5 The Court’s Role in Case Management

378 The court is primarily responsible for active and effective case management to ensure a timely disposition of the case and proportionate use of judicial resources. Thus, the court must monitor whether parties and their lawyers comply with their responsibilities and obligations throughout proceedings.²⁹⁶

379 The court should engage in case management *early* in proceedings. From the outset, judges should thoroughly familiarise themselves with their cases and identify the critical issues so that they may choose appropriate procedural measures and adapt them to the specific characteristics of each case. The court can shape the unfolding of the proceedings from the very beginning and order that the apex hearing, where the case is normally decided, be preceded by the setting of an early case management or preparatory hearing or by written preparatory procedure, which requires the parties to file and exchange written briefs for setting forth contentions, clarify issues, respond to arguments of the opposing party or hints from the court.²⁹⁷ Early case management should manifest the principle of early and ongoing judicial control of the preparatory procedure.

380 In certain cases, it may be difficult to determine the best procedure very early as the issues in dispute may not yet be ripe enough, and the parties’ positions may be insufficiently clear and elaborate. In such cases, early case management decisions could

²⁹⁵ Ibid.

²⁹⁶ Cf eg, Netherlands, Art 19-35 CCP. In the US, civil litigation is largely party-initiated, and party prosecuted. However, the presiding judge has ultimate authority over the parties appearing before the court, and the judge has inherent powers to control and sanction attorneys appearing before the court (*Chambers v NASCO, Inc.* (Supreme Court, United States), Judgment 6 June 1991 [501 US 32 (1991)], 43-44).

²⁹⁷ Eg, Slovenia, Art 286a CPA.

be limited in scope, and further case management hearings can be convened once the case has developed sufficiently.

- 381 As procedural and substantive case management often cannot be separated, it is reasonable that the main issues of case management are decided by the same judge, as will the *judge* who will be in charge of the preparatory (or case management) hearing and who will decide the case and write the judgment.
- 382 However, certain purely technical and organizational matters, as well as certain interlocutory procedural decisions, may be entrusted to judicial assistants – such as *clerks or registrars* (eg, ordering the payment of court fees and advances on costs as well as checking whether these have been duly paid, checking whether the relevant documents have been duly served etc).
- 383 In any case, to prevent overburdening of judges on the one hand but also to safeguard the right of the parties that their dispute is decided by an (impartial and independent) tribunal (which judicial assistants are not part of), it should be carefully considered what measures of case management fall within the core judicial work, which should be reserved to the judges and which can be entrusted to the lower ranking court staff alone or where the judges should count on adequate assistance of such staff (eg, in preparing drafts of interlocutory decisions, filling ‘check-lists’ and writing reports and summaries).²⁹⁸
- 384 A party who knows that any measure of case management or imposed sanction violates the law and yet proceeds with the case without stating his objection to such non-compliance without undue delay or, if a time-limit is provided therefor, within such period of time, shall be deemed to have waived the right to object.²⁹⁹

13.6 Cooperation between the Judge and the Parties

- 385 When managing the case (eg, determining the conduct and timetable of the court proceedings), the court should seek as much as possible to get the parties' agreement or at least seek the parties' opinion *before determining procedural issues*.³⁰⁰ In other words, the parties must be given the opportunity to be heard before deciding essential issues of case management. Exceptions may be made in cases of urgency and matters of minor importance. By involving the parties in forming the plans, the court can consider the views of the parties, who, after all, are the ones who know best their respective cases. In addition, it is probably inherent in any human activity that there is a greater

²⁹⁸ Cf Consultative Council of European Judges, Opinion No. 22 (2019) The Role of Judicial Assistants; <https://rm.coe.int/opinion-22-ccje-en/168098eeeb>.

²⁹⁹ Eg, Slovenia, Art 286b CPA, Norway DA Section 9-6 subsection 2.

³⁰⁰ Norway, DA Section 9-6 subsection 1 obliges the court to consult the parties also on procedural matters.

degree of a possibility that the adopted rules shall be adhered to; they were adopted in cooperation (or, ideally, agreement) with the persons concerned.³⁰¹ A rigid requirement that the court could only adopt measures of case management with the agreement of both parties (thus, effectively giving a 'veto power' to them) is not a preferred solution, as it opens too much space for delaying and derailing the procedure. The parties should be aware that their opinion matters; however, ultimately, it is in the powers of the judge to decide how the case shall unfold.

- 386 Tailoring the proceedings to the particular case also implies *cooperation* between the parties and the court.³⁰² Neither the parties alone, nor the judge alone, decides on the course and timing of the proceedings. The judge makes a decision, having discussed the matter with the parties. The judge can amend the plan for the preparatory proceedings, having discussed the issue with the parties. Although the judge should have a flexible and open approach, too much leniency towards the wishes of the parties has a pernicious influence on achieving efficient proceedings. The judge has the last word on the course of proceedings, and time limits must be enforced for the proceedings to be efficient.
- 387 The parties can be consulted at the case management (preparatory) hearings, they can be requested to submit (joint or separate) case management proposals ahead of the hearing, or the judge may circulate its own proposals for the parties' comments.
- 388 Different procedural tools can be used to ensure proper cooperation with the parties concerning case management. For example, the rules may provide that the court must adopt, after consulting the parties, a *procedural plan*³⁰³ or a '*contract of procedure*'³⁰⁴. This is, in the first place, a *procedural time-table* (or '*scheduling order*'³⁰⁵) (which, although revisable, sets the targets which establish a basic framework for the effective conduct of proceedings); it may, however, also encompass numerous other procedural (and even substantial – such as determination of issues in dispute or defining the preliminary legal basis relevant for the deciding the merits of the case) issues. Thus, before adopting the procedural timetable, the judge should discuss³⁰⁶ the factual and legal aspects of the case with the parties and determine, together with them, the procedural program to be followed. The cooperation between the parties and the judge

³⁰¹ Cf also: CEPEJ (2018) 20R EUROPEAN COMMISSION FOR THE EFFICIENCY OF JUSTICE (CEPEJ) REVISED SATURN GUIDELINES FOR JUDICIAL TIME MANAGEMENT (3rd revision) As adopted at the 31st plenary meeting of the CEPEJ Strasbourg, 3 and 4 December 2018.

³⁰² Cf France, interplay between Art 2 FCCP (parties' control of proceedings) and Art 3 FCCP (the judge's control of the right course of the proceedings).

³⁰³ Eg, Austria, § 258 ATCCP, Slovenia, Art 279č CPA, Serbia, Art 10/2 and Art 308/3 CPA.

³⁰⁴ As developed in France. F Ferrand, 'Procedural Reform in France' in V Trocker and V Varano (ed), *The Reforms of Civil Procedure in Comparative Perspective* (Giappichelli editore 2005), 21.

³⁰⁵ USA, Rule 16 USFRCP.

³⁰⁶ Slovenia, Art 258 CPA, Finland, Chapter 5 Section 18 CJP.

could be effected in an oral procedure (*preparatory*³⁰⁷, *preliminary*³⁰⁸, *pre-trial*³⁰⁹, *organizational*, *case management*,³¹⁰ *interlocutory*³¹¹, or *directions hearing* (or *conference*)³¹², and *status reports* or '*joint plans*') either *in-person* or with the use of *modern communication technologies*³¹³ or in a *purely written procedure*. The choice between these options should be left to the judicial discretion (after consultation with the parties).

- 389 A case management hearing to set a clear schedule of events can be one of the most effective tools to help settlements, avoid adjournments and 'may-rain' fashion of evidence taking, concentrate hearings, and (then) maintain timeframes. The decisions taken during the meeting may be formalised in a 'contract'.³¹⁴
- 390 Parties themselves should be, to a great extent, allowed to determine, in agreement, the schedule of the procedure ('contract of procedure', 'amicable calendar'³¹⁵) and *should be allowed to submit agreements regarding the timeline of the proceedings to the judge*. The judge should be *bound by such parties' agreement provided it complies with the goal of proportionate use of judicial resources*, and it does not jeopardise some fundamental *public interest*. For example, the parties should not be allowed to agree that the system of 'preclusions' (cut-off dates for bringing forward new facts and evidence) shall not apply in the case and that they will be allowed to bring forward new facts and evidence without any obstacles throughout the proceedings until the termination of the main hearing. In contrast, they should be allowed to agree on additional time limits to ensure early disclosure of key evidence and legal arguments. Similarly, the parties should be allowed to add or drop hearings when this would expedite the proceedings without limiting the parties' opportunity to present their case and other procedural rights. The rules of such time limits (see above) also serve a public purpose of expedient resolution of the case and proportionate use of judicial resources; however, this cannot be left solely to the parties' disposition.
- 391 The possibility of the parties to frame the procedure as they wish should always be considered against the background that it is the purpose of the procedure to deliver substantive justice but only by using no more than proportionate resources and within

³⁰⁷ Eg, Japan, Art 168 JCCP, Slovenia, Art 279c CPA, Austria, § 258 ATCCP.

³⁰⁸ Spain: *Audiencia previa*; Art 414-430 LEC.

³⁰⁹ USA, Rule 16 USFRCP.

³¹⁰ Norway DA Section 9-4.

³¹¹ Eg, Singapore, Order 34A, Rules 1-7 of the Rules of Court (RC).

³¹² Eg, Switzerland, Art 226 CCP (*Instruktionsverhandlung*), Australia, Northern Territory, Supreme Court Rules 48.04 ff.

³¹³ Japan, Art 176(3) JCCP, Finland Chapter 5, Sec 15d CJP.

³¹⁴ CEPEJ (2006)13 EUROPEAN COMMISSION FOR THE EFFICIENCY OF JUSTICE (CEPEJ) Compendium of 'best practices' on time management of judicial proceedings (<https://rm.coe.int/16807473ab>).

³¹⁵ For Belgium, cf Art 747(1) Judicial Code. If, however, the parties do not agree on a procedural calendar, the judge imposes one, including a trial date, Art 747(2) Judicial Code.

a reasonable time. The principle of proportionality should be envisaged as the overriding principle concerning the case-management and the overall unfolding of proceedings.³¹⁶

13.7 Sanctions for Parties' Failure to Comply with the Court's Measures of Case Management

392 The court must be regarded as having inherent powers required to preserve the integrity of its process. The parties have an obligation to act fairly and in good faith, and the court has the inherent jurisdiction to ensure that this obligation is complied with.

393 When imposing sanctions, the court should respect the parties' right to be heard and have due regard to the principle of proportionality. When applying the principle of proportionality, the court should consider not just the consequences for the parties to the case at hand but also a general effect on the functioning of the justice system, including the deterrent effect for future litigants.

394 Whenever reasonably possible, and with due regard to the principle of proportionality, the court should strive to allow parties to correct their procedural errors and shortcomings and provide adequate guidance for that purpose. In addition, before imposing any sanction which carries significant consequences for the party, the judge should, to the extent practicable, issue a warning that he is considering imposing a particular sanction and enable the party to comment. The judge should also provide reasons explaining why a sanction was appropriate.

395 Sanctions may include – among others - the following:

- b) Disregarding facts, evidence and arguments submitted after a cut-off deadline set by the judge or imposed by the law;³¹⁷

Drawing adverse inferences (eg, if the party fails, without a valid excuse, to produce the required document, the court may deem that the content of the document is not favourable to that party);³¹⁸

Peremptory orders (orders against a party who failed to comply with an existing order without good cause, which requires the same steps to be taken as the earlier order and is intended to be a final attempt to compel the party in default to comply³¹⁹);

³¹⁶ Cf, England, Art 1 UKCPR.

³¹⁷ Eg Slovenia, Art 286 CPA, Austria, §§ 179, 180 ATCCP, Germany, § 296 GCCP. Finland, Chapter 6, Section 9 CJP.

³¹⁸ Eg, Netherlands, Art 19-35 CCP.

³¹⁹ Eg, *Young Crystal Ltd and Others v Hang Seng Bank Ltd* (Court of First Instance, Hong Kong), Judgment 30 May 2022 [2022 HKCFI 1589].

Striking out a claim or a defence;³²⁰ and

Cost sanctions³²¹: In making decisions about costs, the court may consider the extent to which each party has conducted the proceedings expeditiously and cost-effectively. Cost sanctions may include wasted costs orders against parties' lawyers and orders for payment of security for costs.

396 Cases of breach of procedural conduct by lawyers may be reported to the competent Bar Association.³²²

13.8 Non-Exhaustive List of Issues of Procedural Case Management

397 Following the examples in numerous jurisdictions³²³, civil procedure rules should set a non-exhaustive list of issues of procedural case management. At least for some cases (predominantly higher-value and complex commercial disputes), valuable lessons can also be learnt from arbitration.³²⁴

398 Within the framework of procedural case management, the court may, whenever reasonably possible after consultation with the parties, adopt measures, which include the following:

- a) Determine the relevant procedural and substantive issues, identify which need full investigation and which can be decided summarily and decide the order in which the issues shall be resolved;³²⁵
- b) Set a procedural timetable, including deadlines and time limits for each procedural step to be taken by the parties;
- c) Determine whether the parties' briefs should be submitted sequentially or simultaneously and whether witness statements and expert reports (if applicable) should be submitted along with those briefs or at a later stage;

³²⁰ England, UKCPR 3.4(2)(c).

³²¹ Sweden, Chapter 18, Sec 6 CJP, Finland, Chapter 21, Sections 5, 6 CJP.

³²² Eg, Austria, §§ 200 ATCCP.

³²³ Most comprehensively: England Rule 3.1 UKCPR, Norway DA Section 9-4, subsection 2. Cf also US, Rule 16 USFRCP. In numerous jurisdictions, courts issue practice directions (eg, for contents, form, deadlines and filing of submissions, Ireland, High Court Practice Directions (HC 97, Written Submissions and Issue Papers).

³²⁴ Cf eg, UNCITRAL Notes on Organizing Arbitral Proceedings (2016); ICC COMMISSION REPORT on Techniques for Controlling Time and Costs in Arbitration; ICC Commission on Arbitration and ADR: Effective Management of Arbitration – A Guide for In-House Counsel and Other Party Representatives; Chartered Institute of Arbitrators: Managing Arbitrations and Procedural Orders Chartered Institute of Arbitrators (2015).

³²⁵ Eg, Spain, Art 414-430 LEC.

- d) Determine the number of briefs (if any) that the parties may submit still submit (after the claim and the answer to the claim) and set time limits for the exchange of written submissions;
- e) Limit the number, content and length of submissions (in line with the principle of proportionality and ensuring that the parties are guaranteed a reasonable right to be heard) and specify their form.
- f) Choose between a written or oral preparatory procedure or an adequate combination thereof;
- g) Determine procedural steps which can be done with the use of modern communication technologies;
- h) Set time limits for the exchange of witness statements (if applicable);
- i) Determine the dates of preparatory (organizational) hearings (if any);
- j) Determine the date for the main (apex) hearing;
- k) Choose the method of transcripts/protocols (verbatim, summaries, recordings, etc) of the hearings – when the law allows for a choice between different options;
- l) Consolidate and split cases;
- m) Suspend proceedings if the parties agree to try ADR;
- n) Bifurcate proceedings, for example, by deciding that it shall first give the judgment on the issue liability and only after this judgment is final it shall proceed to determine the quantum or by deciding that it shall first determine issues where no complex questions of facts or law arise;³²⁶
- o) Decide on whether in case the court dismisses procedural objections as to the admissibility of the claim (ie, due to the lack of international jurisdiction or *res iudicata*, *lis pendens* effect or a lack of claimant's standing, it shall rule on the issue immediately with a separate judgment or order (enabling the parties' immediately to contest it on appeal) or whether it shall dismiss the objection together with a final judgment on the merits;

³²⁶ Issues to be taken into account concerning bifurcation: How likely is it that the separate decision will be dispositive of the entire case; How likely is that the separate decision on a certain issue will be an incentive for the parties to settle the case; Added time and cost?; Possible procedural complications; Possible reaction of a losing and a winning party and its style of and approach to participating in proceedings in future phases of proceedings; Are the remaining phases likely to be long and expensive.

- p) Decide which method of service should be used (if the law allows for different ways) and, in general, determine the proper arrangement for routing of written communication between the judge and the parties;
- q) Determine the formal requirements concerning the submission of documentary evidence (ie, updating list of exhibits, pagination, a clear indication of each document and exhibit (eg, C-1, D-1); requiring the parties to clearly and concisely indicate as to which item relates to which factual assertion; defining a system of numbering evidence and paragraphs in parties' submissions; and defining the form in which the evidence must be submitted (unless evidence must be submitted electronically in the case management system) eg, by requiring the parties to separate items of evidence (documents) by inserting plastic ledgers or similar) or requiring electronic (and thus relatively easily searchable) evidence, or both; requiring that submissions include a list of exhibits clearly identifying each exhibit, including date, originator and recipient and that the parties should regularly update the list;
- r) Require the parties to present summaries of lengthy submissions and voluminous documents;³²⁷
- s) Decide whether voluminous and complex documentary evidence is presented (additionally) through summaries, tabulations, charts, extracts or samples;
- t) Require the parties to submit a chronological summary of facts;
- u) Require the parties to pay advances on costs or to provide security for costs;
- v) Discuss issues related to evidence: are experts needed, and if they are, then what type of expertise, one or multiple (when relevant), who should be appointed expert, and what type of evidence should be presented, ask the parties to identify appropriate and proportionate evidence;
- w) Determine the order in which the parties will present their arguments and evidence in the main hearing; determine whether there will be opening and closing speeches and whether e-technology will be required for that purpose (PowerPoint presentations) trial bundles, demonstrative exhibits;
- x) Determine specific issues concerning translations of documents and authenticity of the copies of documents;

³²⁷ Eg, Sweden, Chapter 42, Sec 6 and 16 SCJP.

- y) Decide whether closing statements (post-hearing briefs) shall be allowed (including possible restrictions as to their volume and content); and
- z) Take appropriate measures and sanctions to prevent abuse, deliberate causation of procedural delays and vexatious behaviour.

14 COURTS AND JUDGES PROMOTING SETTLEMENT

Anna Nylund, Aleš Galič and Janek T. Nowak

14.1 Introduction

399 Today, courts and judges actively promote settlement (amicable outcomes) in many different ways: litigants could be mandated to attempt to settle their dispute before bringing an action, mediation can be offered as a mandatory or voluntary alternative track (as an in-house or out-of-house service) to regular court proceedings, litigants could be directed to a settlement hearing, judges can promote settlement within the ambit of regular proceedings or any combination of these. It could thus be said that the facilitation of settlement is an integral part of court proceedings.³²⁸

400 However, for this study on the structure of civil proceedings, we do not go into detail regarding mediation and ADR processes that are offered as separate ‘tracks’, the nature and content of such proceedings, the criteria based on which the cases are diverted to these tracks or the institutional design of ADR process. We focus on activities within regular court proceedings, primarily those intended to lead to a ruling on the merits. This choice entails separating the facilitation of settlement, or ‘judicial dispute resolution’,³²⁹ from activities aiming at a resolution based on the determination of facts and the application of legal rules because they have distinct aims while also recognising that judges can forward both in the same hearing and that undertaking something to promote one of the aims, might as a by-product, advance the other aim.

14.2 Policy-Considerations for Courts Facilitating Settlement

401 Settlement can be an avenue for faster and cheaper resolution of disputes. Unlike court rulings, the parties have the power to shape the content of the settlement and, thus, to

³²⁸ For a comparative overview, see Part VI Chapter 1 Sec 4.2.3, paras 80 ff.

³²⁹ Cf eg, A Zariski, ‘Understanding Judges’ Responses to Judicial Dispute Resolution: A Framework for Comparison’ in T Sourdin and A Zariski, *The Multi-tasking Judge. Comparative Judicial Dispute Resolution*, (Thomson Reuters 2013); P Letto-Vanamo, ‘Judicial Dispute Resolution and its Many Alternatives: The Nordic Experience’ in J Zekoll, M Bälz and I Amelung, *Formalisation and Flexibilisation in Dispute Resolution* (Brill Nijhoff 2014), 149-163; A Zariski, ‘Judicial dispute resolution in Canada: Towards accessible dispute resolution’ (2018) 35 Windsor Yearbook of Access to Justice 433, 433-462; R L Wissler, ‘Court-Connected Settlement Procedures: Mediation and Judicial Settlement Conferences’ (2011) 26 Ohio State Journal on Dispute Resolution 271; U Glässer and K Schroeter (ed), *Gerichtliche Mediation. Grundsatzfragen, Etablierungserfahrungen und Zukunftsperspektiven* (Nomos 2011).

find more favourable terms for settlement than would be possible in a ruling, for instance, by selecting a specific remedy or agreeing on the terms of payment. Therefore, procedural law in many countries encourages or even mandates judges to promote settlement actively. When settlement could be inappropriate, especially due to third-party or public interests being involved, significant power imbalances being present, or the parties having previously attempted to settle, and new efforts would amount to pressure to settle, courts should refrain from promoting settlement.

- 402 Brazilian, German, Norwegian, Slovenian and Spanish judges and commercial court judges in Togo have the power, and to some extent a duty, to promote amicable settlement at all stages of the proceedings unless doing so would not be appropriate.³³⁰ In Brazil, Germany and Togo, courts are obliged to schedule a settlement hearing.³³¹ In Germany, the settlement hearing and the main hearing are often scheduled for the same day. Thus, if the parties do not settle their dispute in full, the case will proceed to the main hearing shortly after the settlement hearing has been closed. Judges in Belgium have the power to encourage and promote settlement but are not required. In the US, the parties are required to meet and confer to attempt to settle the dispute.³³² Afterwards, the parties will attend a pre-trial conference with the judge.³³³ A judge, magistrate or special master facilitates the settlement of the dispute.
- 403 In some countries, settlement is an explicit goal of civil proceedings. The name of the Norwegian Dispute Act reflects this. It is also a quintessential function of German and Nordic civil procedure,³³⁴ and the ERCP rules 9 and 10, emphasise the value of settlements.³³⁵ In contrast, during the socialist era, settlements were regarded as ‘bourgeois individualism’ in many socialist countries in Central and Eastern Europe.³³⁶ Differences in the extent to which settlement is considered as one of the functions of civil proceedings are likely to be reflected in differences in the powers – and even duty

³³⁰ Brazilian CPC Art 3º, §§ 2º and 3º, German § 278 GCCP, Norway § 8-1 DA, Spain Art 414(1)(3), 415 and 428(2) LEC, Togo.

³³¹ Brazilian CPC Art 334, German § 278 para 2 GCCP, Togo.

³³² USFRCP 26(f); USFRCP 16.

³³³ USFRCP 16(c)(1).

³³⁴ Eg, M Anders and B Gehle, *Zivilprozessordnung mit GVG und anderen Nebengesetzen* (80th ed, Beck 2022), § 278, 1136-1137; J Braun, *Lehrbuch des Zivilprozessrechts* (Siebeck 2014), 679-680; A Nylund, ‘Institutional Aspects of the Nordic Justice Systems: Striving for Consolidation and Settlements’ in L Ervo, P Letto-Vanamo and A Nylund (ed), *Rethinking Nordic Courts* (Springer 2021), 193.

³³⁵ Eg, A Nylund, ‘Introduction to the Preparatory Stage of Civil Proceeding’ in L Ervo and A Nylund (ed) *Current Trends in Preparatory Proceedings* (Springer 2016), 6-11, 11-12; A Wall, ‘Austria & Germany: A History of Successful Reform’ in C H van Rhee and Y Fu (ed), *Civil Litigation in China and Europe Essays on the Role of the Judge and the Parties* (Springer 2014), 167-169.

³³⁶ A Galič, ‘The Preparatory Stage of Civil Proceedings in Slovenia, the Czech Republic and Slovakia: Halfway There Yet?’ in L Ervo and A Nylund (ed), *Current Trends in Preparatory Proceedings: A Comparative Study of Nordic and Former Communist Countries* (Springer 2016), 113, 114, 135-136.

– of judges (and other court employees) to promote settlement and the mechanisms for producing settlement.

- 404 Elevating settlement to a goal of civil proceedings could stem from at least three different policy considerations.³³⁷ The first is pragmatism: settlement allows the parties to terminate court proceedings once they have identified a ‘good enough’ outcome. In many jurisdictions, there is a long tradition of settlement. A second reason is that settlement is a form of private ordering that allows the parties to tailor the case’s outcome. The economy is the third reason: settlement - early resolution - saves time and money for the parties and the court. These policy goals are not mutually exclusive. Indeed, they are partly overlapping.
- 405 There are also several policy reasons for limiting the right to settlement. A settlement could harm weaker parties, such as tenants and consumers. The more powerful party could force them to settle at less advantageous terms than the likely litigated outcome. By settling, the powerful party could also avoid the potential negative publicity that a ruling on the merits could entail. Another argument against settlements is that they weaken the public functions of courts. Rulings on the merits are needed to clarify the law (and develop it) and to set examples. A ruling stating that a particular practice is unlawful or discriminatory could be important for deterring others from engaging in or continuing that practice.
- 406 Critics of judicial dispute resolution posit that too many settlements erode the many public roles of courts.³³⁸ They also contend that parties risk being coerced into unfavourable settlements in the quest for efficiency. Moreover, settlements reduce the transparency and accountability of judges³³⁹ Proponents argue that settlements more accurately reflect the parties’ litigation aims, needs and preferences. Additionally, settlements balance the advantages of the potential ruling on the merits and the disadvantage that the costs and risks associated with obtaining the ruling entail.³⁴⁰ Settlement efforts, when the judge is tuned in on the needs and wishes of the parties and takes time to listen to the parties, correlate with party satisfaction with the process

³³⁷ J-F Roberge, ‘The Future of Judicial Dispute Resolution: A Judge who Facilitates Participatory Justice’ in T Sourdin and A Zariski, *The Multi-tasking Judge. Comparative Judicial Dispute Resolution*, (Thomson Reuters 2013), 21 ff; S Chang-qing, ‘From Judgment to Settlement: The Impact of ADR on Judicial Functions from a Comparative Perspective’ in T Sourdin and A Zariski, *The Multi-tasking Judge. Comparative Judicial Dispute Resolution*, (Thomson Reuters 2013), 139 ff.

³³⁸ O M Fiss, ‘Against Settlement’ (1983) 93 Yale Law Journal 1073; A Lahav, *In praise of litigation* (Oxford University Press 2017); J Resnik, ‘Mediating Preferences: Litigant Preferences for Process and Judicial Preferences for Settlement’ (2002) Journal of Dispute Resolution 155.

³³⁹ Eg, E R Archerd, ‘Evaluating Mediation’s Future’ (2020) 31 Journal of Dispute Resolution 51, 51-57; H Genn, *Judging Civil Justice* (Cambridge University Press 2010), 78 ff; J Resnik, ‘Managerial Judges’ (1982) 96 Harvard Law Review 374, 374 ff; J Resnik, ‘Diffusing Disputes: The Public in the Private of Arbitration, the Private in Courts, and the Erasure of Rights’ (2014) 124 Yale Law Journal 2804, 2804 ff.

³⁴⁰ M Keet, H Heavin and J Lande, *Litigation Interest and Risk Assessment: Help Your Clients Make Good Litigation Decisions* (American Bar Association 2020).

and outcome.³⁴¹ Conversely, the perception of procedural fairness is reduced when the judge pressures the parties to settle or directs them toward a specific outcome.³⁴²

- 407 Civil procedural research lacks a consensus on whether and how judicial dispute resolution should be regulated, which principles should guide it, and which mechanisms for accountability should be put in place. Notably, the procedural safeguards in place seem to be weak, considering the lack of specific regulation and attention to the topic in legal doctrine.

14.3 Incentives for Settlement

- 408 In many countries, incentives to settle have been implemented. Settlements concluded in court are enforceable, eg, in Brazil, Germany, Norway, Slovenia, and Spain,³⁴³ and court fees are lower when the parties settle.³⁴⁴ If the parties find an agreement between court hearings, they can ask the court to enter the settlement agreement into court records, which makes the settlement enforceable.³⁴⁵ Alternatively, the parties may end the proceedings without registering their settlement as a court settlement by the claimant withdrawing the claim or joint declaration that the case has been settled. This kind of private settlement ensures that the terms of the settlement remain confidential.
- 409 Judges can encourage the parties to attempt mediation or other ADR processes in addition to promoting settlement. Judges and other court employees offer some of these processes, such as German conciliation hearings and Norwegian court-connected mediation. In Germany, judges can also encourage the parties to attempt out-of-court mediation.³⁴⁶ In Brazil, the Civil Procedure Code expressly foresees that judges, lawyers, public defenders and prosecutors must encourage the use of conciliation, mediation and other methods of consensual dispute resolution, even during the course of proceedings³⁴⁷, and the judge shall schedule a conciliation or mediation hearing, that shall not be held if both parties expressly manifest their lack of interest in an amicable resolution of the dispute or when an amicable resolution by the parties themselves is

³⁴¹ J-F Roberge, 'Sense of Access to Justice as a Framework for Civil Procedure Justice Reform: An Empirical Assessment of Judicial Settlement Conferences in Quebec (Canada)' (2016) 17(2) *Cardozo Journal of Conflict Resolution* 341, 341-346, 357.

³⁴² Eg, E E Deason, 'Beyond 'Managerial Judges': Appropriate Roles in Settlement' (2017) 78 *Ohio State Law Journal* 73; 73 ff; J Resnik, 'Diffusing Disputes: The Public in the Private of Arbitration, the Private in Courts, and the Erasure of Rights' (2014) 124 *Yale Law Journal* 2804, 2804 ff, 2806-2807; N A Welsh, 'Magistrate Judges, Settlement, and Procedural Justice' (2016) 16 *Nevada Law Journal* 1020.

³⁴³ For Germany cf § 794 GCCP, for Norway DA Sec 19–12.

³⁴⁴ For Germany cf n°1000, 1003 and 1004 *Rechtsanwaltsvergütungsgesetz* (Lawyers' Compensation Act) (RVG); for Norway, cf *Rettgebyrloven* (Court Fees Act) Sec 8 (5).

³⁴⁵ Art 278 para 6 and Art 794 para 1 n° 1 GCCP; and Art 19–12 DA, Brazilian CPC Art 90, §3º, 487, III, b, 515, II and III.

³⁴⁶ § 278a GCCP.

³⁴⁷ Brazilian CPC Art 3º, § 3º.

not permitted³⁴⁸. In Belgium, the court can order the parties to participate in mediation unless both parties oppose³⁴⁹, whereas in Slovenia, explicit consent of both parties is required. However, an unreasonable refusal to participate in mediation can result in adverse cost order in Slovenia.³⁵⁰ In the US, each court has its own mandatory or voluntary ADR program consisting of mediation, arbitration, conciliation, or any combination.³⁵¹

- 410 The legal effects of settlements could be an important incentive to settle. In many countries, parties can enter into a court settlement. The court approves their settlement, which becomes enforceable as a ruling on the merits. This is reflected *inter alia* in the ELI/UNIDROIT Model European Rules of Civil Procedure Rule 141, which states that the parties can apply to the court to give effect to their settlement, ie, it becomes enforceable. Similarly, the European Union Brussels I bis Regulation on the jurisdiction, recognition and enforcement in civil and commercial cases³⁵², Article 2 defines court settlements, and Article 59 states that courts in all Member States must enforce court settlements if they are enforceable in the Member State of origin. In some countries, eg, Slovenia, court settlements have full *res judicata* effect³⁵³ and in other countries, eg, Norway and Spain, strong estoppel effects, notably the parties may use the settlement as a defence to argue a lack of need to litigate the case.³⁵⁴ In Norway, a party can bring an action claiming that the settlement is invalid or must be amended pursuant to rules regarding the validity and amendment of contracts.³⁵⁵
- 411 However, sometimes settlement could be formally recorded as withdrawal or admittance of a claim or an action. A claim or an action can be recorded as settled, even if the settlement is not enforceable, only binding on a contractual basis.
- 412 Enforceable court settlements raise the question of to what extent courts can accept settlements that deviate from the likely litigated outcome, particularly whether the parties can add elements they could not achieve in litigation and are allowed to deviate from mandatory rules. While this discussion is highly relevant and concerns the role of the judiciary and civil proceedings, it is beyond the scope of this study.

³⁴⁸ Brazilian CPC Art 334, § 4º.

³⁴⁹ Belgian CPC Art 730/1 and 1734.

³⁵⁰ Art 19 Slovenian Act on Alternative Dispute Resolution in Judicial Matters.

³⁵¹ See also Part 16.

³⁵² Regulation on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast), 1215/2012 of 12 December 2012 (EU).

³⁵³ Cf the comments to ERCP Rule 141 and Rule 148 comment 2 for a relevant definition of *res judicata*.

³⁵⁴ This is the case in Spain, A de la Oliva Santos, *Curso de Derecho Procesal Civil II. Parte Especial* (3rd edn, Editorial Universitaria Ramón Areces 2016), 330-331.

³⁵⁵ § 19-12 (2) DA.

14.4 Active Promotion of Settlement, Judicial Dispute Resolution

- 413 In some countries, courts have the power or duty to encourage or even mandate the parties to mediate or use other ADR processes to resolve their dispute before or after bringing an action.³⁵⁶ ADR can either be an in-court or an out-of-court service. Because this segment focuses on court proceedings, this part discusses only mediation services provided by courts.³⁵⁷
- 414 In Germany, Norway, Brazil and (with the consent of both parties) Slovenia, cases can be transferred to a mediation hearing, in which case a ‘mediation judge’ conducts mediation. This judge is not bound by the regular rules of proceedings, such as rules that preclude *ex-parte* communication.³⁵⁸ The mediation judge cannot rule on the merits if the case does not settle. There are some exceptions to this rule in Norwegian law.
- 415 In Belgium, a similar system exists for family law cases, with special Chambers for Amicable Settlement attached to the family courts. Local courts in Belgium may experiment with such chambers in other areas of law based on their general duty to conciliate parties.³⁵⁹ Further, parties may request the judge competent to hear their case at first instance to mediate their case before bringing an action.³⁶⁰
- 416 As indicated above, in many countries such as Belgium³⁶¹, Brazil, France³⁶², Germany, Japan³⁶³, the Netherlands³⁶⁴, Norway, Slovenia³⁶⁵, Spain, and the US, courts and judges have the power, or even duty, to promote and facilitate settlement during the regular course of proceedings.³⁶⁶ This can be done in many ways, such as during dedicated settlement conferences or as part of general preparatory hearings, the main hearing, etc.
- 417 Judges can promote and facilitate settlement by encouraging parties to consider settlement, discussing the benefits of settlement, or actively facilitating settlement by

³⁵⁶ Cf eg, Art 21 FCCP, Art 731(1) of the Belgian Judicial Code: ‘Il entre dans la mission du juge de concilier les parties’ and Art 277 of the Slovenian CPA.

³⁵⁷ See Part 16 for discussions on ADR in general.

³⁵⁸ Norwegian DA Section 8-3 to 8-7.

³⁵⁹ Art 731, first para Belgian Judicial Code.

³⁶⁰ Art 731, second para Belgian Judicial Code.

³⁶¹ Arts 730/1, §1 and 731, first para Belgian Judicial Code.

³⁶² Art 22 FCCP.

³⁶³ JCP Act Art 89.

³⁶⁴ Art 87(2)c Dutch Code of Civil Procedure.

³⁶⁵ Art 306 Slovenian CPA.

³⁶⁶ For a definition of judicial promotion or facilitation of settlement, cf L Adrian, ‘The Role of Court-Connected Mediation and Judicial Settlement Efforts in the Preparatory Stage’ in L Ervo and A Nylund (ed), *Current Trends in Preparatory Proceedings: A Comparative Study of Nordic and Former Communist Countries* (Springer 2016), 210-215.

pinpointing common ground or indicating a settlement range. In some countries, judges or special masters (magistrates) can suggest a specific settlement. In Germany and Slovenia, judges are allowed and, depending on the circumstances of the case, expected to give the parties hints and feedback,³⁶⁷ indicating strengths and weaknesses in their argumentation and their view on the likely litigated outcome. Although the outspoken rationale for giving judges these powers is not facilitating settlement, this feedback is likely to thrust parties to settle by putting the parties in a position to determine a prudent settlement range. In Spain, the court is to enter into a dialogue with the parties aiming at determining what the truly disputed elements of the case are; and, in light of the results of this dialogue, 'the court may call upon the parties to reach an agreement to bring the dispute to an end'.³⁶⁸ In the Netherlands, a goal of an oral hearing, which can be ordered at any stage of the proceedings,³⁶⁹ is to verify whether a settlement is possible.³⁷⁰ To this end, judges may indicate how they regard the issues (the practice of provisional judgment) to instigate parties to settle during the oral hearing. Sometimes, a judge may actively facilitate a settlement by proposing to this end.³⁷¹ In contrast, in Norway, judges are precluded from providing this type of feedback to the parties during regular hearings.³⁷² In Denmark, at the end of the main hearing, the parties can request that the court present its preliminary view of the case's outcome, which often results in the parties settling their dispute rather than requesting the court to render a ruling.³⁷³

418 Appellate courts may also promote settlement in many jurisdictions. The extent and manner in which appellate judges can promote settlement depend on the form of the appellate proceedings and whether judges may communicate their preliminary view on the prospects of success, key disputed issues, or both.

419 The emerging research on how judges promote settlement indicates significant differences not just among countries but also among courts and judges within countries.³⁷⁴ We still have a limited understanding of what kind of activity this kind of

³⁶⁷ § 139 GCCP.

³⁶⁸ Art 428 LEC.

³⁶⁹ Art 87(1) Dutch CCP.

³⁷⁰ Art 87(2)c Dutch CCP.

³⁷¹ Cf H M M Steenberghe, 'Regie op schikking: de actieve rechter in een bemiddelende rol' (2022) 1 *Tijdschrift voor de Procespraktijk* 12.

³⁷² A Nylund, 'Institutional Aspects of the Nordic Justice Systems: Striving for Consolidation and Settlements' in L Ervo, P Letto-Vanamo and A Nylund (ed), *Rethinking Nordic Courts* (Springer 2021), 190-193.

³⁷³ U R Bang-Pedersen, L H Christensen and C S Petersen, *Den civile retspleje* (5th edn, Hans Reitzels Forlag 2020), 379.

³⁷⁴ L Adrian, S Bager and C S Petersen, 'Perspektiver på forligsmægling' (2015) 3 *Juristen* 98, 98-106; A Zariski, 'Understanding Judges' Responses to Judicial Dispute Resolution: A Framework for Comparison' in T Sourdin and A Zariski, *The Multi-tasking Judge. Comparative Judicial Dispute Resolution*, (Thomson Reuters 2013), 43 ff; M Alberstein and N Zimerman, 'Judicial Conflict Resolution in Italy, Israel and England and Wales: A Comparative Analysis of the Regulation of Judges' Settlement Activities' in M F Moscati, M Palmer and M Roberts (ed), *Comparative Dispute Resolution* (Edward Elgar Publishing 2020).

‘judicial dispute resolution’ is and how its tenets are perceived. Considering that many textbooks lack a description of the basic principles guiding the activity, and the research indicating significant variation among judges, there is reason to believe that judicial dispute resolution is a black box, a process with unknown internal functions. It is unclear which tools and methods are acceptable and how much, and in which ways, the process may deviate from regular procedural principles. Thus, judicial dispute resolution constitutes a research gap.

14.5 Settlement as a Product of Regular Court Proceedings

- 420 Apart from judges (and court employees) promoting settlement, it can also result from the parties’ private efforts to negotiate a solution or as a by-product of regular proceedings or any combination of these.
- 421 Settlement may result from the parties gaining a better understanding of the case, the claims, grounds for claims and evidence, and the risks and costs associated with the litigation process. The parties might gain access to evidence through discovery or disclosure, which puts them in the position to assess the likelihood that they will prevail more accurately, the costs of producing the evidence necessary to prevail, and so forth. As the court proceedings unfold, parties better understand disputed, undisputed, central, peripheral, and irrelevant facts and arguments. They thus can make more informed and accurate estimations of the risks and costs of the case and the likely outcome. In some jurisdictions, the case managing judge, or another court official is expected to actively clarify the case, which could be associated with more settlements. Hence, settlement negotiations occur ‘in the shadow of litigation’ or ‘the steps of the courthouse’.
- 422 In systems with an apex hearing, the apex hearing could be less suited than earlier hearings to facilitate settlement. One reason is the evidence needed to prove the disputed factual circumstances discussed, the costs and risks related to litigation so that the entire hearing could be dedicated to settlement. Even if the hearing is not devoted to settlement, the process in which central and peripheral issues, disputed and undisputed matters are separated, the evidence that will be needed to prove disputed factual circumstances discussed, the costs and risks related to litigation, and common ground also become apparent. Thus, this is a fertile environment also for considering settlement. Moreover, the less formal and more dialogic nature of the hearing could also render it suitable for discussions involving these aspects and discussing the parties’ litigation aims. This enables the parties to decide whether they should continue pursuing their claims through litigation or whether a settlement could better serve their needs and wishes.

CHAPTER 4 – ROLE OF THE PARTIES AND THEIR REPRESENTATIVES

1 WHO IS A PARTY?

14.6 The Notion ‘Party’

- 423 In civil litigation, a party is an individual or group of individuals who seek to assert rights in a legal proceeding, or who defend against allegations of violations of rights and duties or other wrongdoing. Different legal systems apply different terms to denote parties to a lawsuit. These include the designation of a claimant, as the person or persons filing a lawsuit, or a petitioner, as the person or persons filing a petition with a tribunal requesting a judicial ruling. Judicial systems designate the defendant as the person or persons sued or charged with wrongdoing. A respondent is a party opposed to a petition, or an appeal.
- 424 Parties do not include attorneys or counsel in a proceeding. A person or persons who appear in a lawsuit as witnesses providing evidentiary testimony also are not parties to civil litigation.
- 425 Legal systems also designate parties who are made part of a lawsuit by cross-complainant filed in the same lawsuit. Thus, a cross-complainant is a defendant who sues someone in the same lawsuit, and a cross-defendant is a person sued by a cross complainant. Third parties may be joined in a civil action, in which case they may be designated in some legal systems, as a third-party claimant or a third-party defendant.
- 426 In Spanish civil procedural law, a party is the person or entity that institutes proceedings and the person or entity against whom those proceedings are instituted. The claimant is called *demandante* and the defendant is called *demandado*. The notion of party is purely formal or procedural: a person or entity becomes party to a proceeding because the person or entity has instituted proceedings or have had proceedings instituted against them. Spanish proceedings embrace litigation involving two or more claimants or two or more defendants. The Spanish term for joinder of parties is *litisconsorcio*.

14.7 Statutes or Rules Relating to Parties

- 427 In many jurisdictions, the statutes and rules may govern the nature and status of parties to a dispute. Such statutes or rules may set forth legal standards for standing to sue, capacity to sue, joinder of parties, necessary joinder of parties, indispensable or mandatory joinder of parties, cross claims and counterclaims against various parties, and other types of parties such as intervenors.

14.8 Capacity to Sue or Be Sued

- 428 A fundamental concept relating to parties concerns the ability or capacity to sue or be sued. Capacity may be defined by statutory law or procedural rules. Capacity rules frequently are granular and refer to specific categories of individuals or entities.
- 429 Different rules may govern an individual or entity's capacity to sue or be sued. For example, in the United States, the capacity of an individual is determined by the law of the person's domicile; the capacity of a corporation is determined by the law under which it was organized; and for all other parties, by the state law where the court is located (USFRCP 17(b)).
- 430 Certain representatives may sue or defend minor or incompetent persons, including (a) a general guardian, (b) a committee, (c) a conservator, or (d) a like fiduciary. A minor or incompetent person who does not have an appointed representative may sue by a next friend or by guardian *ad litem*. The court must appoint guardian *ad litem* to protect a minor or incompetent person who is unrepresented in an action (USFRCP 17(c)).

14.9 Standing

- 431 In many legal systems, the procedural concept of party designation is different than the concept of standing to sue. Standing to sue is defined by statute in many continental systems and common law systems, or by constitutional standards in the United States. Claimants must have standing to sue; this is a threshold requirement. Generally, standing requires some nexus between the claimant's allegations of harm and the remedy sought in the lawsuit. In the United States, for example, standing doctrine requires that the claimant allege an injury in fact, traceable to the conduct of the defendant, that is redressable at law.³⁷⁵ A party may only assert his or her own rights and cannot raise the claims of a third party who is not before the court. A claimant also may not have standing to sue if the alleged injury is widely shared in an undifferentiated way with many people.
- 432 In Spain, the actual connection of a party or entity with the dispute are known as issues of standing (*legitimación*); generally, they are deemed to be issues of substantive law that do not affect the procedural condition of party.
- 433 In Slovenia, standing to sue (*legitimatjo ad processum*) is recognised if a claimant brings a claim for his benefit (thus, protecting the rights, that the claimant asserts to have). Whether the claimant is truly entitled to such rights under substantive law is the matter of so called *legitimatjo ad causam*. Thus, the rules on *legitimatjo ad processum* prevent claims being brought to the benefit of third persons or an *actio popularis*.

³⁷⁵ *Lujan v Defenders of Wildlife* (Supreme Court, United States), Judgment 12 June 1992 [504 U.S. 555 (1992)].

14.10 Actual Parties: Real Parties in Interest

- 434 In the United States, a civil action must be prosecuted in the name of the ‘real party in interest’. The following persons may sue in their own names without joining the person for whose benefit the action is brought: (a) an executor, (b) an administrator, a guardian, (d) a bailee, (e) a trustee of an express trust, (f) a party with whom or in whose name a contract was made for another’s benefit, and (g) a party authorized by statute (USFRCP 17(a)(1)).
- 435 A court may not dismiss a lawsuit for the failure of to prosecute a lawsuit in the name of the real party in interest. The real party in interest must be provided with a reasonable time in which to correct the defect (USFRCP 17(a)(3)).

14.11 Representative Parties

- 436 As indicated above (Chapter 1.3), certain individuals such as minors or incompetent persons may be represented by designated representatives on their behalf or if no person is designated the court may be under a duty to appoint and appropriate representative.
- 437 Another type of proceeding that embraces representative parties include class action litigation in the United States, where named ‘class representatives’ bring group litigation on behalf of large numbers of unnamed class claimants (USFRCP 23). In such situations, American law is unclear concerning whether such absent class claimants are parties to the dispute; some case law indicates that only the named class representatives are the actual parties to the dispute. Class representatives have a fiduciary duty to protect the rights and interests of absent class members.

14.12 Third Parties

- 438 Civil litigation may embrace so-called ‘third parties’ to the litigation who are not initially sued by the claimant or the defendant. A third party typically is an individual or an entity whom the defendant seeks to bring into the litigation because the defendant believes that the third party (who is not named in the lawsuit) is liable to the defendant. If a defendant asserts a counterclaim against the claimant, the claimant has the same opportunity to join a third-party who might be liable to the claimant on the counterclaim. The common bases for contingent or derivative liability by which third parties may be brought into a lawsuit include indemnity, subrogation, contribution, and warranty.
- 439 In the United States, the joinder of third parties to a litigation is accomplished through the procedural device known as impleader (USFRCP 14). The defendant impleads the third party into the lawsuit. A defendant then becomes a third-party claimant by filing a third-party complaint against an individual or entity not presently party to the lawsuit. The individual or entity that is impleaded is known as the third-party defendant.

- 440 In Belgium, traditional rules exist for the joinder and indivisibility of connected cases (Art 30 Judicial Code (JC); Art 701 JC). Also, cases can be grouped together by way of a mandate. In 2015, an action for consumer collective redress was introduced, which was later expanded to SMEs.
- 441 In Brazil, the civil procedure rules allow for intervention of assistants; third-party impleaders; *amici curiae*, and joinder of a co-defendant.
- 442 In Germany there is provision for multiple party disputes; the idea is to conduct the proceedings in an efficient way. The rules for third-party notice are intended to avoid problems which might result from the fact that the *res judicata* effect is limited to the parties.
- 443 In Slovenia, the law allows for multiple parties but distinguishes between ‘ordinary co-litigants’ and ‘uniform co-litigants’. In principle, in joinder involving ‘ordinary co-litigants’, this does not deprive each party of individual autonomy; hence its actions and omissions only affect its case. Different judgments can be rendered. However, when an action requires only one uniform judgment regarding all co-litigants, the law provides for the ‘uniform joinder of the parties’. In such case, procedural acts during the proceedings apply uniformly for both. Third-party notice has important procedural consequences. If a subcontractor receives notice of an action in which the subcontractor should intervene and ignores it, it will nevertheless be bound by all relevant factual findings and legal standpoints, adopted in the litigation between an employer and the contractor.
- 444 In Spain, broadly speaking anyone who is not a party to a proceeding is a third party to that proceeding. This broad notion of third party includes all persons and entities who have absolutely no connection to the dispute and the litigation. But it also includes all persons and entities who have an interest in or a relationship with the dispute, so that the outcome of the litigation might have consequences for their personal status or their assets. Those belonging to this latter group of persons and entities are known as *procedural* third parties. The law takes these persons and entities into account offering different ways of protecting their interests in the ongoing litigation.
- 445 In Togo, in the interests of the proper administration of justice and with a view to extending *res judicata* to all interested parties, there are specific rules in multiparty proceedings. For example, if an interested third party intervenes in the proceedings before the close of the hearing with an incidental or related claim, the case may be adjourned to a later hearing and the measures of inquiry extended. In the event of several defendants being summoned for the same matter, if at least one of them does not appear, the judgment is deemed to be contradictory with regard to all of them when the decision is subject to appeal or when those who do not appear have been summoned in person.

14.13 Other Types of Parties (Intervenors, Interpleader, Class Members, *Amicus Curiae*)

14.13.1 Intervenors

- 446 Many legal systems provide for additional parties to a litigation who are not originally designated as parties to the dispute. The most common additional party are intervenors. These are individuals or entities that have an interest in the ongoing litigation that may be impaired or impeded by the efforts of the existing parties and for which they are not adequately represented by the existing parties. The ability of non-parties to intervene into an existing lawsuit is governed by statutes or rules, and may be an intervention of right, or permissive intervention (USFRCP 24).
- 447 In Belgium, specific rules on the intervention procedure exist (Art 811-814 JC). Intervention can be free or forced (Art 15, 16 JC). A forced intervention means that a party to the proceedings summons a third party to become part of the proceedings. A judge may not order *ex officio* the addition of a third party (Art 811 JC).
- 448 In Norway, there are specific rules for joinder of multiple parties such as intervenors or third-party practice. There also are rules governing the succession of interest, but these are scattered throughout the rules.
- 449 In Slovenia, intervention is possible if one of the parties (usually the defendant) believes that it might have a claim against a third person, should it lose in the first litigation. Examples of litigation involving intervention include situations where an employer sues a contractor and the contractor invites, via a notice, the sub-contractor to join as intervenor. The legal consequences of such notice (*litis denuntiatio*) are far-reaching. The third person duly notified (regardless whether he will join the proceedings) will, in principle, be bound by factual and legal findings in the judgment rendered in these proceedings.
- 450 In Spain, the general rule is that no public interest representatives will intervene in civil proceedings. Nevertheless, there are exceptions to the intervention of the Public Prosecution Office and Public Offices whose task is related to the dispute. The PPO may intervene as the claimant in a representative action for protection of consumer interests, or when the defendant is a minor who does not have other legal representation. The PPO shall intervene in incidental proceedings where the jurisdiction or the impartiality of the civil court have been challenged; proceedings aiming at the judicial protection of a fundamental right; proceedings where minors, mentally disabled persons or legally absent persons are involved; proceedings for the nullity of marriage; proceedings for establishing parenthood; and *proceso de revisión* (revision proceedings), aimed at vacating a judgment that is final and unappealable. The European Commission and the National or Regional Anti-trust Agencies may intervene in civil proceedings related to

anti-trust law. The European Commission and the National or Regional Data Protection Agencies may intervene in civil proceedings related to data protection law.

14.13.2 *Interpleader*

451 Interpleader is another procedural device, often used to resolve insurance disputes, that creates parties to an action. In the United States, an interpleader action is initiated when the claimant holds property on behalf of another but does not know whom the property should be transferred (USFRCP 22). The party initiating this litigation is designated as the stakeholder. The money or property is designated as the *res*. All possible defendants having an interest in the property are called claimants. In some jurisdictions, these parties are referred to as the claimant-in-interpleader and claimants-in-interpleader. Interpleader actions proceed in two stages. The first determined whether the stakeholder is entitled to an interpleader action, to be discharged from liability for the *res*. The second stage is to determine which of the claimants is entitled to the *res*.

14.13.3 *Amicus Curiae*

452 Many jurisdictions allow an appearance by *amici curiae*, or ‘friends of the court.’ *Amici curiae* are technically not parties to the litigation, but with leave of the court are permitted to participate in the proceedings to provide additional advice or insight to the court.

453 In Spain, the PPO may appear as an *amicus curiae* (eg, providing a learned opinion on whether the court has jurisdiction or not). The European Commission and the National or Regional Anti-trust or Data Protection Agencies will always intervene as *amicus curiae*.

14.13.4 *Class Action Members*

454 In American class action jurisprudence, it is unsettled law whether absent class members are parties to the action. Some courts have concluded that only the named class representatives in the complaint are the parties to the dispute, and unnamed claimants are not actual parties. Other courts have concluded that absent class members are parties to the litigation.

14.13.5 *Rules for Succession of Parties*

455 All jurisdictions have rules governing the substitution and succession of parties based on certain events that trigger a need for the succession of parties. In the United States, the substitution or succession of parties is governed by rule (USFRCP 25). Substitution of parties may be effectuated upon death, incompetency, or the transfer of an interest (USFRCP 25(a)-(c)). Substitution of a government official does not occur automatically when a named government official dies in office, or is no longer, a government employee (USFRCP 25(d)).

- 456 In Belgium, there are a few technical rules on the succession of deceased parties or parties changing the capacity in which they were a party to the case (Art 815-816 JC).
- 457 In Brazil, there are specific rules for the succession of parties (Art 108-110 Civil Procedure Code).
- 458 German law also provides for the succession of parties, in the interest of the parties and the efficiency of court proceedings.
- 459 In Norway and in Slovenia, if a party who is a natural person, dies and was not represented by a lawyer, the proceedings are automatically suspended. They will continue once the heir takes it over, or the court invites him or her to do so. If a party, who is a natural person, dies and was represented by a lawyer, the proceedings are not suspended. If a party, who is a legal entity, ceases to exist, the proceedings are suspended regardless of whether it was represented by a lawyer.
- 460 In Togo, there are no specific procedural rules. The rules of the Civil Code apply in this respect.

15 PROCEDURAL DUTIES AND RESPONSIBILITIES OF THE PARTIES AND THEIR REPRESENTATIVES

15.1 Representation by a Lawyer

- 461 In the United States, there is no legal requirement that a claimant or a defendant be represented by an attorney. Parties may appear on their own behalf *pro se*. However, certain types of litigants who, because of their lack of capacity (such as minors or incompetent persons) may require court appointment of an attorney to represent their interests. *See above* 1.3 (Capacity to Sue or Be Sued).
- 462 In Belgium, representation is not mandatory unless the law provides otherwise (Art 758, first para JC). This is the case for procedures for the Supreme Court (Art 1080 JC). However, a judge may deny a party the right to represent itself in court if he finds that due to passion or lack of skill, they are unable to discuss their case with the required propriety or with the necessary clarity (Art 758, second para JC).
- 463 In Brazil, except in small claims court in cases up to 20 minimum wages, parties must be represented by attorneys. Lawyers can represent themselves.
- 464 In Germany, there are two types of first instance courts: the local district courts for disputes up to EUR 5,000 and claims in certain areas of law, eg house rental cases, and the regional courts for disputes of an amount exceeding EUR 5,000. Only before the latter and before second instance courts, is the representation by a lawyer mandatory. Before the Federal Court of Justice, only a small group of specialized lawyers is admitted.

The remuneration of the solicitors is regulated in a statute, which is not mandatory, but which is nevertheless respected in usual cases.

- 465 In Norway, there is no mandatory requirement that persons be represented by counsel. Almost all litigants are represented. In small claims proceedings (amount in dispute is below NOK 250,000 = EUR 25,000) self-represented parties are common. In small cases, the compensations of legal costs are limited to maximum 20 % of the amount in dispute.
- 466 In Slovenia, except in proceedings in the Supreme Court (and other extraordinary remedies such as the reopening of proceedings), representation by a lawyer is not mandatory. In practice however, more than 90% of the parties are represented by a lawyer.
- 467 In Spain, legal representation is required for most civil and commercial cases. For disputes of more than EUR 2,000, the LEC³⁷⁶ requires that the parties hire an advocate who will study and investigate the case, write briefs and make oral pleas to the court. This advocate is deemed the party's technical defender. In addition, the LEC requires that parties also hire the services of *procurador* (a procurator). The procurator is deemed to be the party's representative before the court. The procurator (1) deals with service and notifications related to the party, (2) submits briefs previously written by the advocate to the court and (3) takes care of the correct unfolding of proceedings.
- 468 In Togo, a distinction must be made between natural and legal persons. For natural persons, representation is not compulsory before the court of first instance and on appeal. It is only before the Supreme Court that it becomes mandatory. Because before the Supreme Court the issues dealt with are purely legal and essentially technical. For legal persons, representation is compulsory in all instances.

15.2 Right of Self-Representation; *pro se* Proceedings

- 469 In the United States, a person or entity may represent themselves, known as *pro se* representation. In England and Wales, the equivalent status is called a litigant in person. In the United States, the most frequent type of action in which parties appear *pro se* relate to domestic relations, such as divorce proceedings and family matters. Prisoner petitions in civil matters are overwhelmingly pursued by *pro se* litigants. In addition, small claims lawsuits are likely to be pursued by *pro se* litigants. In federal courts, the right of self-representation is protected by statute (28 USC § 1654). Longstanding rules do not permit corporations to be represented by non-attorneys, and a *pro se* litigant may not serve as a class representative. In addition, in many jurisdictions matters relating to estates or probate must be litigated by executors or administrators who are attorneys.

³⁷⁶ LEC stands for *Ley de Enjuiciamiento Civil* (Civil Procedure Act) (Spain). Accessible at <https://www.boe.es/eli/es/l/2000/01/07/1/con>.

- 470 In Belgium, a judge may deny a party the right to represent itself in court if he finds that due to passion or lack of skill, they are unable to discuss their case with the required propriety or with the necessary clarity (Art 758, second para JC).
- 471 In Brazil, lawyers can represent themselves.
- 472 In Norway, in small claims proceedings (amount in dispute is below NOK 250,000 = EUR 25,000) self-represented parties are common, especially in the mandatory first instance proceedings in Conciliation Boards. In small cases, the compensations of legal costs are limited to maximum 20% of the amount in dispute.
- 473 In Spain, for low value cases of EUR 2,000 or less, litigants are free to defend themselves without using the services of any legal professional. These litigants are called litigants in person. Litigants appearing in person may prepare a succinct statement of claim. There is no need to specify any legal grounds, but just the fundamental facts upon which the claim for relief is based (Art 437(2) LEC). It is understood that the law cannot require an ordinary citizen who lacks legal skills to make a legal study of the case and produce a statement of claim in a professional way.
- 474 If in a case up to EUR 2,000, one party is a litigant in person, but the other party chooses to have legal representation, the court will provide the litigant in person with the opportunity to obtain legal representation. If the litigant in person does not have sufficient means to pay, the litigant may ask the court to issue an order stating that the litigant requires legal representation for the sake of the ‘principle of equality of the parties within the proceedings.’ With this court order, the litigant will be able to address the Legal Aid Commission with a request for legal aid. The main proceedings will be stayed until the Commission issues a decision on the application for legal aid (Art 6.3(a) LAJG³⁷⁷ and Art 32 LEC).

15.3 Adversarial Proceedings and the Duty of Good Faith and Cooperation

- 475 In many systems, the idea of civil litigation is conceived as a battle between the parties. This is especially true in the United States, in which litigation is based on an adversarial model. However, this concept seems to be abating with a modern emphasis on the parties’ duty to participate in good faith and cooperation. In some systems parties might even be under a procedural duty of cooperation (cf the modern trend reflected by the ELI/UNIDROIT European Model Rules of Civil Procedure). In the United States some state civil procedure rules and codes of professional responsibility set forth duties of cooperation and civility in the conduct of litigation.
- 476 In Belgium, while parties are expected to cooperate on certain matters, for example when a judge orders the disclosure of documents, it is not yet a general principle with

³⁷⁷ LAJG stands for *Ley de Asistencia Jurídica Gratuita* (Free Legal Aid Act) (Spain).

specific sanctions. The judge can, however, sanction parties in different ways if they do not comply with requests or orders. Although the principle of procedural loyalty appears from time to time in the Supreme Court's case law, it remains to be seen how it will evolve. While a number of textbooks consider it as a 'principe directeur' of Belgian civil procedure³⁷⁸, its content is still unclear. Generally, it obliges parties to fair-play, both with the judge and adversaries. This means, for example, timely communicating, only raising exceptions when one suffers a prejudice from procedural mistakes of the other side, raising exceptions at the earliest possibility, etc. It does, however, not cover a duty to be complete or to be truthful. To which extent it differs entirely from a prohibition of abusive litigation, is unclear.³⁷⁹ It can also be doubted whether it truly exist as a duty separate from specific rules prescribing a form of procedural conduct that could be described as an embodiment of good faith.³⁸⁰

- 477 Article 6 of the Brazilian Civil Procedure Code establishes a principle of cooperation, stating that 'All who in any way participate in the proceedings shall cooperate in order to obtain, within a reasonable period of time, a fair and effective judgment on the merits'.
- 478 Article 5 of the Brazilian Civil Procedure Code states that 'All who, in any way, participate in the proceedings shall act in good faith'.
- 479 In Germany, there is no duty to cooperate, but there is an ongoing discussion about this idea. There is a duty to act in good faith, but the limits are not clear cut.
- 480 In Norway, there is a duty to cooperate, but it is not enforced. Norwegian legal culture is based on the idea of cooperation, and thus formal sanctions for failure to cooperate are not needed. There also is a duty to act in good faith, but it also is not enforced. The court is empowered to draw adverse consequences of it (facts) or apply cost sanctions. In a small country such as Norway, people are aware of their reputation and all lawyers wish to maintain a good relationship with local judges. Managing good relationships is paramount in rural areas (and to some extent in urban areas).
- 481 In Slovenia, as explained above (Part 6, Chapter 3.5) there is no explicit rule on the duty of the parties to cooperate, but the principle is promoted by the Constitutional Court. In Spain, in the context of each party's own investigation there is no proper duty to cooperate; there is no proper mutual duty of discovery or disclosure. There are no pre-action or post-action disclosure duties directly enforceable between parties. There are

³⁷⁸ D Mougenot, *Principes de droit judiciaire* (2nd edn, Larcier 2020), 92-94; J Englebert and X Taton (ed), *Droit du procès civil* (vol I, Anthemis 2019), 65-66; This is not the case, however, for the leading Flemish textbook on civil procedure. Cf J Laenens, P Thiriar, B Vanlerberghe, D Scheers and S Rutten, *Handboek gerechtelijk recht* (5th edn, Intersentia 2020), 148-149.

³⁷⁹ D Mougenot (n 378) 93-94.

³⁸⁰ J Englebert and X Taton (n 378) 65.

no sanctions or negative consequences for the party ignoring private requests. If a party wants to get information or evidence from an opposing party, they must go to a civil court and ask for an order (Art 328 LEC). Indeed, civil litigation in Spain is still very much seen as an adversarial battle between claimant and defendant, where each is entitled to engage into any strategy, they please for the sake of their own interests. The law does not clearly state any clear duty of good faith and cooperation in relation to the opposing party. The only limits here are the law and the duty of good faith towards the court. But no specific duty of good faith towards the opposing party is due and it is considered legitimate that each party fights her position without helping in any way the position of the opponent.

- 482 In Togo, there is a duty to cooperate through the obligation of simultaneous and spontaneous communication of documents. In addition, parties are obliged to cooperate with the investigative measures the judge orders. This obligation gives the judge the power to draw any consequences from an abstention or refusal (Articles 45, 49, 103 of the Code of Civil Procedure). The obligation to act in good faith is not expressly provided for in the Code of Civil Procedure; however, it can be implicitly deduced through the procedure of false civil incident in Article 94 of the Code of Civil Procedure.

16 PARTIES AS 'MASTERS' OF THE PROCEEDINGS

16.1 The Role of the Parties in the Introduction of Facts

- 483 In many systems of civil procedure, parties are considered to be the masters of the proceedings. A key aspect is the parties' power to determine the matter in dispute. In the United States, claimants and defendants are considered to be masters of their pleadings and to assert any and all legal claims and defences available at law and equity. However, American rules of civil procedure permit liberal amendment of pleading throughout the course of litigation, including up to and during trial (USFRCP 15).
- 484 In Spain, only the parties may introduce the essential facts supporting the claims and the affirmative defences. The general rule is that all facts (be them essential or secondary) must be introduced by the parties and only by the parties. The parties exclusively define the litigation's subject matter. The court is therefore banned from carrying any factual investigation of its own and from taking into account facts that have not been previously alleged by at least one of the parties (Art 216 LEC). However, some scholars have argued that the principle of party autonomy does not require only the parties introduce secondary facts; the court could investigate and bring secondary facts for the sake of seeking the truth.
- 485 In Belgium, it is expected the defendant, when contesting, does this in a constructive manner. However, if defendants fail to bring the necessary facts or raise the necessary points, judges have in principle no obligation to raise defences *ex officio*. That being said, since the whole case file is at the disposal of the judge, a judge may raise any issue and

put it to the parties when the law does not prohibit the judge from doing so and parties have not expressly agreed to exclude the issue.

- 486 In Brazil, the defendant must present all factual and legal allegations, presenting documental evidence and specifying the evidence the party intends to produce.
- 487 In Germany, it is not sufficient to contest the opposing side's allegations. It is necessary to substantiate the counter position. The only exception concerns situations in which the contesting party does not have sufficient information for substantiating the counter position because the allegation concerns the inner sphere of the other side.
- 488 In Norway, the parties decide the ambit of the dispute. The court may only rule on the claims that are made and within the scope of the claims for relief. It may only base its ruling on the factual grounds that have been invoked, Dispute Act (DA) Section 11-3. It is the duty of the parties to invoke the facts that based on the applicable substantive law are needed to produce the outcome requested. For instance, if the claimant sues for payment for goods, the claimant must invoke facts out of which the contract for the sale of goods, the amount to be paid and the lapse of the time limit for payment. This is usually done in writing in the statement of claim but can also be done later orally or in writing. Similarly, as a defence, the defendant could invoke facts based on which the sales contract is null and void, or that the duty to pay has not arisen because the goods were not delivered as agreed, or that the defendant has already paid, or similar facts.
- 489 In Slovenia, contesting facts needs to be specific. If the party is reasonably expected to have any knowledge of the facts asserted by the other party, it will need to give reasons for contesting facts, to provide its version). The rule is applied with a degree of flexibility and not strictly. Often an implied contesting is accepted. In addition, the extent of the burden to specify reasons for contesting facts also depends on how specific and reasoned the allegation was in the first place. The allegation that 'all is contested unless specifically admitted' has no effect in law.
- 490 In Spain, there are qualifications to this principle of party submission whenever the lawmaker considers it important to seek the truth. For example, where the public interest is at stake (eg, family cases, consumer litigation), the State may have an interest to seek the truth. Thus, the law allows the court to introduce and consider evidence that, despite not having been explicitly alleged by the parties, may be found in the case file.
- 491 In Togo, the defendant is obligated to communicate in good time the factual grounds on which they base their claims, the evidence they produce, and the legal grounds they invoke, so that each party is able to organize its defence. On the merits during the pleadings, the questions the defendant raises must be relevant and related to the subject matter of the proceedings and must be asked in a moderate manner so as to observe the respect which the court deserved as well as the necessary courtesy towards the other party.

16.2 The Role of the Parties in the Introduction of Legal Grounds

- 492 Different legal systems may have different requirements concerning party responsibility for alleging the legal grounds for claims or defences. Generally, in the United States, parties, as masters of their pleadings, set forth their claims and defences at law and equity. Certain types of claims, such as compulsory counterclaims, must be asserted by defendants in an answer to the claimant's case in chief (USFRCP 13(a)). The defendant's failure to assert a compulsory counterclaim will result in a waiver of the defendant's ability so subsequently pursue that claim. The doctrines of *res judicata* or estoppel also may function to bar subsequent litigation of a compulsory counter claim. Normally, the court plays no role in defining applicable claims and defences.
- 493 In Belgium because the whole case file is at the disposal of the judge, a judge may raise any issue and put it to the parties when the law does not prohibit the judge from doing so and parties have not expressly agreed to exclude the issue.
- 494 In Norway, while the principle of *iura novit curia* applies, the parties must specify the legal grounds for the claim, eg, damages for breach of contract, but they need not specify the legal norm that the claim arises from. The grounds bind the court: it cannot decide other claims than those that have been invoked. For instance, if a party has only invoked damages for economic losses but not for pain and suffering as well, then the court can only decide on economic damages.
- 495 In Spain, the parties must specify legal grounds sustaining their claims and defences (Art 399 LEC; Art 405 LEC). The court must decide solely based on the legal grounds the parties assert (Art 218(1) LEC). The parties' legal grounds bind the court; when deciding the merits, the court must do so within the parties' asserted legal grounds and may not apply any legal ground that that at least one party has not asserted. The parties' duty to provide and exhaust all available legal grounds do not apply to litigants in person. Litigants in person can limit themselves to assert the fundamental facts supporting their claims and defences and, thus, they are not required to state any legal ground, let alone to exhaust all the legal grounds available (Art 437(2) LEC).
- 496 In Slovenia the principle of *iura novit curia* applies. The parties are not obliged to state legal grounds for their claims and defences. It is of course valuable for the parties and their lawyers to engage in a serious legal research and analysis as only in this manner can they identify the material facts. Certain limits to the rule of *iura novit curia* are imposed by the constitutional right to be heard. If the court intends to apply the legal rule which neither of the parties invoked and could not be reasonably foreseeable for a diligent party, the court has an obligation to draw the parties' attention to such rule and enable the parties to reflect.

16.3 The Powers of the Parties to Alter the Subject Matter of the Proceedings

- 497 In many legal systems, parties may alter or amend the subject matter of proceedings during the proceedings. Some legal systems, however, specify when the time at which the claims and defences in the litigation are fixed, and may not be amended or altered. In the United States, the procedural rules permit the liberal amendment of pleadings during the course of litigation, including up to and during trial (USFRCP 15(a), (b)). A special rule governs the amendment of pleadings to add new parties or claims after the statute of limitations have run on the parties' claims or defences (USFRCP 15(c)).
- 498 In Spain, the law provides a time when the dispute's subject matter is considered as determined or established, with no further possibilities of modification (*mutatuo libelli*). Once the litigation is determined, strict legal preclusions doctrines apply to subsequent attempts to relitigate claims and defences determined by the proceeding. This gives the parties certainty. The defendant becomes aware of the exact claims that to contest, and the claimant is informed of the defences that must be responded to. The court can focus on the subject-matter of its judgment without needing to decide unexpected new issues (Art 412(1) LEC). However, the claimant may assert new claims as long as the defendant has not yet submitted the defence statement and the time limit to submit such a statement has not yet elapsed (Art 401 LEC). Numerous highly detailed provisions govern the introduction of new facts and legal contentions by either party, and the grounds for doing so (Art 265, 270, 286, 338, 412, 426, 433, 435 and 460 LEC).

16.4 The Role of the Parties in the Introduction of Evidence

- 499 In some legal systems, the parties have the responsibility to introduce evidence in support of their claims or defences. In the United States, the parties will adduce evidence in support of claims or defences through investigation conducted through the informal and formal rules of discovery (USFRCP 26 – 36). The parties' introduction of evidentiary support of factual allegations is especially important during the summary judgment procedure, where the court will determine whether there are disputed fact questions that require resolution through a trial (USFRCP 56). Generally, courts in the United States do not conduct fact investigation.
- 500 In Brazil, the defendant must present all factual and legal allegations, presenting documental evidence and specifying the evidence the party intends to produce.
- 501 In Norway, the parties must introduce the evidence that supports the factual grounds that their claims and defences are based on. Although the court has a right to introduce new evidence, they do so only under exceptional circumstances, such as when it is very difficult for the parties to get access to the evidence or when the quality of the evidence could be diminished if the parties introduce it. An exception applies also for cases on compulsory care of minors and coercive measures in health and social services. In Norway, the parties must inform each other of important evidence if there is reason to

believe that the other party is not aware of the information. The form of the information is not regulated. The rule has two purposes. One is to avoid unnecessary litigation: cases that would have been resolved outside the courts had both parties had access to all information. The other purpose is to produce a shift from a doctrine of the parties not having to provide evidence against themselves to the adoption of a common law-style duty of disclosure. The latter purpose has been rather unsuccessful in that it has not resulted in a culture change, and courts sanction failure to comply with the first purpose of the rule. Failure to comply falling under the latter justification is often not sanctioned, and when sanctioned, the court simply draws negative inferences. Simultaneously with the duty to inform the opposite party of evidence, rules on access to such evidence were enacted.³⁸¹

- 502 In Spain, the parties have the responsibility to introduce evidence. They are expected to conduct themselves with due diligence to comply with their burden of proving all the facts upon which their claims and defences are grounded (*principio de aportación de parte*).
- 503 This requires a claimant to conduct a thorough private investigation of all the available evidence during the pre-action stage. The defendant must engage in this private investigation within the time limit that she is given to file the statement of defence. The parties then submit all written and tangible evidence with their initial briefs. At the pre-trial hearing, the parties are required to express their position on the evidence (Art 427 LEC). The submissions with the initial briefs do not suffice for the evidence to be considered formally offered by a party. The law requires that once the disputed points of fact and law have been clarified, every party makes a formal offer or *proposición de prueba* (proposal of evidence). If the action proceeds to trial, parties are expected to participate in taking of evidence at the trial. In their final arguments, every party is expected to elaborate on the evaluation of the evidence that has been admitted and taken before the court (Art 433(3) LEC).

16.5 The Role of the Court in Introducing New Evidence in Support of Factual Allegations

- 504 In some jurisdictions, courts may play an independent role in introducing evidence in support of allegations, but in other jurisdictions, this does not occur. For example, in the United States, courts rarely conduct fact investigations or introduce facts or evidence that have not been adduced by the parties. In extremely rare situations, judges have the power to appoint special masters to conduct investigations and to report to the judge (USFRCP 53). Judges also have the power to appoint their own expert witnesses, but again this power is used sparingly.

³⁸¹ For some details, cf M Strandberg, 'Standards of Evidence in Scandinavia' in L Tichý (ed), *Standard of Proof in Europe* (Mohr Siebeck 2019).

- 505 In Slovenia, the judge is bound by factual assertions and evidence the parties offer but has a right and a duty to stimulate the parties (with questions, hints and observations) to amend and clarify their assertions of facts. The judge also needs to warn the parties if they consider the evidence insufficient and warn them about the distribution of the burden of proof. The judge also needs to openly consult with the parties the legal viewpoints that the parties have neglected. By enabling the judge and the parties to define as soon as possible which issues are disputed — particularly which are relevant for adjudication — this permits the proceedings and trial to occur faster, more rationally, and economically for better access to justice. It enables the proceedings to quickly concentrate on the relevant points relevant which is extremely important for the rationalisation of the taking of evidence.
- 506 In Spain, the court may actively engage in the investigation and introduction of evidence only in exceptional circumstances (Art 216 LEC). This principle is linked to (1) the need to preserve the impartiality of the adjudicators (because allowing them to investigate the facts and the evidence of the case on their own motion will create an undue bias); (2) the expediency of saving public money (because it makes no sense to spend public money on investigating facts and evidence that the parties know better); and (3) the protection of the fundamental right to privacy. In cases where a public interest is at stake (eg, family cases, consumer litigation), the court may introduce and take into account elements of fact or evidence that, despite not having been explicitly alleged by the parties, may be found in the case file.
- 507 In Togo, the subject of the dispute is determined by the parties' respective claims. Therefore, the judge must decide on everything that is claimed and only on what is requested. It is for each party to prove in accordance with the law the facts necessary to support their claim. But the court also has the power to order *ex officio* all legally admissible measures of instruction. If one party has evidence, the judge may, at the request of the other party, order it to be produced, on threat of a fine. Moreover, by virtue of the contradictory principle, the court is obliged to submit to the parties in advance any evidence or law on which it intends to base its decision so that they can make their observations.

16.6 The Law Finding Function

- 508 Courts in different jurisdictions may play different roles in the law-finding function. In the United States, the judge determines the elements of claims and defences that the parties have asserted and will instruct the jury on the law. If the action is conducted solely by the judge, in a bench trial, the judge will adjudicate the dispute according to the judge's understanding of the applicable law.

16.7 The Parties' Powers to Early Termination of Proceedings Without Final Judgment

- 509 Consistent with the principle of party autonomy, parties have various means in different legal systems to voluntarily terminate or stay proceedings short of a resolution of the action and the application of *res judicata* principles. Examples of the ability to terminate an action include a claimant's relinquishment of rights or a defendant's acknowledgement of claims, settlement, withdrawal of claims, or the expiration of proceedings by the failure of the claimant to prosecute the litigation in a timely fashion.
- 510 In the United States, claimants may voluntarily dismiss their claims with or without a court order (USFRCP 41(a)). Parties may resolve their dispute through settlement, followed by the claimant voluntarily dismissing the claimant's claims. A court may dismiss a lawsuit for lack of prosecution at the expiration of an applicable period (USFRCP 41(b)).
- 511 In Belgium, parties may terminate proceedings by agreement confirmed by the court, withdrawal of the case, or inaction an *ex officio* deletion of the docket.
- 512 In Brazil, parties may settle or voluntarily dismiss the case (waiver). The case may also terminate due to a summary judgment or a final decision on the merits.
- 513 In Spain, claimants may terminate proceedings by various means. A claimant may end a proceeding by wilfully and explicitly relinquishing or waiving a substantive right for which the proceeding was initiated (*renuncia*) (Art 19(1) and 20(1) LEC; Art 6(2) CC). A defendant may end a proceeding by wilful, explicit acknowledgement of the claim, expressing the defendant's will that the court renders a judgment upholding the claim. A court may deny a defendant's acknowledgement if a statute prohibits it, it entails fraud, is contrary to general interest or public policy, or prejudices third parties' interests (Art 19(1) and 21(1) LEC). In addition, parties may agree to an admission of facts and the court is bound to consider the admitted facts as true.
- 514 In Spain, the parties also have the power to end a proceeding by a settlement; courts encourage parties to settle their disputes, especially during the pre-trial hearing (cf Art 414(1)(3), 415 and 428(2) LEC). The parties who settle may submit the settlement terms for judicial approval. The court shall approve the settlement terms unless the settlement is prohibited by statute, is contrary to general interest or to public policy, or prejudices the interests of third parties (Art 19(2) LEC). Settlements have a *res judicata* effect (Art 1816 CC).
- 515 In Germany, the claimant can withdraw the claim unilaterally until the oral hearing, and, after that, with the defendant's consent. The claimant also can terminate the proceedings by resigning their right which is the object of the claim. The defendant can terminate the proceedings by acknowledging the claim. The most important way of

terminating the court proceedings is an amicable settlement. If such a settlement is added to the court records, it even constitutes an enforcement title.

- 516 In Norway, parties may terminate proceedings by jointly withdrawing the case, and withdrawals are common. A litigation may be terminated by entering into an in-court settlement that will have the same status as a judgment. In addition, an action may be terminated by a party admitting the claim and the court ruling in the opposing party's favour. A case may be terminated by a party's absence, which results in a default judgment.
- 517 In Slovenia, the concept of party autonomy relates to the party's powers to freely dispose of their claims and defences by voluntary withdrawal, acknowledgement of the claim, and court settlement. The court is bound by the parties' factual and evidentiary basis for their claims and the relief sought. Voluntary dismissal of the claim, acknowledgement (admission) of the claim and in-court settlement result in termination of litigation and produce a *res iudicata* effect, preventing a relitigation regarding the same claim. Apart from the voluntary dismissal of a claim there also is the possibility of the withdrawal of a claim. The withdrawal, however, does not have the effect of *ne bis in idem*. In order to protect the legitimate interests of the defendant, his or her consent is necessary for the latter to occur. The admission of a claim refers to the claim as a whole. This needs to be differentiated from the admission of facts. The admission of facts has binding effects; the court is obliged to consider the facts which were admitted to be established as true, thus making evidence superfluous. However, even if a defendant admits all facts, the court still has the duty to check whether the claim is founded in substantive law. A party's (including the claimant's) failure to appear at the main hearing does not result in any immediate sanctions terminating the proceedings. By not filing the defence plea the defendant can voluntarily achieve an early termination of the proceedings as the judgment in default shall be issued.
- 518 In Spain, a claimant may withdraw its claim without *res judicata* effect (*desistimiento de la demanda*). Because a defendant has an interest in having the dispute resolved and is not subject to relitigation, the court must ensure that the termination respects the defendant's interests. A proceeding may be terminated without *res judicata* due to the lack of any procedural activity during a period of two years, provided the inactivity is because of the parties' actions or omissions (*caducidad de la instancia*) (Art 237, 238 and 240 LEC).
- 519 In Togo, the parties are free to terminate the proceedings before they are terminated by the effect of the judgment or by law (Art 34 CCP). This faculty can be used in several ways. The parties may in fact terminate the proceedings by amicable agreement or by the withdrawal of the claim or the renunciation of the claimant's rights which are the object of the proceedings. In the case of a withdrawal of the claim, the outcome of the proceedings may depend on the agreement of the defendant under certain conditions.

16.8 Stay of Proceedings

- 520 Most jurisdictions have rules or practices that permit a court to stay proceedings upon request by the parties. In some cases, stays are automatic, but in other cases, a grant of a stay is subject to judicial discretion. By court order, a judge may stop or suspend a proceeding temporarily or indefinitely. Common instances where the court may grant a stay of proceedings include an interlocutory appeal of the judge's order. In the United States, parties seeking a stay of proceedings on appeal must show that they (1) are likely to prevail on the merits of the appeal, (2) will suffer irreparable injury if the stay is denied, (3) other parties will not be substantially harmed, and (4) the public interest will be served by the court's grant of a stay. In the United States, some types of stays are governed by federal rules (USFRCP 62).
- 521 In Spain, the parties may agree on a stay of proceedings. This agreement is binding on the court (Art 19(4) and 179(2) LEC). The court may refuse the stay based on a provision that requires the parties to abide by the rules of good faith. Courts may dismiss any stay requests that entail an abuse of rights or fraud (Art 247 LEC). The parties normally will use the stay to negotiate and reach an amicable settlement of the dispute. For proceedings to resume, at least one party must make such a request. If such a request is never made and proceedings are stayed for more than two years, the expiry of proceedings will occur.

16.9 The Powers of the Parties to Create Their Own Procedural Rules

- 522 Generally, parties have limited powers to create their own procedural rules. In most jurisdictions, the rulemaking function is vested in the judicial or legislative branches of government. In the United States, the procedural rulemaking function is a shared power between the federal judiciary and Congress. The judiciary has a statutory delegated power to create uniform rules of procedure for the federal courts (28 USC §§ 2071, 2072).
- 523 However, in some jurisdictions, parties have leeway to modify certain procedural requirements or rules, particularly relating to deadlines or the manner in which proceedings will be conducted. In many jurisdictions, parties may by agreement stipulate to the modification or agreement on procedural matters (USFRCP 29).
- 524 In Brazil, parties cannot choose the procedural rules but may request to adapt the rules to the case. When the case may be solved by auto composition, the parties may stipulate changes in the procedure, but the judges shall control, *ex officio* or upon request, the validity of the agreements.
- 525 In Belgium, the framework provided by the Judicial Code is mandatory. However, the code leaves liberty to parties to determine the progress of the procedure, at least in the preparatory phase. Parties who are in agreement can determine to a large extent the

progress of the procedure before the hearing. They can apply to extend procedural deadlines, they can decide on the number of conclusions to be exchanged and determine the day of the hearing. Only when parties disagree or do not ask for anything, will the judge decide and bind the parties, unless the parties apply together for a change of the judge's timetable (Art 747, 748 and 750 JC). Parties can also apply jointly to have a completely written procedure (Art 755 JC). At a judge's proposal, parties can agree to have the oral hearing replaced by an interactive debate between the judge and the parties (Art 756ter JC).

- 526 In Germany parties are, for example, allowed to exclude the third instance. Parties can ask the court to conduct written proceedings; the court is, however, not bound by the common request of the parties. The new international commercial courts, which have just been established, might give more room for party autonomy.
- 527 In Norway, parties in theory do not have a right to choose the rules governing the proceedings, but in practice, this is not the case. Many rules are flexible and give the judge the authority to deviate from the rules after consultation with the parties. In addition, a judge is obliged to comply with parties' joint requests unless weighty reasons suggest otherwise. Examples include deviation from the rules governing partly or fully written proceedings; mediation and settlement efforts where there is more leeway when both parties agree or request something; the joinder or severing cases; amendments by mutual agreement; remote hearings; appointment of experts; written instead of oral evidence; costs; and waiver right to appeal.
- 528 In Slovenia, the concept of party autonomy does not embrace the parties' powers to frame the course of procedure. According to the principle of legality, the court is bound by the course of procedure set in the law, unless explicitly provided that the parties may diverge from it (for example, a jurisdictional agreement). If the parties want to make their own procedure, they may wish to choose to go to arbitration. The Supreme Court has, for example, stated that the parties' agreement that the claimant will withdraw its claim, has no immediate procedural effect. Courts also will not honour parties' agreements for limiting the number of witnesses or excluding witnesses.
- 529 In Togo, litigants do not have the right to determine their own procedural rules, because the rules of procedure are of public order.

ABBREVIATIONS AND ACRONYMS

Abbreviations which are not contained in this list are based on the **Cardiff index of legal abbreviations**.

ACHPR	African Court on Human and Peoples' Rights
ADR	Alternative dispute resolution
ALI	American Law Institute
Art	Article/Articles
ATCCP	Code of Civil Procedure (Austria)
BGH	<i>Bundesgerichtshof</i> (Federal Court of Justice) [Germany]
BID	<i>Banco Interamericano de Desarrollo</i> (Inter-American Development Bank)
CCP	Code of Civil Procedure
CC	<i>Código Civil</i> (Civil Code) (Spain)
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
CPA	Civil Procedure Act (Slovenia)
DA	The Dispute Act (Norway)
DES	Synthetic Drug Diethylstilbestrol
EBRD	European Bank for Reconstruction and Development
edn	edition/editions
ed	editor/editors
etc	et cetera
ECtHR	European Court of Human Rights
ECLI	European Case Law Identifier
eg	<i>exempli gratia</i> (for example)
ELI	European Law Institute
EU	European Union
EUR	Euro
FCCP	Code of Civil Procedure (France)
ff	following
fn	footnote (external, ie, in other chapters or in citations)
GCCP	Code of Civil Procedure (Germany)
GVG	<i>Gerichtsverfassungsgesetz</i> (Courts Constitution Act) (Germany)
ibid	<i>ibidem</i> (in the same place)
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)
JC	Judicial Code (Belgium)
JCCP	Code of Civil Procedure (Japan)
JPY	Japanese Yen
LAJG	<i>Ley de Asistencia Jurídica Gratuita</i> (Free Legal Aid Act) (Spain)
LEC	Ley de Enjuiciamiento Civil
n	footnote (internal, ie, within the same chapter)
no	number/numbers
OHADA	Organization for the harmonisation of Business Law in Africa
para	paragraph/paragraphs
PPO	Public Prosecution Office (Spain)
pt	part
Sec	Section/Sections
SCC	Supreme Court Canada
SME	small and medium-sized enterprise
supp	supplement/supplements
trans/tr	translated, translation/translator
UK	United Kingdom
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
USC	United States Code (US)
USD	United States Dollar
USFRCP	Federal Rules of Civil Procedure (US)
v	versus
vol	volume/volumes
WB	World Bank
ZKM	<i>Zeitschrift für Konfliktmanagement</i>

LEGISLATION

International/Supranational

African Charter on Human and Peoples' Rights 1981

Agreement on the European Economic Area, OJ No L 1, 3.1.1994, p. 3 (EU)

American Convention on Human Rights 1969

Arab Charter on Human Rights 2004

Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ L 339, 21.12.2007, p. 3-41 (EU)

Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters 1965 (HCCH)

Council Directive on unfair contract terms in consumer contracts, 93/13/EEC of 5 April 1993 (EU)

EU Charter of Fundamental Rights 2000

European Convention on Human Rights 1950

International Covenant on Civil and Political Rights 1966

Proposal for a Directive of the European Parliament and of the Council on protecting persons who engage in public participation from manifestly unfounded or abusive court proceedings ("Strategic lawsuits against public participation"), COM(2022) 177 final (EU)

Regulation establishing a European Small Claims Procedure, 861/2007 of 11 July 2007 (EU)

Regulation on cooperation between the courts of the Member States in the taking of civil or commercial matters, 2020/1783 of 25 November 2020 (EU)

Regulation on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast), 1215/2012 of 12 December 2012 (EU)

Statute of the Arab Court of Human Rights 2014

Universal Declaration of Human Rights 1948

National

Act on the Expediting of Trials 2003 (Japan)

Act on Land and Building Leases 1991 (Japan)

Belgian Judicial Code (see *Gerechtigd Wetboek*)

Burgerlijk Wetboek, Dutch Civil Code (the Netherlands)

Civil Provisional Remedies Act 1989 (Japan)

Code de l'organisation judiciaire (French Courts Constitution Act) (France)

Code de procédure civile (Code of Civil Procedure) (France)

Code of Judicial Procedure (Finland)

Código Civil Español (Spanish Civil Code) (Spain)

Código de Processo Civil Brasileiro 2015 (Brazilian Code of Civil Procedure) (Brazil)

Constitución Española 1978 (The Spanish Constitution) (Spain)

Constituição da República Federativa do Brasil (The Constitution of the Federative Republic of Brazil) (Brazil)

De Belgische Grondwet, La Constitution Belge (The Belgian Constitution) (Belgium)

Decrét n° 75-1123 du 5 décembre 1975 instituant un nouveau code de procédure civile 1975 (Decree establishing a new code of civil procedure) (France)

Decrét n° 2010-1165 du 1er octobre 2010 relatif à la conciliation et à la procédure orale en matière civile, commerciale et sociale 2010 (Decree dealing with conciliation and oral proceedings in civil, commercial and social matters) (France)

Dutch Code of Civil Procedure (Netherlands)

Federal Rules of Civil Procedure (USA)

Gerechtelijk Wetboek, Code Judiciaire (Belgian Judicial Code) (Belgium)

Gerichtsverfassungsgesetz (Courts Constitution Act) (Germany)

Grundgesetz für die Bundesrepublik Deutschland (Constitution of the Federal Republic of Germany) (Germany)

Iran's Code of Civil Procedure (Iran)

Japanese Code of Civil Procedure 1996 (Japan)

Kongeriket Norges Grunnlov (The Constitution of the Kingdom of Norway) (Norway)

Ley de Asistencia Jurídica Gratuita 1996 (Free Legal Aid Act) (Spain)

Ley de Enjuiciamiento Civil 2000 (Spanish Code of Civil Procedure) (Spain)

Ley de Patentes 2015 (Law on Patents) (Spain)

Ley de Secretos Empresariales 2019 (Law on Trade Secrets) (Spain)

Ley de Seguridad Privada 2014 (Law on Private Security) (Spain)

Ley Orgánica del Poder Judicial (Organic Law on the Judiciary) (Spain)

Ley reguladora del uso de las tecnologías de la información y la comunicación en la Administración de Justicia 2011 (Law regulating the use of information and communication technologies in the Administration of Justice) (Spain)

Loi n° 2007-1787 du 20 décembre 2007 relative à la simplification du droit (1) 2007 (Law relating to the simplification of law) (France)

Loi n° 2020-002 du 7 janvier 2020 portant modification de la loi n° 2018-028 du 10 decembre 2018 instituant les juridictions commerciales en republique togolaise 2020 (Law on amending the law on instituting commercial restrictions) (Togo)

Lov om mekling og rettergang I sivile tvister (tvisteloven) 2005 (Act relating to the mediation and procedure in civil disputes (The Dispute Act)) (Norway)

Lov om rettsgebyr (rettsgebyrloven) 1982 (Court Fees Act) (Norway)

Northern Territory of Australia Supreme Court Rules 1987 (Australia)

Patent Act 1959 (Japan)

Personal Status Litigation Act 2003 (Japan)

Real Decreto por el que aprueba el Reglamento de Seguridad Privada 1994 (Law which approves the regulation of private security) (Spain)

Rechtsanwaltsvergütungsgesetz (Germany – RVG – Law on the lawyers' fees)

Rules of Court 2021 (Singapore)

Slovenian Civil Procedure Act 1999 (Slovenia)

The Act on Alternative Dispute Resolution in Judicial Matters 2009 (Slovenia)

The Civil Procedure Act (Serbia)

The Civil Procedure Rules 1998 (England)

The Constitution of Afghanistan 2004 (Afghanistan)

The Constitution of Japan (Japan)

The Constitution of the Federal Republic of Nigeria 1999 (Nigeria)

The Constitution of the Islamic Republic of Iran 1979 (Iran)

The Constitution of the Kingdom of the Netherlands (Netherlands)

The Constitution of the Republic of Ghana 1992 (Ghana)

The Constitution of the Republic of Slovenia (Slovenia)

The Constitution of the Socialist Republic of Vietnam (Vietnam)

The Constitution of the United States of America (USA)

The Swedish Code of Judicial Procedure 1942 (Sweden)

Togo Code de procédure civile 2021 (Code of Civil Procedure) (Togo)

Unfair Competition Prevention Act 1993 (Japan)

United States Code (USA)

Zivilprozessordnung (Austrian Code of Civil Procedure) (Austria)

Zivilprozessordnung (German Code of Civil Procedure) (Germany)

Zivilprozessordnung (Swiss Code of Civil Procedure) (Switzerland)

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CEPEJ(2018)20R EUROPEAN COMMISSION FOR THE EFFICIENCY OF JUSTICE (CEPEJ) REVISED SATURN GUIDELINES FOR JUDICIAL TIME MANAGEMENT (3rd revision) as adopted at the 31th plenary meeting of the CEPEJ Strasbourg, 3 and 4 December 2018.

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National

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Chambers v. NASCO, Inc (Supreme Court, United States), Judgment 6 June 1991 [501 U.S. 32 (1991)].

Lujan v. Defenders of Wildlife (Supreme Court, United States), Judgment 12 June 1992 [504 U.S. 555 (1992)].

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