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CONF/JUGES (2003) PROCEEDINGS

1st EUROPEAN CONFERENCE OF JUDGES

"Early settlement of disputes and the role of judges"

organised by the Council of Europe in co-operation with the Consultative Council of European Judges (CCJE)

24 and 25 November 2003
Strasbourg

PROCEEDINGS

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[1] This text has been included for information only as the Conference has not dealt with the early settlement of criminal cases.

FOREWORD

The 1st European Conference of Judges, organised by the Council of Europe in co-operation with the Consultative Council of European Judges (CCJE), a consultative body of the Committee of Ministers of the Council of Europe, was held in Strasbourg on 24 and 25 November 2003 on the theme of "Early settlement of disputes and the role of judges".

The aim of the Conference was to identify means available to judges to assist parties to reach an early settlement of disputes. The Conference did not deal with the early settlement of criminal cases.

The following topics were considered:

- Procedures to avoid litigation and procedures to make it effective, including provisional measures aimed at protecting parties during litigation;
- Protection of the parties' cases and evidence, time limits, accelerated and summary procedures and interlocutory judgments;
- Legislative and judicial incentives to early resolution;
- Alternative dispute resolution (ADR / mediation)
- Case management – a proactive and innovative but impartial judiciary

This text contains in particular the opening speeches, the reports and papers presented by the Rapporteurs and certain participants in the Conference, the conclusions adopted by the Conference as well as the programme and the list of participants.

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PROGRAMME

Monday 24 November 2003

08.30 onwards Registration

09.30 Opening of the Conference

Welcoming words:
• Mr Guy DE VEL, Director General of Legal Affairs, Council of Europe
Overview:
• The Right Honourable Lord Justice MANCE, Chair of the Conference, Chair of the Consultative Council of European Judges (CCJE), Court of Appeal of England and Wales, United Kingdom

I. INTRODUCTORY SESSION

10.00 Introduction: Mr Alain LACABARATS, Chair of the Introductory Session, Vice Chair of the CCJE, President of a division of the Court of Appeal, Paris, France

10.05 The need for judges to assist parties to reach an early settlement of disputes (with particular reference to the experience of the Economic Courts of the Russian Federation)

Report: Mr Veniamin YAKOVLEV, President of the Supreme Economic Court of the Russian Federation

10.25 Interveners on the experience of their courts: (maximum 5 minutes each interverner)

10.40 Discussions

10.41 11.00 Break

II. PROCEDURES AND TECHNIQUES TO ENCOURAGE EARLY SETTLEMENT OF DISPUTES

a. Procedures to avoid litigation and procedures to make it effective, including provisional measures protecting parties during litigation

11.30 Introduction: Ms Louise OTIS, Chair of the topic, Justice, Court of Appeal, Quebec, Canada

11.35 Report: Mr Alain LACABARATS, Vice-Chair of the Consultative Council of European Judges (CCJE), President of a division of the Court of Appeal, Paris, France

11.55 Interveners on the topic (maximum 5 minutes each intervener)

12.10 Discussions

12.30 Lunch

b. Protection of the parties' cases and evidence, time limits, accelerated and summary procedures and interlocutory judgments

14.15 Introduction: Mr Peter LAMPE, Chair of the topic, member of the CCJE, President of the District Court of Maastricht, Netherlands

14.20 First report: Mr Raffaele SABATO, member of the CCJE, Judge, Court of Naples, Italy

14.40 Interveners on the first report (maximum 5 minutes each intervener)

14.55 Discussions

15.15 Second report: Mr Lars OFTEDAL BROCH, member of the CCJE, Justice, Supreme Court of Justice, Norway

15.35 Interveners on the second report (maximum 5 minutes each intervener)

15.50 Discussions

16.10 Break

c. Legislative and judicial incentives to early resolution

16.30 Introduction: Mr Lars OFTEDAL BROCH, Chair of the topic, member of the CCJE, Judge, Supreme Court of Justice, Norway

16.35 Report: Mr Aleš ZALAR, member of the CCJE, President of the District Court of Ljubljana, Slovenia

16.55 Interveners on the topic (maximum 5 minutes each intervener)

17.15 Discussions

17.45 Reception in the Restaurant of the Palais de l'Europe

Tuesday 25 November 2003

d. Alternative dispute resolution (ADR / mediation)

9.30 Introduction: Mr Raffaele SABATO, Chair of the topic, member of the CCJE, Judge, Court of Naples, Italy

9.35 Report: Ms Louise OTIS, Justice, Court of Appeal, Quebec, Canada

9.55 Interveners on the topic (maximum 5 minutes each intervener: Mr Francesco BENIGNI, Italy, Mr Giuseppe DE PALO, Italy and Mr Jean A. MIRIMANOFF, Switzerland

10.10 Discussions

10.30 Break

e. Case management – a proactive and innovative but impartial judiciary

11.00 Introduction: Mr Aleš ZALAR, Chair of the topic, member of the CCJE, President of the District Court of Ljubljana, Slovenia

11.05 Report: Mr Peter LAMPE, member of the CCJE, President of the District Court of Maastricht, Netherlands

11.25 Interveners on the topic (maximum 5 minutes each intervener)

11.40 Discussions

12.00 Lunch

III. CLOSING SESSION

14.30 Chair: Mr Veniamin YAKOVLEV, Chair of the closing session, President of the Supreme Economic Court of the Russian Federation

14.40 Conclusions of the Chair of the Conference: The Right Honourable Lord Justice MANCE, Chair of the CCJE, Court of Appeal of England and Wales, United Kingdom

15.00 Closing of the Conference

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OPENING SPEECHES

OPENING SPEECH

by

Guy DE VEL
Director General of Legal Affairs,
Council of Europe

Lord Justice Mance,
Ladies and Gentlemen,

It is both a privilege and an honour for me to open this European Conference, aimed at an authority which fully embodies the humanistic ethic, i.e. the judiciary, and dealing with alternative dispute resolution procedures.

I am especially pleased to welcome the many participants from Council of Europe member states and other states that have observer status with our Organisation.

I would like to thank the Rapporteurs for participating, and for the valuable and illuminating written contributions which they have sent us and which are available to all the participants.

For some years now, the Council of Europe has been contributing to the development of a European legal area by formulating standards which are chiefly designed to harmonise and modernise its member states' legal systems – in other words, to establish and strengthen the rule of law in Europe.

We have every reason to be proud of the unique *corpus juris* we have painstakingly and methodically put together in this way. In co-operating with our member states, we urge them to look to it for inspiration in bringing their national laws into line with the Council's principles.

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To make the rule of law a reality, we are focusing our efforts on making courts more efficient and on expediting judicial proceedings.

The smooth functioning of judicial systems, as a vital element in the rule of law, was the main issue discussed by the European Ministers of Justice at their Conference in Chisinau in 1999. They proposed that the Committee of Ministers adopt a framework global action plan to strengthen the role of judges in Europe, and set up a Consultative Council of European Judges (CCJE).

And so, in 2000 - for the first time ever – a body consisting solely of judges was established within an international organisation. The CCJE advises the Committee of Ministers and prepares opinions for it on general questions concerning the training, status, powers and performance of judges.

The CCJE has held three meetings since it was founded, and has adopted: - Opinion No. 1 (2001) on standards concerning the independence of the judiciary and the irremovability of judges, Opinion No. 2 (2001) on the funding and management of courts with reference to the efficiency of the judiciary and to Article 6 of the European Convention on Human Rights, and Opinion No. 3 (2002) on the principles and rules governing judges' professional conduct, in particular ethics.

It will be holding its 4th meeting immediately after this conference, in Strasbourg from 26 to 28 November 2003. In keeping with its terms of reference, it will be formulating an opinion on appropriate initial and in-service training for judges at national and European levels. This follows logically on previous consultations carried out at the Committee of Ministers' request, which were generally concerned with professional requirements for judges, and ways of consolidating their independence and impartiality.

Questions relating to the training of judges are the particular focus of the European information exchange network between persons and bodies in charge of the training of judges (the Lisbon Network), which has just held its 6th plenary meeting in Bucharest. At that meeting, the network suggested that it should be restructured to link its members more closely, and make a greater contribution to the training of judges.

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Discussions at the present conference should also take account of the activities of other Council of Europe bodies, such as the European Committee on Legal Co-operation and the European Commission for the Efficiency of Justice.

Both these bodies are working to improve the functioning of judicial systems and consolidate recourse to alternative ways of settling disputes.

The European Committee on Legal Co-operation is the standard-setting body in this area. Its work led to the adoption by the Committee of Ministers of the four Recommendations on alternative dispute resolution procedures and mediation, which I shall be mentioning later.

The European Commission for the Efficiency of Justice assesses member states' judicial systems, and works to improve relations between the public and the courts, and encourage recourse to alternative procedures.

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This conference on "early settlement of disputes and the role of judges" is a CCJE initiative. Its aim is to discuss the commonest alternative procedure – mediation - and consider how judges can persuade the parties to disputes to seek consensus-based solutions.

As part of its work on legal themes, the Council of Europe has for several years been looking closely at mediation as a means of social pacification. The four recommendations which it has adopted in this field mark an important change in its

approach. They encourage member states to introduce, promote and reinforce this peaceful means of solving disputes:

- Recommendation N° R (98)1 on family mediation
- Recommendation N° R (99)19 concerning mediation in penal matters
- Recommendation N° R (2001)9 on alternatives to litigation between administrative authorities and private parties.
- Recommendation N° R (2002)10 on mediation in civil matters.

Against the background of broader social change, mediation reflects a new conception of relations in society. Many countries first used it in pilot project form. After an initial period of wide-ranging and multifarious experiment, alternative dispute resolution procedures are becoming increasingly widespread and are being written into national law.

Experience shows "*that there is no better justice than the justice the parties accord themselves"* (François Ost) - although traditional procedure remains as a last resort if attempts to agree on a settlement break down.

Although the four Recommendations I have mentioned reflect obvious progress towards the adoption of European standards in this field, we still need to consider the role of one of the main protagonists in the mediation process - the judge. Judges uphold the law, but they also uphold judicial equity, and they should – before exercising their decision-making powers – recall the parties to a sense of their own responsibilities, help them to communicate and encourage them to seek a negotiated settlement.

It is generally agreed that the role of judges has changed radically, and that this affects their status and working methods, as well as the procedures they follow. As conceived of at present, judicial authority is exercised by specialists who apply the rules they consider most conducive to a satisfactory outcome. In other words, justice is something which evolves, taking the form of the solution best suited to produce a desired result.

In these circumstances, law becomes "*a management technique designed to promote the community's optimum economic and social development*" (François Ost), and the judge the only authority with a full understanding of the spirit of the law. This marks the transition from imposed to negotiated law, with compromise as a possibility in the legal systems of modern democracies.

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Ladies and Gentlemen,

I would like to say again how much I welcome the holding of this highly interesting and important conference – the first European Conference of Judges – for the eminently useful purpose of looking at ways in which judges can secure an early settlement of disputes referred to them, and considering the links between normal judicial procedure and judicial or non-judicial mediation.

I believe that your discussions will help the Council of Europe to progress in its future work on this question, and I wish you every success for your meeting.

Thank you for your kind attention.

OVERVIEW

by

The Right Honourable Lord Justice MANCE
Court of Appeal of England and Wales, United Kingdom
Chair of the Conference, Chair of the Consultative
Council of European Judges (CCJE)

1. During the 1980s the publicity brochure issued by a set of barristers' chambers in London showed a barrister with a lion's face sitting behind a desk and exclaiming to a client: "Settle!? What's the fun of that?" Nowadays, many barristers are also accredited mediators. Within a short space of time, the legal professions and the public have become conscious that litigation can no longer be regarded as an interesting occupation, which provides income for lawyers. It is an expensive, time-consuming and often highly stressful occupation for clients, and it is also very costly for governments, who have the social obligation to provide a viable and efficient system of justice, but who have to maintain often elderly buildings, to support and modernise their facilities and to pay judges and staff. So litigants and governments alike have begun to insist on changes and on value for money.

2. It is the purpose of this conference to examine in this light the role of judges in the early settlement of disputes. To some, this title may suggest a conference focused on that fashionable topic, mediation. And it does include it - but only in our second day. When mediation is ordered or encouraged, the matter passes out of the immediate control of judges. The real purpose of this conference is to show how judges and judicial procedures can in the course of litigation encourage settlement. Judges administer court procedures, and often they are in a position to change them, or to influence or encourage their change. So it is also of value not just to examine ways in which judges may assist early settlement within the confines of existing national procedures, but to examine the procedures and rules developed in particular countries – to see whether they might usefully be adapted to other countries. Each of us will of course be speaking about what we know about – which will mostly be our own system. But I hope that we will interest ourselves in each other's experience and procedures, with a view to gaining ideas from them.

3. In this brief introduction, I propose to summarise some of the techniques which have been developed in England to encourage early settlement. They start even before litigation is begun. The code-name under which most of them fall is Woolf – Lord Woolf, our present Chief Justice, having promoted and given his name to a new civil procedural code ("CPR").

4. *The overriding objective:* This new code, the CPR, was implemented in England and Wales on 26 April 1999 with the overriding objective of "enabling the court to deal with cases justly" (CPR1.1(1)). But that uncontentious aim was spelled out by definition (CPR1.1(2)) to include, so far as practicable:

"(a) ensuring that the parties are on an equal footing;

(b) saving expense;

(c) dealing with the case in ways which are proportionate-

(i) to the amount of money involved;

(ii) to the importance of the case;

(iii) to the complexity of the case;

(iv) to the financial position of each party;

(d) ensuring that it is dealt with expeditiously and fairly; and

(e) allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases."

5. Of course, some may be suspicious of references to economic considerations in the judicial context. The Consultative Council of European Judges has itself commented in its second opinion that "unfortunately economic aspects may dominate discussions concerning important structural changes of the judiciary and its efficiency", and that "the courts as one essential arm of the State have a strong claim on resources". But it also observed that no country "can ignore its overall financial capability in deciding what level of services it can afford". The CPR's references to the need to deal with cases proportionately, allocating an appropriate share of the courts' resources, reflect an undeniable fact. Courts have to work as best they can within existing financial constraints, however much they would wish and are seeking more money. It is unfair not only to the particular litigants, but also to other litigants if one piece of litigation is allowed to develop out of all proportion and without regard to such financial constraints.

6. It has to be said that the Woolf reforms have probably been more successful in eliminating delays in the progress of civil litigation than in reducing cost. In part, this was the result of intentional 'front-loading' of costs. If parties were intent on litigating, then they should prepare properly and pursue the litigation diligently. That costs money. It was hoped that this would bring home to parties the desirability of considering settlement at an early stage. In part, it is also because it is extremely difficult to control costs under a system like the English, where in the larger cases there is full costs recovery, in the sense that the loser pays all the costs that the winner reasonably incurs. (In smaller cases, we have introduced a fixed costs system, adopting therefore a system more like the German.)

7. *The duty to cooperate:* The Woolf rules go on to impose on the parties to litigation a requirement to help the court to further the overriding objective. Their complexity was ameliorated through a root and branch re-writing in simple, easy to understand English. The use of Latin phrases was discouraged.

However, it has to be said that, in my experience, Latin phrases (like prima facie, ratio decidendi, etc.) remain part of the European legal linqua franca, so once again England is perhaps not fully in accord with the rest of the continent!

8. *Case management:* CPR1.4 also state the general principle of case management in broad terms, as well as listing detailed powers. The general principle reads thus:

> "1.4(1)The court must further the overriding objective by actively managing cases.
>
> (2) Active case management includes –
>
> (a) encouraging the parties to co-operate with each other in the conduct of the proceedings;
>
> (b) identifying the issues at an early stage;
>
> (c) deciding promptly which issues need full investigation and trial and accordingly disposing summarily of the others;
>
> (d) deciding the order in which issues are to be resolved;
>
> (e) encouraging the parties to use an alternative dispute resolutionprocedure if the court considers that appropriate and facilitating the use of such procedure;
>
> (f) helping the parties to settle the whole or part of the case;
>
> (g) fixing timetables or otherwise controlling the progress of the case;
>
> (h) considering whether the likely benefits of taking a particular step justify the cost of taking it;
>
> (i) dealing with as many aspects of the case as it can on the same occasion;
>
> (j) dealing with the case without the parties needing to attend at court;
>
> (k) making use of technology; and
>
> (l) giving directions to ensure that the trial of a case proceeds quickly and efficiently."

So the rules state clearly that the court's role in relation to settlement exists both in encouraging alternative dispute resolution (ADR) and, quite independently, in "helping the parties to settle the whole or part of the case".

9. The Woolf rules allow English judges to deal with matters on paper, or for that matter by electronic communication, to a greater degree than previously. But I would like to say a word about the traditional English approach, which has been to decide matters on the basis of oral argument *and* to do so immediately by an *ex tempore* oral judgment (later of course transcribed from the tape recording or transcript). To some European eyes, the extent to which English judges intervene and participate in the oral debate with advocates is surprising, and to many the idea of an impromptu oral judgment is both unfamiliar and perhaps even frightening. I have to say that, to newly appointed judges, it can also be worrying. But the oral tradition is bred into English advocates who becomes judges, and I have to say that the impromptu oral judgment is a remarkable instrument for making oral hearings relevant and focuseed, for dealing with a case and the arguments raised while they are fresh in the mind and for despatching business with expedition. The tradition goes back to a great English Chief Justice, Lord Mansfield, a great procedural reformer who dragged English common law out of the mists of the Middle Ages and made it fit for the newly expanding commercial empire. On the very first day of his 32 years in office in 1756, he introduced it in order to start to clear a backlog of unresolved cases. It has survived to this day. I would commend to you the idea that judges can, without losing their impartiality, and should, where relevant and may be helpful, express thoughts they have and difficulties they may perceive in the course of oral submissions. I would also commend to you for consideration the concept of the impromptu oral judgment.

10. I will summarise the other main features of English litigation which encourage early settlement in chronological order.

11. *Pre-action protocols.* Pre-action protocols are documents giving guidance as to steps which should be taken before proceedings are even commenced. Their purpose is to achieve early identification of the issues, by exchange of information and evidence, which may enable parties to avoid litigation and reach a settlement. If settlement cannot be reached they ensure that parties are in a much better position to respond to timetables imposed once proceedings are issued.

12. The most significant areas where pre-action protocols have been formulated are clinical negligence and personal injury. But there are also protocols for construction and engineering disputes, for professional negligence andf for judicial review. All such protocols are formulated by co-operation between the representatives of those interested on both sides of such disputes, e.g. insurers, lawyers and interested associations or bodies. Of course there must be some sanction, if a pre-action protocol is not observed. Otherwise, parties could and would simply ignore them. The sanctions which the court may impose include an order that a party who failed to follow a pre-action protocol should pay the costs of the proceedings *even if successful*; and an order that a successful party be deprived of interest, or, where the party at fault is an unsuccessful defendant, an award of interest at an enhanced rate.

13. Further, the practice direction governing pre-action protocols makes clear that even in cases not covered by any approved protocol, the court will expect the parties to act reasonably in exchanging information and documents relevant to the claim and generally in trying to avoid the necessity for litigation.

14. *Pre-action information.* The CPR also aims to avoid unnecessary litigation, by enabling parties to obtain information which will show whether it is worthwhile beginning litigation, as well as to preserve evidence for use if litigation is begun. Under CPR25.1(1)(i) and 31.16, the court may, before litigation is begun, order disclosure of documents by a person likely to be a party to such proceedings, where desirable, amongst other reasons, in order to assist the dispute to be resolved without proceedings.

15. *Provisional measures.* Some litigants profess only to be interested in the principle involved in their case. But most are interested in an efficient remedy. An efficient system of provisional remedies can act as a very strong incentive to settle. To take two examples:

> (i) The success or failure of an application for an injunction to restrain a breach of contract or other wrong-doing pending trial will often give a very good indication of the likely ultimate result of the litigation at trial, and so lead to early settlement.
>
> (ii) When I started practice, it was a truism of English procedure that a party had no right to attach another party's asset until he had obtained a final judgment in his favour, unless he had a proprietary claim to the asset. One of Lord Denning's greatest innovations was the development, as judge-made law, of new procedures, whereby a party could be restrained from disposing of or dealing with his or its assets, if there was a risk that they would otherwise be hidden or dissipated before the litigation concluded. This relief was formerly granted by *Mareva* injunction (now re-named a freezing order). Such relief can be granted in advance of the commencement of litigation. Because its normal basis is a risk of concealment or dissipation of assets, it is normally granted in the first instance in the absence of and without notice to the party whose assets are affected. Once granted, notice is given not only to him, but to any known or likely holders of his assets, such as his bank. So, from being the jurisdiction which offered no such facility, England has become a jurisdiction to which litigants in *foreign* litigation sometimes resort simply to obtain interim protection. Because the relief operates *in personam* (if I may be forgiven the Latin), it can be granted in relation either to specific assets or all a person's assets, known *or unknown*, inside or outside the English jurisdiction. It can be combined with an order that he disclose on oath what such assets are and where.

16. *The commencement of litigation.* A novel feature of the case management process is the allocation questionnaire which all parties are required to complete at the outset of litigation. On the basis of this questionnaire the courts will allocate the case to one of three tracks. Each of the tracks requires a different degree of case management. In the most general terms the pace at

which a case must progress to trial and the degree to which it will be subjected to hands-on judicial management increases as one moves from the small claims to the fast track and from the fast track to the 'multi-track'. In definitional terms the divisions between the different tracks are essentially (though not wholly) financial. The questionnaire therefore requires the parties to provide detailed preliminary details on the action which include the following:

(i) whether they wish to have a one month stay to attempt to settle the case;
(ii) whether they consider that the case is most suitable for the small claims track, fast track or multi-track or for a specialist list; whether they have complied with any pre-action protocol;
(iii) whether they intend to issue an application for summary judgment;
(iv) whether they intend to apply for the court's permission to issue a claim against someone not yet a party to the proceedings;
(v) what witnesses of fact they intend to call at the hearing and which facts they will deal with;
(vi) whether there is any reason why the case needs to be heard at a particular court;
(vii) the estimated length of trial and whether the parties intend to be represented by solicitors or counsel;
(viii) an estimate of costs (both legal and overall costs including disbursements).

17. *Identification and verification of parties' cases.* No doubt it is a feature of all or almost all legal systems that parties should have to exchange details of their respective cases. But there is a risk that one or other party may seek to use such exchanges to obfuscate or delay, rather than to promote transparency and insight. Importance attaches to (a) a strict time-table for exchanges, (b) a limit on the number of exchanges and (c) rules regulating their content and (d) the extent to which a party is required to commit himself or itself to such content (so that any discrepancy could later be held against him or it). The modern English requirement is that any claim should state the facts relied on "concisely" and that any defence should state which of the allegations in the claim he denies, which he admits and which he is unable to admit or deny, but requires the claimant to prove; further, where he denies any allegation, he must state his reason for doing so; where he intends to put forward a different version of the facts he must state his own version; and, where he fails to deal with an allegation, he shall be taken to admit it. The sanction attaching to failure to file a proper statement of case is that the claim or defence (if any) may be struck out and judgment entered in default of defence.

18. *Summary judgments* (CPR24). The early definition of the real issues between the parties is often a prelude to an application for summary judgment[2]. Summary judgment is defined as " a procedure by which the court may decide a claim or a particular issue without a trial". It thus covers both points of fact and points of law. Under the new rules an application can be made by either the claimant or the defendant. The question of summary judgment can also be raised by the court though the court will of course hear the parties before entering any judgment. Unless the court gives permission a claimant cannot apply for summary judgment until a defendant has responded to the claim by filing either an acknowledgement of service or a defence. If the defendant does neither of these then a default judgment may be applied for. The court may give summary judgment against a claimant or defendant on the whole of a claim or on a particular issue if it considers that he has no real prospect of succeeding on (or, in the case of a defendant, of defending) the claim or issue and there is no other reason why the case or issue should be disposed of at trial.

19. *"Interlocutory" judgments.* One case management power has proved of very considerable importance in assisting the early settlement of larger litigation. That is the power to "direct a separate trial of any issue" (CPR 3.1(2)(i)). English litigation has always believed that matters fundamental to jurisdiction (e.g. whether the proceedings have been correctly brought in England under what was the Brussels Convention and has become for most purposes Council Regulation (EC) No.44/2001) should be resolved by a separate judgment at the outset of proceedings. This avoids the need for unnecessary, costly and time-consuming argument and investigation on the merits. But it is not the invariable procedure elsewhere in Europe.

20. In other respects, particularly on the merits, English litigation tended to favour a "big bang" approach. Everything came to a head in one trial. But modern judicial thinking has recognised that there are very often key issues of fact or law. Their determination of which is likely to enable the parties to resolve the remaining issues by agreement. In rejecting a submission that that the trial of separate issues deprived the claimant of his expectation of a full trial, the House of Lords said this in *Ashmore v.* Lloyd's [1992] AC 446, 454:

> "the control of proceedings rests with the judge and not with the plaintiffs. An expectation that the trial would proceed to a conclusion upon the evidence to be adduced is not a legitimate expectation. The only legitimate expectation of any plaintiff is to receive justice"

The court's ability to identify a separate issue of fact or law and to determine it in advance of any other is closely linked with the need to

[2] Summary judgment can be given against a claimant in any type of proceedings - except a small number of claims pertaining to property rights, particularly applications for possession of residential premises against a mortgagor or a tenant or a person holding over after the end of his tenancy whose occupancy is protected within the meaning of the *Rent Act 1977* or the *Housing Act 1988*; and proceedings for an admiralty claim in rem and contentious probate proceedings. However, even in these excluded cases there is nothing to stop the defendant from seeking summary judgment against the claimant.

define the issues at as early a stage and in a concise and precise a way as possible. There is of course a risk that the separate issue may be separately appealed and that the overall progress of the litigation may in the end be delayed. The magnitude of this risk depends on the speed of the appellate system – which is a different topic. But it is a risk that has to be taken into account, and balanced against the potential advantages. In the English experience, interlocutory judgments have gained a very real importance, but especially in the larger commercial cases, of which London sees many.

21. *Disclosure of documents (formerly known as discovery).* As is well known, the English requirements obliging each party to make disclosure of relevant documents (that is documents on which he relies in support of his contentions or which materially affect his case or support the other party's case) is considerably more extensive than the continental European, but is also much less vexatious and expensive than the United States model. But the CPR aimed at a "culture change", seeking to limit the extent of discovery at least in the normal case, and to make it more proportionate. Nevertheless, the requirement to disclose unfavourable as well as favourable documents often proves a considerable incentive to settlement - either before or after disclosure has had to be made!

22. *Trial timetable.* CPR29.8 requires each party to file a pre-trial check list, after which the court holds a listing hearing or a pre-trial review, and then normally sets a timetable for the trial (if not already set). The court's powers of strike out is strengthened and parties can expect cases to be struck out simply for failure to comply with a directions timetable, particularly if this will jeopardise a trial date for a case in the fast track. It is particularly important that time limits are complied with if the overall efficacy of the system of justice is to be upheld, and if there is to be an incentive on both parties to settle. Extensions of timetables at the parties' discretion or simple request ought no longer to be acceptable. That is so in the interests both of the particular litigants, and of other litigants in other litigation. No state's resources to carry unresolved litigation are indefinite. Nor are those of the European Court of Human Rights, to deal with complaints about delays in member states of the Council of Europe.

23. *Offers to Settle (CPR*36). I come to one of the most radical incentives to settle under the new CPR. This consists in its new provisions relating to offers to settle and payments into court, and stipulating for severe financial consequences for a party failing at trial to do better than the other side's previous offer. A claimant may offer to accept, or a defendant may offer to pay, less than the full claim[3]. (In the case of a money claim, the defendant must also follow up his offer, by paying the money into court.) If a claimant gets more than he offered to accept, or a defendant is ordered to pay less than

[3] To give rise to the consequences provided by CPR, such an offer must be open for acceptance for at least 21 days

he offered to pay, then save in the case of small claims, severely adverse consequences may follow in costs, and also, for a defendant, in interest[4].

24. If a claimant fails at trial to better a defendant's pre-trial offer, the court will, unless it considers it unjust to do so, order the claimant to pay any costs incurred by the defendant after the 21-day acceptance period (CPR36.20).

25. If a claimant at trial does better his own pre-trial offer, then the court will, unless it considers it unjust, (a) award the claimant interest on the whole of part of the amount awarded at a rate not exceeding10% above base rate for some or all of the period starting with the end of the 21 day acceptance period and (b) order the defendant to pay the claimant's costs on an indemnity basis from that date together with interest (again at a rate not exceeding 10% above base rate) on those costs. Indemnity costs involve a more favourable basis of assessment - the onus being on the paying party to show that any particular item was unreasonable and there being no limitation (at least, express) by reference to proportionality.

26. In deciding whether it would be unjust to attach any of these consequences to a failure to beat an offer, the court takes all the circumstances into account including the terms of the offer, the stage of the proceedings when it was made, the information available at that time, and the conduct of the parties in giving or refusing information to enable the offer to be evaluated. The last consideration reflects the co-operative spirit in litigation at which English procedure aims, although, of course, always achievable (take the case of the reluctant or impoverished payer).

27. I am not aware of any comparable system of financial incentives in other European countries. I note however information that in Germany, where lawyers' fees are regulated by statute, the legislature, in order to provide an incentive for lawyers to encourage settlement, raised the statutory settlement fees for lawyers from a full fee to 150% of a full fee[5]. The provision for indemnity costs is of course indirectly beneficial to the claimant's lawyers, and so involves a similar incentive.

28. *Alternative Dispute Resolution (ADR/Mediation) (CPR1.4(2)(e) – set out above)*. The court must not only encourage and facilitate ADR if appropriate, but, even more generally, it must help the parties to settle the dispute either in whole or in part (CPR1.4(2)(f)). In most cases ADR will mean mediation. The question of ADR will most commonly crop up at the stage when the case is allocated to a particular management track (or, on an appeal, when the court of appeal first sees the case). The parties are asked in the allocation questionnaires at the start of any proceedings whether they would like the action to be stayed for a month to allow an attempt at settlement either by

[4] There are also provisions for such offers to be made, and taken into account in costs, before proceedings are actually begun: CPR36.10. In that case, the costs benefits to a defendant to a money claim of having made such an offer depend upon his making a matching payment into court within 14 days after service on him of the claim.

[5] Gottwald, "Civil Justice Reform: German Perspective" in *Civil Justice in Crisis, Comparative Perspectives on Civil Procedure*, edited by AAS Zuckerman (Oxford, OUP, 1999) at p 220.

ADR or otherwise. But the possibility of a stay for mediation (even a second mediation) may arise, and not infrequently does arise, at a later stage in the history of the action, when the issues and facts have become clearer, and the case (and the parties) may be more malleable. The power to order a stay for mediation can be exercised even where one party objects.

29. *Summary.* Inevitably, I have, as I said, had to look at the position through the eyes of my own jurisdiction. But I have spent time with German judges, and seen how they address their duty to resolve proceedings. This is a duty which has been interpreted in a similar sense to the modern English rules. It requires them to consider and encourage the possibility of settlement, wherever this seems appropriate and without imperilling their position as impartial arbiters of the disputes before them, if no settlement is reached. I believe that judges everywhere have now to recognise that litigation to trial is often wasteful and avoidable, although sometimes of course very necessary. It is our duty to frame our procedures and our management of cases with that in the forefront of our minds. I believe that this conference will give us many mutually beneficial insights into the possibilities.

REPORTS

Why judges must help parties to achieve prompt settlement of disputes?

by

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1. A legal system for protection of the rights of entrepreneurs is being developed and refined with the aim of enabling economic courts to dispense justice. In reality, however, the ever increasing number of cases handled by economic courts, the changing and increasingly complex nature of disputes, and the advent of new categories of cases are resulting in a vast increase in the case load.

   Whatever the use judges may have made of computers in their work, it is quite a difficult task to cope fully with the volume of cases. The courts must therefore be interested in the development of alternative means of settling disputes, and in the use of conciliation procedures. Such a development will ease the load on the courts and make judicial protection more effective and of higher quality. Entrepreneurs should also be interested in the use of such procedures and means of settling disputes.

2. The 2002 Procedural Code of the Russian Federation on Arbitration (hereinafter the Code), which formulates the task of the economic courts as being (Article 2) to promote the establishment and development of partnership in business relations, and to build up the usages and ethics of business exchanges, presupposes the assistance of an economic court in the reconciliation of parties, including explanation by the court to the parties in a case of their right to transfer the dispute to an arbitration tribunal, and to have recourse to an arbitrator to reach a peaceful settlement.

3. The practice of recourse to conciliation procedures is not exclusively a new one. It had previously existed, because the 1995 and 1992 Codes envisaged the possibility of negotiations being held between parties with the aim of reaching an amicable agreement. The achievement of amicable agreement has always been regarded as the best means of resolving disputes in the economic courts.

4. The fact that a separate section of the new Code is devoted to conciliation procedures is an indication of the significance of measures aimed at the reconciliation of parties. The abstract idea is set out in the provision that the economic court should take measures to achieve reconciliation of the parties, and assist them in resolving the dispute. However, although it is obligatory for the court to take such measures, the parties may, by mutual agreement, avail themselves of specified procedures, which are voluntary for the parties.

5. The new Code encourages parties and courts to make wider use of conciliation procedures, because they are a "milder" means of resolving disputes. Their use makes it possible to reconcile and harmonize the interests of the parties to the dispute, to seek compromise solutions acceptable to them, and thus to maintain normal business relations between contracting entrepreneurs.

6. One of the reasons why parties are amenable to arriving at an amicable agreement is that court cases are costly, because quite highly remunerated lawyers take part in them. The party in the wrong is the one that most often drags out cases, while the party in the right is always interested in speedy settlement. Consequently, by dragging out court proceedings, the party in the wrong increases the costs of the other party. The new Code stipulates that a party in the wrong, having lost the argument, has to reimburse the costs of the other party, including costs connected with the hiring of a lawyer. This will make it possible to shorten the length of proceedings and more often reach a friendly settlement of disputes through the conclusion of an amicable agreement.

7. One particularly noteworthy provision of the Code concerns the possibility that parties may settle a dispute with the help of an arbitrator, which is an institution mentioned for the first time in the new Code. The arbitrator does not make any judgement, but merely assists the parties in arriving at an amicable agreement. Arbitration is linked, as an institution, with conciliation procedures. Given the lack of development of this institution in our context, and in the absence of its regulation, it is very important to explain to those involved in a case their right to have recourse to an arbitrator, and the consequences of such recourse. This task is currently the responsibility of the judge of the economic court, who, in his turn, should understand that it is in his interest for the dispute to be settled before a court hearing, since not only does this reduce the time taken to examine the case, but also reduces the case load. The attraction for the parties is a reduction in legal costs, and the possibility of settling the dispute without the use of measures of official coercion.

   In this context an important role is accorded to the stage during which the case is being prepared for court examination, and especially to the conversation of the judge with the parties or their representatives. The judge is able to explain the advantages of having recourse to an arbitrator. Should the judge see during conversation that the parties are amenable to arbitration, he must not restrict their rights. Importance therefore attaches to the provision under which the economic court has the right to postpone court examination, if both parties petition to that effect in connection with their seeking the assistance of a tribunal or an arbitrator for the purpose of settling the dispute.

8. The stipulation in the Code by which the ruling of the court ratifying conciliation shall recommend that half the stamp duty paid be refunded to the plaintiff from the federal budget is an important measure in promoting conciliation procedures and encouraging parties to seek amicable agreement.

9. Reconciliation of the parties through amicable agreement is possible at any stage in the arbitration process and in implementation of a ruling of the court (Article 139(1)).

10. Further encouragement may be found in the provision (Article 141(8)) on prompt implementation of the ruling of the court ratifying conciliation and permitting appeal against it within one month directly to the economic review court, without going through the appeal court (Article 141(8)).

This not only considerably reduces the time taken to examine the case, but also rules out re-examination of the ruling of the court concerning amicable agreement with respect to actual circumstances.

The reaching by the parties of an amicable agreement, confirmed by the court, terminates proceedings on the case (Article 150(2)), which excludes the subsequent possibility of recourse by the same parties to the economic court on the same matter and with the same grounds (Article 151(3)).

11. When ratifying the amicable agreement the economic court must certify that it is not contrary to laws and other legal instruments and does not infringe the rights and legal interests of other persons. In other words, the machinery of the court for the prevention of various infringements is in force.

12. According to statistical returns, the economic courts in the Russian Federation dealt in 2002 with more than 17 thousand cases in which amicable agreement was reached. Already during the first half of 2003 more than 11 thousand cases have been settled by amicable agreement.

Early settlement of disputes: urgent procedure in French Law

by

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One of the main features of the changes taking place in civil procedure in France is that attention is being paid to the effectiveness of the courts. Today the judicial system is conceived of as a public service that must not only allow members of the public to have their rights recognised in theory, but must also ensure that court sentences are actually enforced. Under the influence of the European Convention on Human Rights, and more particularly Article 6 of the convention, the case-law enshrines a fully-fledged right to justice for citizens, in two respects:

- everyone has the right to apply to a court if his or her rights are infringed;
- everyone has a right to obtain a court decision within a reasonable time.

This has strengthened the prohibition of the denial of justice. Traditionally understood as meaning that the courts had refrained from ruling in cases submitted to them, denial of justice now also exists when, for whatever reason, courts do not deal with cases and hand down their decisions within a time compatible with the interests of the person concerned.

According to the case-law, a court's failure to abide by the reasonable time criterion means that the justice system is not functioning properly and entitles the victim to obtain compensation by bringing an action against the state, which is the guarantor of the proper functioning of the judiciary under Article L781-1 of the Courts Act (*Code de l'organisation judiciaire*). It should, however, be pointed out that, regardless of the fact that compensation has been awarded for damages, the argument that the proceedings have been excessively long does not render void the proceedings or the decision handed down by the court. The same applies if the European Court of Human Rights has previously found that the state was in breach of its obligation to do justice within a reasonable time: this finding has no effect on the validity of domestic law proceedings.

In France, Parliament has introduced a number of measures to improve the investigation and trial of cases, in order to make the justice system more effective:

- the parties are obliged to specify the grounds for their claims;
- the powers of the judge responsible for investigating cases have been strengthened;
- expert opinion orders are strictly supervised;

- the judge may briefly sum up the parties' claims and grounds so as to devote the bulk of the judgment to the reasons for the court's decision;
- efforts have been made to simplify the way in which cases are dealt with at first instance and in the appeal courts;
- there is a procedure rendering appeals on points of law that are manifestly groundless inadmissible.

What symbolises the urgent administration of justice in French law, however, is **urgent procedure**.

The decision handed down under urgent procedure is a provisional decision taken at the close of *inter partes* proceedings, whereby one party may obtain the measures that he or she requires immediately. The main features of urgent procedure are as follows.

1. The decision is provisional

Decisions handed down under urgent procedure are provisional in that the urgent applications judge does not rule on the merits of the dispute but simply takes steps to safeguard the interests of the parties. It is not, therefore, possible to ask an urgent applications judge to rule on liability for an accident, settle a dispute concerning ownership rights or terminate a contract or declare it void. The judge may, on the other hand:

- order an expert appraisal to elucidate the causes of an accident or determine the consequences before the victim institutes proceedings to have the other party declared liable and obtain compensation;
- entrust moveable property over which there is a serious ownership dispute to a custodian *pendente lite*, who will keep and preserve it until the ownership dispute is settled by the competent trial and appeal courts;
- suspend the effects of a contract of doubtful validity until the matter has been settled by the court.

2. Inter partes proceedings

The decision under urgent procedure is handed down after *inter partes* proceedings. This presupposes that the opposing party has been summoned to appear. The law nevertheless authorises the applicant to issue a summons to the defendant at short notice, and even at an hour's notice, if the case needs to be dealt with particularly quickly. In any event, it is up to the judge to make sure that the defendant has had sufficient time to prepare a defence. This time may, of course, vary according to the nature of the case.

3. The powers of the urgent applications judge

The various parts of the French Code of Civil Procedure concerning urgent applications state that the urgent applications judge has the power to adopt "measures" (investigative measures, measures to preserve property, etc and restorative measures). Although the conditions under which these measures may be adopted vary according to the case, the term "measures", which is particularly vague, shows that

urgent applications judges, who must aim to ensure effectiveness, must seek means of alleviating the disputes submitted to them and, to this end, choose the measure that strikes them as most appropriate to the facts of the case or as best safeguarding the interests of the parties. This feature empowers them to adopt a measure other than that requested, provided they respect the principle that both parties must be represented and do not aggravate the situation of the defendant. For example, when faced with an application for the restitution of property in the possession of a third party, the urgent applications judge may, on his or her own authority, on finding that there is serious difficulty in ascertaining who owns the property, decide to entrust it to a custodian until the trial and appeal courts have determined the ownership of the property. Similarly, when faced with a demand that a book that libels the plaintiff or constitutes an invasion of privacy be withdrawn from sale, the urgent applications judge may decide simply to order publication of a statement setting out the plaintiff's protests. If, on the other hand, the judge receives a request that such a statement be disseminated, he or she may not go further than the request and ban the sale of the book.

Similarly, urgent applications judges may limit the period for which their decisions apply, so as not to infringe the parties' rights irremediably. For instance, if they provisionally ban the release of a libellous publication, they may give the libelled person a time-limit within which to apply to the trial court, and make the continuation of the ban subject to application to the court within a set time. They may also arrange for their decisions to be followed up, in particular by making arrangements for their implementation and for the parties to appear at a later hearing to ensure that injunctions have been complied with.

4. Immediate enforcement

The effectiveness of action by urgent applications judges is enhanced by the fact that their decisions are immediately enforceable: the time allowed for entering an appeal and even the actual exercise of the right of appeal do not cause the decision to be suspended. Furthermore, in the event of an appeal, the President of the Court of Appeal does not have the power to stop the provisional enforcement of the decision handed down under urgent procedure (except, since a law passed on 15 June 2000, when that decision infringes freedom of information).

5. Links with the trial court

The cases in which urgent applications judges may intervene are very numerous and varied. They are often connected with a dispute between parties which has been or is likely to be submitted to the trial or appeal court. This is the case, in particular, when urgent applications judges are asked:

- to order an expert appraisal in order to obtain evidence that will enable one party to institute proceedings against the opposing party in the trial court;
- to order, for the same purposes, the release of documents held by a third party;
- to place official seals on property or place it in custody until the trial court hands down a decision;
- to appoint a provisional administrator for a firm or grouping of any kind until the dispute involving its directors is settled in court;

- to suspend the effects of the deliberations of a meeting until the lawfulness of those deliberations has been determined by the trial court or appeal court.

Urgent applications judges have even been empowered, since a law of 28 December 1998, to refer a dispute between parties direct to the trial court, provided one party has so requested and the matter is urgent.

Urgent applications are, however, independent in that they allow the judge to intervene outside the context of trial court proceedings and even, in certain cases, to put an end to the dispute, making trial court proceedings unnecessary. This is the case, for instance, when the urgent applications judge is asked to put a stop to something that is manifestly unlawful, ie to punish the obvious violation of a rule of law:

- evict squatters who are unlawfully occupying a building belonging to someone else;
- order the demolition of a building that has been put up unlawfully;
- order the resumption of contractual relations that have been unlawfully broken off.

It is also the case when the urgent applications judge allocates a creditor an advance on a debt, the condition for this being that the existence of the debt cannot be seriously contested.

As the Court of Cassation ruled that the "advance" could correspond to the entire debt, an urgent application for an advance (*référé-provision*) has, in court practice, particularly in commercial cases, become the ordinary law means of collecting debts, when the debtor cannot put forward any serious argument against the application submitted against him or her.

6. Absence of res judicata

Regardless of the extent of the powers of urgent applications judges, it should be specified that their decisions do not constitute *res judicata* in respect of the main proceedings. This principle is of twofold significance: an application dismissed by the urgent applications judge may subsequently be submitted to a trial court, and a decision by the urgent applications judge is never binding on the trial court, regardless of the nature of the decision and the reasons for it.

Protection of the parties' cases and evidence, time limits, accelerated and summary procedures and interlocutory judgments

by

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1. Introduction

Although they may seem quite diverse, the topics to be dealt with in this report all include consideration of the need that , in civil procedure, the duration of the proceeding should not be detrimental for the parties, and even more so for the winning party.

In fact, long proceedings may jeopardise the possibility to prove that the case is well founded; even if the case is won, the chances of a party to obtain a practical result may be put at risk by events connected with the passing of time. It is then necessary that each system devises protective measures[1] of the parties' cases and evidence.

If, through protective measures, that are usually determined on the basis of a summary appraisal of the case, the fact of a long duration of the proceeding is taken for granted, one should also examine the ways to reduce unjustified delay. Actions taken to reduce the duration of trials include introduction of time-limits for the parties' activities within ordinary proceedings, as well as of accelerated and summary[2] procedures as alternatives to the ordinary scheme of a civil proceeding.

Some of the above topics are closely connected with case management, i.e. the process of reviewing, in some countries, the advantages and disadvantages of the

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[1] Protective measures include measures that are granted through "interlocutory" judgments or orders. It may be useful to note here that in this context the concept of "interlocutory" decision indicates those provisional orders or decisions that are not final and do not determine the issues at trial. Another meaning of the expression "interlocutory decision" includes those determinations of some issues only of the case, while further court action is needed for the resolution of the remaining issues.

[2] Summary proceedings, therefore, are also used outside the area of protection of the parties' cases and evidence during an ordinary trial; summary trial thus becomes an alternative to the ordinary trial, and not only a parenthesis in it finalised to determination of a protective measure.

adversarial system of conducting civil proceedings.[3] This subject will be dealt with separately in other reports.

The limited scope of this report prevents from detailed reference to the several European systems. However, some relevant examples will be included.

Since this report is addressed to further progress of actions with the framework of the Council of Europe, extensive reference to a relevant CoE text will instead be included. Some reference to European Union texts has also been deemed necessary.

2. Protective measures

There is no uniform concept of "protective measure" in Europe, although the concept of a "protective jurisdiction" is undisputedly one of the key elements of protection of rights through the rule of law.[4] However, even in the large scale harmonisation project started under the auspices of the European Union, having so far resulted in drafts relating to certain specific areas of civil procedure,[5] one has had to note that "*il serait illusoire de projecter une unification formelle des mesures conservatoires et provisoires, et des procédures de les obtenir*".[6]

One may nonetheless distinguish:

a) protective measures aimed to protecting the practicability of enforcement, or to anticipate enforcement;[7]

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3 The term "case management" is used to describe processes involving the control of movement of cases through a court or tribunal (caseflow management) or the control of the total workload of a court or tribunal (caseload management). Lord Woolf's reports on the civil justice system in England and Wales focussed on the role of case management in encouraging settlement of disputes at the earliest possible stage; when settlement cannot be achieved, cases should to trial as speedily and at as little cost as is appropriate.

4 See, for the E.U., the ECJ decision C-213/89.

5 Reference is made to the final report of the Working Group for the Approximation of the Civil Procedural Law in Europe, presided by the Ghent professor and *advocaat* M. Storme, Approximation of Judiciary Law in the European Union, Dordrecht/Boston/London, 1994. The section concerning provisional measures was under the responsibility of the Milan professor G. Tarzia.

6 Ibidem, p. 106.

7 The links between protective law and law on attachment (that is also part of the law on enforcement) are quite relevant. The following graph attempts to summarise this relationship.

<table>
<tr><td rowspan="2"></td><td>a) protective measures other than attachment;</td><td rowspan="2">PROTECTIVE LAW</td></tr>
<tr><td rowspan="2">LAW ON ATTACHMENT</td><td>b) protective measures by attachment;</td></tr>
<tr><td>c) enforcement measures by attachment;</td><td rowspan="2">LAW ON ENFORCEMENT</td></tr>
<tr><td></td><td>d) enforcement measures other than attachment</td></tr>
</table>

b) protective measures aimed to "freezing" a certain situation of fact pending the trial, e.g. through appointment of a receiver;

c) measures that cannot be indicated as protective, if not in a very broad sense, since they aim at anticipating the decision in the substance of the case.

In the first category, one may include "saisie conservatoire", "Arrest", "sequestro conservativo", Mareva injunction,[8] etc., but also "einstweilige Verfuegung" (in the form of "Sicherungsverfuegung").

In the second category, one may include "référé"/"kort Geding" in some of its applications, "einstweilige Verfuegung" (in the form of "Regelungsverfuegung"), and the "sequestro giudiziario".

In the third category, one may include the "Befriedigungsverfuegung", the "référé-provision", and the "ordinanza interinale".

One point that deserves attention is the fact that, in addition to orders provided by law and intended for the protection of a specific situation (e.g., custody and preservation of property, sequestration, injunction to restrain from works on property adjoining the property of the plaintiff), the judge should be empowered by national law to formulate any provisional remedy according to the circumstances of the case, such as in proceedings of "référé", "interim injunctions", "provvedimenti d'urgenza", etc.[9]

Conditions for granting of provisional remedies are quite variable in the several systems. In particular, it seems worth mentioning that not always urgency (or "periculum in mora") is a requisite, being sometimes sufficient that the existence of the claimed right is evident.

Whereas usually remedies are granted after both parties are heard ("inter partes"), exceptional circumstances may impose that they be granted "ex parte"; but the remedy granted "ex parte" should then be confirmed, varied or withdrawn at a subsequent hearing "inter partes".

In this respect, one should mention that the traditional need, that several systems have felt, to establish protective measures in view of the taking of evidence (provisional hearing of witnesses, experts reports, site inspections, taking of samples) has now expanded to more sophisticated measures that enhance the possibility for the plaintiff to even gather information for the trial. One may mention, for example, the English experience of the "Anton Piller order", a kind of mandatory injunction elaborated by case-law in order to safeguard things and documents which form the

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8 The Mareva injuction or "freezing order" has been elaborated by English case-law to restrain a party from removing or dissipating assets, even if monies are held by third parties. The remedy has boomed, usually through an "ex parte" proceeding, before trial. It may also be used after trial for the enforcement of a judgment.

9 The need that such atypical protective power vested in the court be affirmed has been the main worry of the Storme report in this field.

basis of the claim, avoiding the risks connected with the traditional orders that can be issued only "inter partes". Through an "Anton Piller order", on the basis of an "ex parte" proceeding, the defendant may obliged to hand over materials detrimental for the case of defendant and beneficial for the case of the plaintiff. The ECHR has found that this proceeding complies with art. 8 of the Convention on HRFF.[10]

A quite interesting feature of some protective systems (e.g., référé) is the possibility that the interlocutory judgment is not followed by a proceeding aiming at a final decision, if no party so applies. Other systems impose on the parties that final proceeding must be instituted within a fixed strictly applied time-limit; otherwise protective remedy will lose its effect. The several systems also differ as to appeals procedures on the provisional measure, as well as to the possibility that the same judge that has granted the protective measure may then adjudge the substance of the case.

It may be quite surprising to note that the issue of protective measures receives no specific attention in the framework of the Recommendation No. R (84) 5, "*Principles of civil procedure designed to improve the functioning of justice*" adopted by the Committee of Ministers of the Council of Europe on 28 February 1984.[11]

Through § 38 of the Presidency Conclusions, the Tampere European Council of 15-16 October 1999 invited the Council and the Commission of the E.U. to prepare new procedural legislation in cross-border cases, in particular on those elements which are instrumental to smooth judicial co-operation and to enhanced access to law. Provisional measures were mentioned in this respect.

International procedural law (reference may be made, as an archetype, to Art. 24 of the Brussels Convention) establishes that provisional or protective measures may be applied for in the courts of the State under whose law such measures are available, even if, pursuant to the rules of jurisdiction, another court has jurisdiction in respect of the substance of the matter.

3. Time-limits within ordinary proceedings

The objective of a speedy trial may be realised by imposing limits on activities that traditionally were freely available to the parties, provided that no unreasonable restrictions are made to the right of defence. Arbitrary limits would amount to a fundamental denial of natural justice.

Modern legislation and/or "case management" standards provide, e.g., for limits in the number of witnesses, length of written or oral submissions, means of recourse, etc.

One particularly important feature is the determination of time periods for trials, so as to require the parties to complete their respective cases by fixed times.

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10 ECHR judgment of 30 March 1989.

11 One may only note that Principle 8 recommends that particular rules be introduced to expedite judgements taking into account the nature of the dispute, on which an early decision is required. This concept, of course, greatly differs from the concept of a protective measure.

Whereas some time-limits may be in the discretion of the judge (e.g., the time allowed for the examination and cross-examination of witnesses at trial), some other limits may be set in pre-trail conferences and/or provided by statutory law.

Principle 1 of Recommendation No. R (84) 5, "*Principles of civil procedure designed to improve the functioning of justice*", after establishing that normally the proceedings should consist of not more than two hearings, sets out the rule that sanctions should be imposed when a party does not take a procedural step within the time-limits fixed by the law or the court. Depending on the circumstances, such sanctions might include declaring the procedural step barred, awarding damages, costs, imposing a fine and striking the case off the list. The Explanatory Memorandum underlines that failure by the parties to respect time-limits tends to delay the proceedings and increases their cost, so it should be sanctioned; sanctions may also include the possibility of recognising the plaintiff's claim when the defendant is at fault.

Some systems have adopted the "forfeiture" solution ("forclusion"), providing by law that some activities should be mandatorily performed before or at the first hearing, while some other activities should be performed within strictly fixed time-limits imposed by the judge, after which the activity is barred.[12] It is important to note that, in order to assure effectiveness of forfeiture of procedural steps, the forfeiture should be declared "motu proprio" by the court.

§ 38 of the Presidency Conclusions of the Tampere European Council of 15-16 October 1999 mentioned the sector of time-limits as one of the areas in which the Council and the Commission of the E.U. should prepare new procedural legislation in cross-border cases.

4. Accelerated and summary procedures

Whereas the concept of accelerated proceeding refers to a proceeding in which procedural steps are organised in such a way that the proceeding has a short duration, a proceeding is summary if the examination of the case on the part of the judge is done on the basis of what is only evident, without a complete proceeding as to the taking of evidence; only in some system summary judgements have the force of "res judicata".

With reference to both accelerated and summary procedures, the Explanatory Memorandum to Principle 8 of Recommendation No. R (84) 5 recalls that the procedure does not necessarily have to be uniform for all cases, and it should be possible, within appropriate limits, to adjust it to the subject matter, the amount at stake, the personal characteristics of the parties and the type of interests involved. Particular rules of procedure have been introduced in many States for this purpose, and their use is chiefly determined by:

12 Principle 5 of the Recommendation provides that, except where the law prescribes otherwise, the parties' claims, limitations or defences and in principle their evidence, should be presented at the earliest possible stage of the proceedings and in any event before the end of the preliminary stage, if there is one.

a. the nature of the claim. disputes on which an early decision is required (urgent cases procedure) and recovery of certified uncontested debts;

b. the value involved: small claims;

c. the personal characteristics of the parties and the type of the interests at stake: employer-employee relations, landlord and tenant relations, questions of family relations (divorce, custody of children, maintenance) and disputes involving consumers;

d. the frequency of certain cases showing similar characteristics: disputes relating to road accidents.

Principle 8 of the Recommendation mentions a number of examples of procedural simplifications:

- simplified methods of commencing litigation;
- no hearing or convening of only one hearing or, as the occasion may require, of a preliminary preparatory hearing;
- exclusively written or oral proceedings, as the case may be;
- prohibition or restriction of certain exceptions and defences;
- more flexible rules of evidence;
- no adjournments or only brief adjournments;
- the appointment of a court expert, either "ex officio" or on application of the parties, if possible at the commencement of the proceedings;
- an active role for the court in conducting the case and in calling for and taking evidence.

In any case, simplification of procedures must not weaken the fundamental guarantees provided for the parties to present their case adequately or to use lawful and relevant means in countering their adversaries' claims.

Principle 2 of the Recommendation indicates as a further area for the use of a summary proceeding the one concerning manifestly ill-founded claims. Also, when a party fails to observe the duty of fairness in its conduct of the proceedings and clearly misuses procedure for the manifest purpose of delaying the proceedings, even if not manifestly ill-founded, the court should be empowered either to decide immediately on the merits or to impose sanctions such as fines, damages or declaring the procedure barred.

The Presidency Conclusions of the Tampere European Council of 15-16 October 1999, § 30, contain an invitation to the E.U. organs to establish common procedural rules for simplified and accelerated cross-border litigation. Areas of the law mentioned for such procedures are small consumer and commercial claims, as well as maintenance claims and uncontested claims. § 38 mentions payment orders. A proposal for a Regulation concerning an European executive title on uncontested claims, on the basis of an accelerated procedure, is presently pending.

As for accelerated procedures, one may mention here the examples provided:

- by France of an accelerated procedure on the merits applied to simple cases or in default of the defendant: within the "procédure de renvoi à l'audience" (arts. 760 and 761 NCPC), when in the opinion of the President of the chamber the case does not need to be examined and is ready to be tried, it may be transferred directly to a hearing to be pleaded and decided;

- by Germany, through the "Urkunden- und Wechselprozess" (§§ 592-605a ZPO), a procedure to accelerate payment in respect of claims to money, goods or securities based on documentary evidence produced in deeds.

As for summary procedures, one may mention the examples provided by a number of countries:

- in England and Wales, the possibility to resort to a summary procedure on the application of one party or "motu proprio" by the court, in some circumstances (CPR 24);

- in France, the "référé" proceedings (arts. 808-810 of the NCPC for the Tribunal de GI), in so far as urgency is not required in certain cases, allow a summary judgment ending with a provisional decision (ordonnance), with no authority of "res iudicata" but enforceable; appeal is provided for before the Court of Appeal.

Injunction relief is provided for in many systems: judicial orders for payment (*injonction de payer*) or, sometimes, to perform contractual obligations (*injonction de faire*) may be issued after a simple procedure "ex parte"on the basis of documents, not limited to small claims. Debtor can apply within a set time-limit to set the decision aside. The "Mahnverfahren" procedure at the German "Amtsgericht" is characterised by the further features that no documents are necessary and that the petition is addressed to the "Rechtspfleger" of the residence of the plaintiff. The "Mahnbescheid" contains an order to pay within two weeks or produce a defence (§692 ZPO); if the defendant produces a defence, adversarial proceeding follows in the competent court; if not, enforcement follows, but a review is possible ("Einspruch").

Small claims procedures provide some additional simplifications:

- in England and Wales, small consumer cases are decided by the Registrar of the County Court, in chambers, with parties appearing in person without legal representation; strict rules of evidence do not apply.

- in Germany, the small claim procedure (§495a ZPO) ends with a judgment that does not state facts or grounds for the decision; no means of recourse is available;

- in Italy, petty claims are decided by the justice of the peace with an equitable judgment, against which no appeal is available.

Protection of the parties' cases and evidence, time limits, accelerated and summary procedures and interlocutory judgments - the Norwegian perspective

by

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1. Introduction

The current Norwegian Civil Procedure Act, which regulates the procedure in all civil cases, dates from 1915. Although the Act has been continuously amended, there is no doubt that the call for a more extensive reform of the provisions regulating civil procedure in Norway is overdue.

A procedural system has two primary purposes: firstly, to ensure that the rights of individuals and the rule of law are observed and, secondly, to ensure that the substantive rules of law are applied. In order to meet these goals, both the factual circumstances of the case and the law in question must be elucidated as well as possible. It is also imperative that decisions are made as soon as possible. A lengthy procedure will often be a financial and psychological strain for the parties. Finally, the procedural system must not be too costly, either for the parties involved or for the State.

To a certain extent, these considerations are inconsistent with each other. A system under which no stone shall remain unturned in search of the correct solution will necessarily be both costly and time-consuming. A satisfactory procedural system must strike the right balance between these considerations.

Work is currently in progress in Norway on a new Dispute Resolution Act. A Law Reform Committee was appointed in April 1999 to undertake a thorough review of the provisions relating to the procedure in civil cases before the courts. The Committee delivered its report on 20 December 2001. The report contains a detailed review of the current civil procedure system, views on how the system should be in the future, and a draft version of a new Act.

The main elements in the draft Act include provisions on active participation by the judiciary in the administration of proceedings, provisions to ensure that cases are dealt with efficiently and provisions to ensure proportionality between the relative importance of the issue in dispute and the resources that are expended in resolving it. The primary purpose of the draft is to contribute to limiting, or rather reducing, the resources that are expended on litigating civil cases before the courts, both by the parties and the State. This requires that the focus in the proceedings must be concentrated on the main issues in dispute, and that the unnecessary submission of evidence on issues that are of minor importance to the resolution of the case is

avoided. To this end the judge to whom a case is allocated must participate actively in administering the preparation of the case, and he or she must give due regard to the need for concentrating the proceedings and to the interests of proportionality. It is a central aim of the draft that both the preparation of the case and the trial shall be more concentrated than today.

Further, although a case is filed with the courts, the delivery of a judgement need not necessarily be the best method of resolving the case. There are many reasons why a settlement between the parties may be preferable to a court judgement.

The draft Dispute Resolution Act paves the way for extensive judicial and non-judicial mediation. Furthermore, it proposes a method of case preparation that is designed to clarify the parties' legal position as early as possible, thereby providing the parties with the best possible basis upon which to assess the possible outcome of the case in advance, and thus to consider whether the case ought to be settled out of court.

At the same time, it should be stressed that there may be reasons why a case ought not to be settled out of court. A case may, for instance, involve issues of principle in an area where there is a need to clarify the legal position. Furthermore, there is a risk that settlements that are reached may be unjust or unfair in circumstances where the relative strength of the bargaining positions of the parties is unequal. To a certain extent, this can be alleviated by the establishment of formalised mediation, which the draft Dispute Resolution Act provides for.

2. The Preliminary Stages of a Case

According to current law, there is no general power to strike out a case on the grounds that it is obvious that it will not succeed. Nor does the draft Dispute Resolution Act include such a general power. However, the draft does include a number of provisions that will have as a result that many of the cases that obviously cannot succeed do not in fact come before the courts.

2.1 Notice

Firstly, a plaintiff is under an obligation to notify the potential defendant prior to bringing legal action. The notice must be in writing and contain details of the claim and the basis for such claim. In addition, both parties are obliged to provide information on documents and other evidence relevant to the claim. These provisions will presumably lead to a certain degree of clarification even before a writ of summons is filed.

2.2 Mediation

The parties are required to attempt either non-judicial and/or judicial mediation prior to bringing legal action. This is likely to result in an amicable settlement in a number of cases. A pilot judicial mediation project established by the Law Reform Committee led to an amicable resolution of the dispute in more than 80 % of the cases in which mediation was attempted. However, mediation under the pilot scheme was voluntary, and it is reasonable to assume that the success rate will drop if mediation is imposed

on parties who do not wish to give it a try. (A more extensive introduction to the project is given in the Norwegian working paper to the Conference.)

3. Preparation of the case

The current Civil Procedure Act lays down certain requirements for a writ of summons. However, in practice, a writ of summons rarely contains many of the facts that are pleaded at the trial. There is currently no requirement that the writ of summons shall state the legal basis for the claim.

3.1 Requirements of the writ of summons

The purpose of the writ of summons is to lay down the framework for the case. According to the draft Dispute Resolution Act, the writ of summons shall specify the factual and legal grounds upon which the claim is based, and provide a sound basis for the parties and the courts to handle the case. As a consequence, the writ shall specify the plaintiff's view on how the case should proceed in the future. More or less the same requirements apply to the defendant's reply. The intention behind the proposed rules is that the court, on the basis of the writ of summons and reply, shall be put in a position to direct the preparation of the case in a quick, cost-efficient and satisfactory manner. At the same time, a more detailed writ of summons and reply will hopefully give the parties a proper basis upon which to form an opinion on how their case stands, and pave the way for a settlement in appropriate cases.

3.2 Case preparation

The preparation of a case shall ensure that the case is dealt with in a speedy, cost-efficient and satisfactory manner. At present, the preparation of cases is too slow and unfocussed. The draft Dispute Resolution Act imposes a duty on the court to actively and systematically manage the preparation of the case, and the President of the court shall ensure that this duty is observed in individual cases. Today, court sittings preparatory to trial take place only in exceptional cases. Pursuant to the draft, however, such preparatory sittings shall be the general rule, where a time schedule for the further proceedings shall be fixed and other issues may be clarified. A date for the conclusion of preparations and for the main hearing shall be fixed. As a rule, it shall not take more than six months from the submission of the writ of summons until the case is brought to trial.

4 The main hearing

Under the current Civil Procedure Act, a full hearing must normally be held in all cases, irrespective of how small the claim is or whether it is obvious that the claim will not succeed. The draft Dispute Resolution Act proposes a simplified procedure in a number of cases.

4.1 Judgement without trial

The draft Dispute Resolution Act contains rules on simplified judgement proceedings. At each stage of the proceedings, including immediately after the writ of summons and the reply have been filed, the court may proclaim judgement on the basis of the

information before it. The court may only proclaim judgement pursuant to this simplified procedure in circumstances where it is evident that the claim cannot be upheld, or where it is evident that the objections to the claim are groundless. The purpose of the rule is, of course, to deal quickly and efficiently with claims that are clearly hopeless and those where it is quite clear what the result must be. The simplified judgement procedure can only be invoked upon application of one of the parties. It is therefore for the parties to determine whether the court may pass judgement in this way. The judgement may be appealed in the ordinary manner.

4.2 Small claims procedure

Special considerations apply to claims where the financial amount in dispute is small. As mentioned above, the primary purposes of a civil procedure system is to ensure that the rights of individuals and the rule of law are observed, and to ensure that the substantive rules of law are applied. In the case of small claims, adjustments must be made to the procedural system in order that these goals can be met. First and foremost, the costs must be kept relatively low, and they must also be predictable. At the same time, the procedure must be sufficiently thorough to ensure a substantively correct result. However, in many such cases it may be more important that a resolution of the dispute is reached than that the solution arrived at is legally correct.

The Law Reform Committee has proposed a simplified procedure for small claims, the purpose of which is to ensure that small claims are dealt with in a manner that is simpler, quicker and more cost efficient than other cases. Like all other claims, claims subject to the small claims procedure shall be initiated by way of writ of summons and reply. The court can provide assistance in formulating these initiating pleadings. The court is under a special duty to direct the preparation of the case through contact with the parties, and to give them guidance. As far as possible, only one court sitting shall be held to rule on the case and the sitting shall be confined to one day. The judgements in small claims cases can be briefer than in other cases, and there is also a power to deliver judgement orally at the end of the hearing. The small claims procedure is subject to time limits. The final hearing shall be held within four months of the writ of summons being submitted, and judgement shall be put in writing within one week after the hearing is closed. There are exhaustive rules on the costs that may be claimed, and legal aid is limited to 25 % of the amount in dispute in the case.

4.3 Submission of evidence

The power of the courts to deny the submission of evidence in civil cases is extremely limited under the current procedural rules. Furthermore, there is only a very restricted right to submit written testimony as evidence. As a result, the presentation of evidence is often very extensive, even on issues of minor importance and that are not key issues in the case.

It is to be hoped that the proposed rules on case preparation will lead to an increased concentration on the factual circumstances that are truly relevant to the case. In addition, however, the Law Reform Committee has proposed a number of rules designed to limit and simplify the presentation of evidence in appropriate cases. Among other things, the courts are empowered to refuse the presentation of evidence where the scale and scope of the evidence sought to be submitted is disproportionate

to the importance of the dispute. The draft also envisages a wider right to submit written statements as evidence, and proposes that long-distance examination should be used in more cases than today. This will be both more convenient for witnesses and reduce the costs involved in taking witness testimony.

4.4 The focus of the main hearing

One problem with the current civil procedure system is that the main hearing is often poorly prepared, progresses too slowly and takes too long. The Law Reform Committee proposes that the court can require the parties to submit a written summary of its submissions or a final submission. Furthermore, it is proposed that the preparation of the case shall be deemed to be completed at least two weeks prior to the main hearing. After that date, the parties will not normally be allowed to submit new claims or evidence or to seek to expand the prayer for relief.

The court shall draw up a plan for the main hearing, to which the parties may make suggestions. The court may lay down time frames for the various stages of the main hearing.

5. Summary

The draft Dispute Resolution Act aims to ensure a quick, efficient and fair procedure that will lead to substantively correct resolutions of disputes. The aim is to be reached through a number of individual provisions, only a few of which are mentioned here. The draft sharpens the duty of the court to direct and lead the proceedings and, at the same time, places stronger demands on the duty of the parties in the preparation of the case.

The report of the Law Reform Committee is at present being considered by the Ministry of Justice. The Ministry is expected to submit its proposals to the Norwegian parliament in the first half of 2005.

Legislative and judicial incentives to early (amicable) resolution

by

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1. Introduction

It is clear that the complexity of issues related to legal and judicial incentives to early amicable resolution doesn't allow to address them all. Having studied different legal systems and traditions, the aim of this report is to examine some steps that were taken in various jurisdictions and to consider the most applicable under the rule of law. However, it is important to note that no matter how well a particular legal or/and judicial incentive to early resolution works in one country, it is never completely exportable to another. There are no quick fixes, no silver bullets, no one-size-fits-all models.

The Conclusions of the First Study Commission of the International Association of Judges about various special measures implemented in different countries to manage the increasing number of cases coming before courts, pointed out two important problems which are particularly relevant for early dispute resolution. The first one is the excessive amount of time taken by the parties in preparing their case, while the second is the excessive amount of time taken by the court in processing the case. The report stated that the tradition of many countries is to leave the control over the progress of proceedings in the hands of the parties until they are ready to present the case before a judge. Nevertheless, more and more changes are being introduced taking the control over the pace of proceedings from the parties and substituting it by interventionist judicial management, whether at instance of the parties or imposed by a more rigorous procedural framework.[1]

2. Therapeutic justice

Since early amicable resolution of judicial dispute often presupposes early court intervention, judges should have and exercise powers of *dominus litis*. This sometimes represents a considerable challenge, since judges will never be able to resolve as many cases per day as the parties and their representatives are able to put before court. Thus, principles and techniques of delay reduction that are referred to as case-flow management play an important role at promoting early settlements. Some of case-flow management powers need certain statutory or other legal ground others could be developed through convenient best judicial practices. But what seems of utmost

[1] Conclusions of the First Study Commission, Porto (Portugal) 7 – 10 September 1998; The Voice of the Judicial Power, 42nd IAJ Annual Meeting, Taipei, Taiwan, 1999.

importance is that changes in case processing speed necessarily require changes in the attitude and practices of all members of legal community, especially judges. The crucial element is concern on the part of judges coupled with early court control and intervention in order to assist parties to settle their dispute. Regarding legal tradition in certain jurisdictions this means that a role of a judge might be changed.[2] A judge who is involved in settlement activities does more than simply decide a case. He or she assumes the role of problem solver, a therapeutic justice provider.

3. Problems of litigants

On the other hand, one important aspect of early resolution of disputes lies on the parties' side as well. It derives from the fact that people generally don't sue in order to settle, but in order to win their case. However, during litigation the personal style of managing conflicts could play a decisive role regarding early resolution. Avoidance (I lose you lose), accommodation (I lose you win), compromise (both sides win some and lose some), competition (I win you lose) or collaboration (I win you win) are five different styles of managing conflicts which could lead to a different position of the parties towards any settlement activities.

The difficulty in seeking to respond to the question of how a court should ensure early resolution of dispute is further exacerbated by three tensions that accompany every disputed relationship: the tension between creating and distributing value in a dispute[3], the tension between empathy and assertiveness[4] and the tension between the interests of the principal and those of his agent[5]. The problem-solving judge cannot make this disappear, no matter how skilled she or he may be. The best she/he can hope to do is manage all three tensions effectively.

4. Settlement as a legal value

In many European countries most disputes are not resolved before entering litigation proceedings, neither are they settled out of court during litigation. Some countries,

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[2] It has been traditional practice of English judges not to become involved in the settlement of disputes, although the courts have always been willing to provide time for the parties to discuss settlement where this would be appropriate (Gatenby J. 2002, ADR and the English Courts; Current Issues and Future Trends, London). Significant change has been introduced by Woolf's reform of civil procedural rules (CPR) (Genn H, 2002, Court-based ADR Initiatives for Non-Family Civil Disputes: The Commercial Court and the Court of Appeal, London).

[3] The desire for distributive acquisition means that a party wants a bigger piece of the pie than that given to him by the opposing party. Creative value, on the other hand, means the possibility for the whole pie to be increased in size and with it the pieces belonging to the parties, but only if this is a result of the joint efforts of both parties.

[4] Empathy means an understanding of the interest of the other party in the dispute whereas assertiveness refers to ensuring one's own interests are met. The resolute assertion of one's own interest without understanding the interest of the opposing party can lead to a serious conflict between the parties. But empathy without asserting one's own interest endangers those interests.

[5] The interests of parties and their attorneys are rarely in complete harmony. An attorney can help clients understand their legal position or manipulate clients by not giving them full information or by encouraging extreme emotional reactions which make it more difficult to resolve the dispute. On the other hand, by making unrealistic demands or by withholding information a client can make the attorney feel uncertain. No attorney's fees can overcome this contradiction (Mnookin, R. H., 2000, Beyond Winning, Harvard University Press, Cambridge, Massachusetts).

however, do have a strong tradition of preparing for a trial, which never takes place since litigation is used merely as a threat in order to bring a reluctant party to the negotiating table. Both sides are well aware of this fact. It is something of an arms race. Each side builds up an arsenal, while hoping that it will never have to use it. The arsenal is needed to signal readiness for battle. But both would also benefit, if both sides agreed to reduce the weapons' stockpile (Mnookin 2000: 115-116). The problem is that neither side wants to disarm first. No side wants to be the first to blink. In this conditions legal incentive or suggestion from the court supported by selective pressure mechanisms might in fact be welcomed by the parties and provide a valuable stimulus to settlement.

Legal theory underlines several advantages of a settlement as a legal value:

- parties' agreement could cover other or all aspects of personal or business relationship than just those, claimed in litigation (creative settlements);
- win-lose solution doesn't guarantee the enforcement of obligation by the parties who couldn't pay (fewer enforcement problems);
- settlement could repair and preserve long-term relationships (neighbour, business, family);
- settlement could save time costs and help the parties to avoid psychological frustrations;
- since it is based on the principle of self-determination of the parties they could *de novo* determine their rights and obligations.[6]

Comparative court statistics could reveal interesting data concerning court settlements rates, especially where countries with similar legal system are compared.[7] It is obvious that it is not only the pattern of parties' behaviour in a disputes that affects the success of (early) settlement, but that suitable training programmes for judges entrusted with settlement activities have to be provided in order to facilitate these judges work. However, one should not overlook the tradition potentially having a significant impact on court settlement rates[8].

5. Legal incentives to early settlements

5.1. Pre-trial conference

As regards legal incentives to early settlements, the Council of Europe Member States' Codes of Civil Procedure (CPC) allow for the possibility of seizing a judge principally concerned with conciliation[9], making conciliation the compulsory

[6] Galic A, 2002, The role of a judge in facilitating settlements, The Collection of science discussions, Ljubljana.

[7] Slovenia and Germany are countries with similar procedural and substantive civil law regulation however in Slovenia five to ten percent out of all disposed cases are settled while in Germany settlement rate vary from 20 up to 30 percent (Dykoff N. 2002, Theoretical and practical problems of court settlements, Legal practice, No. 1 - 2, Ljubljana).

[8] It remains unclear to the author what the practical consequences of former Soviet Union legislation aimed at prohibition of any judicial incentive regarding court settlements were.

[9] Article 322 of the Italian CPC, Article 209 of the Greek CPC or Article 371 of the Belgian Judicial Code.

phase of the procedure[10] or explicitly encouraging judges to intervene actively in the search for agreement between the parties[11].

In order to enable the court to test the settlement readiness and options with the parties, procedural law in various countries prescribes the duty or an option for the court to schedule a pre- trial or settlement conference[12]. In order to make them meaningful and effective events rules should provide that at least one of the attorneys for each party must have authority to enter into stipulations and admissions and to participate fully in all settlement discussions and, unless excused by the judge for good cause shown, all parties must be in attendance. In addition, any person not a party, whose authority is needed to settle the case must attend the conference in person or be available by telephone. Sanctions should be imposed when a party does not comply with the court order or procedural rules. Depending on the circumstances such sanctions might include awarding damages, costs or imposing a fine as they are recommended in Appendix to Recommendation No. R (84) 5 of the Council of Europe[13].

5.2. Good faith participation

Parties sometimes misuse settlement conferences just to learn about the other side's strengths and weaknesses of the case therefore good faith participation requirement rule might be helpful. Legal incentive to good-faith participation in settlement discussion might be a procedural rule, which stipulates that in case of failed settlement attempt a judge may immediately proceed the case to trial hearing.

Some jurisdictions do not require only good-faith participation at a settlement conference, but also good faith to negotiate a settlement of the action. The parties and/or their attorneys shall spend sufficient time in discussing the case fairly and shall endeavour to reach agreement prior to pre-trial or trial.[14]

5.3. Settlement proposals

It is interesting to see how far certain procedural rules go as the judges' role in settlement activities is concerned. In Slovenia and Germany, for example, a judge is encouraged not only to openly discus the factual and legal aspects of the dispute with

[10] For example, in Finland the judge must first obtain an arrangement between the parties in all civil actions.

[11] In accordance with Section of the 279 ZPO (CPC), in Germany the court must favour the search for an amicable solution throughout the procedure. In France, Article 21 of CPC stipulates that it is the responsibility of a judge to reconcile the parties (Green Paper on Alternative Dispute Resolution in Civil and Commercial Law, Commission of the European Communities, Brussels 2002). In Slovenia Article 306 of CPC determines the duty of a judge to notify the parties about a possibility to settle and to assist them in settling. A similar provision can be found in Article 258 of the Austrian ZPO (CPC.

[12] Paragraph 2 - 6 of Article 278 of the German CPC (Gütungsverfahren), Article 305a – 305c of the Slovenian CPC, Article 185 of the Italian CPC.

[13] Recommendation on the Principles of Civil Procedure Designed to Improve the Functioning of Justice, No R (84) 5, Council of Europe, Strasbourg.

[14] See for example Rule 16 (c), (c) 7 D. C. C. pre-action protocols in England and Wales have a similar value (Getting the Deal through Dispute Resolution in 30 Jurisdictions Worldwide, 2003, Law Business Research).

the parties, but is also entitled to make his own settlement proposals.[15] Slovenian judges are still reluctant to use this authority, since in case of unsuccessful attempt to settle it is the same person that has to act as trial judge and therefore his/her impartiality might be questioned by the parties. In order to avoid a situation, where the settlement judge would have to defend his own settlement proposal, it might be recommendable to require such proposals to be submitted in the form of a draft versions. It also seems indispensable to provide judges with extensive training on methods and techniques of balancing the appearance of impartiality and settlement proposals.[16]

5.4. Alternative Dispute Resolution

Several legal systems integrate alternative dispute resolution (ADR) into the civil action case processing system. ADR, entrusted by the court to a third party, is the subject of general regulations or draft regulations in most European states. These range from the possibility of recourse to ADR (for example in Belgium[17] and in France[18]), to the encouragement (in Spain[19] in Italy[20], in Sweden[21] and in England and Wales[22]) and even the prior obligation to have recourse to ADR under the law by decision of the judge (for example in Germany, Belgium and in Greece[23]). Pilot projects[24] aimed at encouraging a wide-spread use of ADR include practical experiments that have been carried out following the initiative of the courts themselves[25] or the initiative of the competent ministries .

In general, courts offer mandatory or voluntary mediation in two forms: as an alternative dispute resolution annexed to the proceeding court within the court or as a procedure carried out by private provider by order or referral from the court. The courts in the United Kingdom ,for example, offer mediation to parties involved in judicial dispute by instructing them to seek mediation services from a private provider. In this way the mediation is separate from the civil action and represents an alternative to it. Parties are referred away from the court and mediation is not part of the activities carried out by the court. In contrast, courts in Slovenia offer mediation as a court service. Mediation is integrated within the court, is staffed and funded by the court. Mediators (judges, retired judges, practising lawyers, social workers) are trained, monitored and licensed by the court.[27]

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[15] Article 307 paragraph 4 of Slovenian CPC, Article 278 of German CPC.

[16] Hausnan H. 2003, Settlement in case law – unpublished paper.

[17] Article 665 of the Judicial Code.

[18] Articles 131 – 1 to 131 – 15 of CPC.

[19] Articles 414 and 415 of Act No. 1/2000.

[20] Articles 183, 185 and 350 of CPC.

[21] Chapter 42 Section 17 of CPC.

[22] Rule 26.4, 44.5 of CPR.

[23] Green Paper … p. 15.

[24] Experimental projects are being conducted in the Netherlands and in Denmark (European Commission of the Efficiency of Justice, Mediation, Strasbourg (2003) 25 CD1) Council of Europe).

[25] An experiment is being conducted in at a French labour tribunal and at the Slovenian District Courts of Ljubljana, Koper and Nova Gorica.

[27] According to the Slovenian model of court-annexed mediation the parties sign in case of agreement a binding and enforceable court settlement order.

5.5. Financial incentives

Apart from specific financial incentives like those in England and Wales (offers to settle and payment into court[28]) system of court and attorneys fees seems as useful incentive to early resolution. In case of separate court fees for the filing of a lawsuit, for the procedure of examination of evidence and for a court decision, such system could encourage parties to settle in an early stage of the procedure and thus save fees.[29]

As far as attorneys' fees are concerned, European legal systems vary significantly. The range covers various forms from contingency fees, a regressive scale depending on the value of the litigation claim to per-hour fees. As to incentives to settle, the system of paying attorneys per procedural step of the litigatiojn without limitations seems to be less favourable[30] Enhanced attorneys' fee for court or out of court settlement might contribute significantly to the promotion of amicable dispute resolution. One can certainly not expect lawyers to adopt a system favouring early settlement, if it causes reduction of their income.[31]

Lessons learned from voluntary mediation programmes show that free-of-charge court-annexed mediation could significantly contribute to willingness and readiness of parties to settle.[32] On the other hand, UK experience revealed that the efforts a party has made to resolve a dispute in ADR may be taken into account when determining cost liability and therefore represent a tool of selective pressure imposed on the parties.

5.6. Other legal incentives

Filing and serving of documents, assignment of cases to individual calendars, reasonable timetable of proceeding, summary procedures or decisions, interim measures, limited oral and written submissions, *ex tempore* oral decisions, case appraisal and other procedural actions could have important impact on early settlements in various countries.[33]

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[28] See The Right Honourable Lord Justice Mance, Early settlements of disputes and the role of judges, CCJE, European Conference of Judges, Strasbourg 2003.

[29] Germany has a statutory regulation as described above. Slovenian Article 12 of Court Fees Code stipulates that a party is not obliged to pay any court fee in case of withdrawal of complaint or settlement reached.

[30] The former Slovenian attorneys' fees system has encouraged attorneys to benefit from a long and complicated procedure.

[31] Lawyers often describe ADR as an alarming diminishment in their revenues.

[32] Zalar A, 2003, Management of Change in the Judiciary Case Study of Court – Annexed Mediation in the Ljubljana District Court; Five Challenges for the Slovenian and German Judiciary, Ljubljana.

[33] First Study Commission, International Association of Judges, Reports of member national associations, San Juan, Puerto, Rico, 1997 and Porto, Portugal 1998.

6. Judicial incentives to early settlement

6.1. Early court intervention

Early court intervention in case progress by means of case-flow management involves the collection of case information at case initiation, the scheduling of hearing or conference dates and the issuing of case-management orders that govern case progress to disposition by non-trial means.[34] Early court intervention also means that filing of a case triggers a monitoring process. In order to be effective, monitoring needs automated case-management system.

6.2. Differentiated case management (DCM)

An effective toll for ongoing court control of case progress is differentiated case management (DCM) under which the court distinguishes among the individual cases in terms of amount of attention they need from judges and lawyers and in terms of the pace in which the case reasonably proceeds to conclusion. Through an early screening process involving court-attorney communication after case filing, cases could be divided into different tracks: expedited, standard and complex. The court could establish different overall time expectations for each track.[35] With each time standard the term "early" has a different meaning. Each track could have its own specific intermediate event and time standards, as well as management process.

6.3. Preparation for court events

For early disposition of a case by settlement, the court must promote preparation for court events by parties and lawyers. It is lawyers and parties, not judges who settle cases. Lawyers settle cases when they are prepared and they prepare themselves just for significant and meaningful court events.

6.4. Meaningful pre-trial events

Court events often do not take place on the scheduled date, whether due to the postponement being granted by the court at the request of a party or being necessary because the court could not fit the case in its calendar. Firm trial dates and restrictive continuance policy is therefore crucial. Continuances should be kept to a minimum and should be given when good cause is shown. The parties and their representatives have to duly expect that continuance requests are more likely to be denied than to be granted. Scheduled court events should be "chiseled in stone".[36]

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[34] Steelman D. C., 2000, Case-flow Management: The Heart of Court Management in the New Millennium, National Centre for State Courts, Williamsbourgh.

[35] In Slovenia, the Ljubljana District Court adopted six, eighteen and twenty-four months time limits to disposition for each track.

[36] Shuker N. R. 2003, Civil Delay reduction, Washington D. C.; Steelman D. C. 2000… p. 3-14, chapter 1.

6.5. Settlement techniques

In settlement discussions judges should make the role of the judge clear to all parties at the very outset of the discussion. informing them whether the judge is the settlement judge or whether he/she is to preside over a bench or jury trial, if the matter fails to settle. A judge should use settlement techniques that are both effective and fair and be mindful of the need to maintain impartiality in appearance and in fact.[37]

It may be expected that a judge raises the settlement issue him/herself, channels discussion to areas that have the highest probability of settlement, points out the weaknesses of the case based on the facts or the law by informing the litigants on how similar cases were settled and to engage in litigation risk analysis of the particular case, including the economics of going to trial.

Judges in settlement discussions are often asked by litigants: How strong is my case? How much is it worth? What are the chances it will settle? Sometimes this is merely an excuse for something a party finds hard to accept and seems appropriate to evaluate especially when the party's expectations are unrealistic and the party's attorney can not convince him or her of this. However, the relative nature of the evaluative approach lies also in the fact that people will always listen to what they want to hear and that parties want an evaluation of their position only until they hear what it is.

Nevertheless, a settlement judge should always be aware of his/her role to build trust, to separate interest from positions, to be focused on the future not on the past, and to listen. And in settlement discussions he or she should not sacrifice justice for expediency.

[37] Goldschmidt J, Milord L. Judicial Settlement Ethics Judges Guide, 1996, American Judicature Society.

Alternative dispute resolution: judicial mediation

by

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Introduction

The crisis affecting the administration of civil and commercial justice, in its classic form, traces its origin to numerous factors that stem from the rigidity and complexity of the adversary system, which has become outdated in many respects, and from the institutional failings of the system itself. Another simpler, less costly and more desirable channel for dispute resolution is slowly beginning to emerge within the judicial system.

Seeking to reflect the movement of western societies eager to participate in their judicial destiny, courts, such as the Quebec Court of Appeal, have begun to introduce a unique conciliational form of justice that reinvests the parties with their decisional powers.

The classical system of civil justice

The evolution of western societies has led to the institutional expression and resolution of judicial conflict. For decades, only the trial mode – leading to the judiciarisation of the conflict – has enabled dispute resolution through an adversarial and contradictory procedure. In short, a state-controlled justice system whose essential purpose has been the judging of opposing subjective rights of the parties by judicial decision.

Many contributory factors have assured the perpetuation of the contradictory justice system which still remains the regal pathway to conflict resolution: notably, the independence and impartiality of the decision-maker; the application of a uniform and neutral procedural code; the assurance that the judicial decision will essentially emanate from the evidence produced by the parties; the resolution of the dispute with regard for rule of law and the juridical stability as assured by judicial precedents. Not insignificant are the phenomena by which the judiciary has become a function of social regulation which punctually defines the ordinary relation of the individual to society and accounts for its evolution (abortion, assisted suicide, the right to equality, bio-rights…). The judicial decision translates the relativity of the juridical norm and bears witness to the degree of risk that pluralistic western society is willing to take with regard to the common values that mould it.

In essence, the act of judging proceeds from a reflexive analysis and a maturation of juridical thought that fuels positive law, debate and argument. It is inevitable that the course of a judicial dispute that ends in judgment be subject to procedural and, by necessary implication, temporal constraints. The efficiency of the judicial system and the modern management of proceedings may, indeed, restrict

frivolous or dilatory actions, but these measures will never constrain the act of judging, introspective by nature, to a conclusion incompatible with its attributes: discernment, reason and wisdom. Another form of justice, of a conciliatory nature, is about to join the classical system of civil justice in order to divert the disputes which are unsuitable to such a formalistic system, and to settle them swiftly, and, in all respects, in the best possible way. For if the mission of adjudication, or the act of judging, remains steadfast, one must nevertheless recognize that, in most civil disputes, contradictory debate, both complex and procedural, is ill-adapted to the efficient resolution of these disputes in modern juridical reality, and the interests of litigants.

In fact, the classical adversary system, hinges on the *polarization* of roles (plaintiff-defendant; appellant-respondent), the *opposition* of legal representatives, and the exacerbation of the *antagonism* at the source of the conflict.[1] These considerations bring about the unweildiness of the contradictory debate, weighed down by the procedural burden (discoveries, preliminary exceptions, incidental proceedings, expert reports…).

The judicial determination of the parties' rights constitutes the cornerstone of contradictory justice. The cause and the resolution of the conflict at the origin of the dispute do not constitute, namely, the object of the judicial contract and can be ignored in the processing of the dispute.[2]

The shortcomings of the traditional system[3] - enunciated time and again - have created a real crisis in the authoritative judicial order and have resulted in emergence of new means of conflict resolution, more functional and better adapted to settling a great proportion of civil disputes.

Amongst these tallied shortcomings, let us mention the delays (administrative and procedural),[4] the judicial and extrajudicial costs[5] related to the contradictory

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1 W.B. Wendel, "Value Pluralism in Legal Ethics" (2000) 78 Washington University Law Quarterly 113 at 212.

2 L.L. Riskin, "Mediation and Lawyers" (1982) 14 Ohio State Journal on Dispute Resolution 59; see also, A.J. Black, "Separated by a Common Law: American and Scottish Legal Education" (1993) 4 Indiana International and Comparative Law Review 15 at 31; K.J. Rigby, "Alternative Dispute Resolution" (1984) 44 Louisiana Law Review 1725 at 1727.

3 H. Stinzing, *Mediation – A Necessary Element in Family Dispute Resolution?: A Comparative Stude of the Australian Model of Alternative Dispute Resolution for Family Disputes and the Situation in German Law* (Frankfurt: Peter Land ed., 1994) at 28-35.

4 M. Conrod, "Case Management Wins Plaudits" (1999) The Lawyers' Weekly 18:38 (February 19, 1999) 13.
For example, procedural delays (inscription in appeal, appearance, factum preparation, incidental proceedings, etc.) inherent to the course of any ordinary civil case, vary between eight and ten months. It is only once the procedural delays have expired that the appeal is deemed ready and can be put on the role for hearing. It then takes another eighteen months, on average, for the appeal to be heard.

5 A.L. Levin & D.D. Colliers, "Containing the Cost of Litigation" (1985) 37 Rutgers Law Review 219. A study led by the Commission of Revision of Civil Justice of Ontario established the fees related to a typical civil case at over $38 000. 75% of the awarded amount was applied towards fees and legal costs. See the *Rapport du groupe de travail sur les systèmes de justice civils,* Canadian Bar Association, August 1996, at 16.

debate, agency costs[6] resulting, at times, from overlapping interests, the physical and psychological trauma associated with, most particularly, long judicial conflicts,[7] and the inherent limits of contradictory debate with regard to the search for the best solution that can, in real terms, put an end to the dispute.[8]

Conciliational justice: another way of rendering justice

As the subjective shortcomings inherent to adversarial debate became apparent, consensual models of dispute resolution began to develop within state-controlled justice. At the same time, consensual models of normative output made their appearance: there emerged regulatory models under which agents who are subject to rules also actively take part in their formulation. These models operate primarily in the area of regulated activities (environmental protection, welfare state, financial markets) and they coincide to some extent with what *Habermas*[9] and *Van de Kerchove*[10] described as a loss of legitimacy of norms resulting from the democratic deficit in post-industrial societies. Whether scientific or grounded in social regulation, norms are withdrawn from state control (a process which *Lucie Lamarche* calls «désétatisation») as the role of the state shifts.

However, neither the classical judicial system's efficiency crisis nor the legitimacy crisis which has gripped post-modern society can explain, on their own, the rise of conciliation practices by judicial bodies. One is preeminently compelled to recognize the desire of the community to gain independence – in suitable cases – from imposed justice in order to seek, through the emergence of a collective maturity, a mutually negotiated and accepted solution.[11] In order to mirror societies' movement towards the control of its judicial destiny, tribunals have agreed to introduce, within the state-controlled system, a judicially supervised participation which, according to the will of the parties, substitutes for the authoritative juridical order, which imposes its judicial solution, but does not always succeed in reconciling the parties

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6 W.P. McKeown, "Expert and Survey Evidence in Patent and Trademark Cases: Proposed Federal Court Case Management Procedures" (1997 14 C.I.P.R 1 and 2; M. Teplitsky & W. Low, "Arbitration: An Alternative" (1983) 4 Advocates' Quarterly 233.

7 V.J. Christiansen, "Ritual and Resolution: The Role of Reconciliation in the Mediation Process" (1997) 52 Dispute Resolution Journal 66; see also G. Appleby, "An Overview of Alternative Dispute Resolution" in C. Samson & J. McBride, eds., *Solutions de rechange au règlement des conflits* (Ste-Foy: Presses de l'université Laval, 1993) at 25.
During the course of appellate judicial conciliation sessions, parties have consistently and spontaneously expressed the physical and psychological aftereffects that ensue from enduring disputes. Episodes of situational depression as well as pathologies related to the stress of judicial litigation are frequently reported by the parties and their attorneys.

8 In matters related to property law (boundary marking, servitudes, common property, co-ownership, etc.) the adjudicative function, limited to the judicial contract of the parties and the rigid application of the norm, has a hard time achieving dispute resolution. One notices the judicial recurrence of disputes related to such matters.

9 J. Habermas, *Théorie de l'agir communicationnel* (Paris : Fayard, 1987), see also from the same author : *La technique et la science comme idéologie* (Paris : Gallimard, 1990). See also, M. Van de Kerchove & F. Ost, *Le système juridique entre ordre et désordre* (Paris : Presses Universitaires de France, 1988).

10 M. Van de Kerchove & F. Ost, *ibid*.

11 L.L. Riskin, "The Represented Client in a Settlement Conference: The Lessons *of G. Heileman Brewing Co. v. Joseph Oat Corp.*" (1991) 69 Washington University Law Quarterly 1059.

differences.[12] This judicial solution of conciliation becomes part of a supple, efficient and inexpensive process. In a nutshell, humane, participatory and accessible justice.

Alternative modes of dispute resolution, specific to the postmodern era, experienced the first phase of their development during the 1970's.[13] They literally exploded thereafter, going on to penetrate numerous spheres of public and private activity. Alternately criticized[14] and praised[15], the existence of alternative modes of conflict resolution has contributed to the revival of the ideological disagreement with regard to the concept of justice: interventionism/liberalism; antagonism/interdependence; procedure/substance, etc.

The dichotomy of these seemingly opposite concepts has been resolved, in the Quebec Court of Appeal, by the integration of conciliational justice within the classical judicial system based on adjudication. Thus, trial justice and conciliational justice cohabit within the same quarters and, according to their respective vocation, participate in fulfilling the mission vested in courts and other tribunal: rendering justice.

The experience of the Quebec Court of Appeal

The judicial conciliation program introduced at the Quebec Court of Appeal en 1998 was conceived to ease the deficiencies of the classical system of civil justice and, also, to reflect the evolution of society's interest in participating in its judicial destiny.

Judicial conciliation offers an additional pathway to judicial conflict resolution to parties already involved in a contradictory debate. Whereas alternative means of dispute resolution usually tend to avoid trial justice and favour the conclusion of out-of-court settlements, judicial conciliation offers, within the framework of the state-controlled judicial system, a channel to negotiate a settlement intended to put an end to litigation. Should the negotiations fail, the parties pursue their proceedings within the formal system so as to obtain judicial adjudication. The Quebec Court of Appeal has integrated both tracks to a judicial solution within a unique, harmonious and

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12 J. MacFarlane, "An Alternative to What?" in J. MacFarlane, ed., *Rethinking disputes: The Mediation Alternative* (Toronto: Emond Montgomery Publications Ltd, 1997) at 4-8.

13 To learn about the origine of these conflict resolution measures and their development, see : S.B. Goldberg, F.E.A. Sander & N.H. Rogers, *Dispute Resolution : Negotiation, Mediation, and Other Processes,* 3rd ed. (Boston : Little, Brown & Company, 1996) c. 1.

14 O.M.Fiss, "Against Settlement" (1984) 93 Yale Law Journal 1073; O.M. Fiss, "Out of Eden" (1985) 94 Yale Law Journal 1669; J. Resnick, "Managerial Judges" (1982) 96 Harvard Law Review 376; J. Resnick, "Failing Faith: Adjudicatory Procedure in Decline" (1986) 53 University of Chicago Law Review 494.

15 See *e.g.*: J. Thibault, *Les procédures de règlement amiable des litiges au Canada* (Montreal: Wilson & Lafleur, 2000) at 311; J. Paré, "Solution de rechange pour le règlement des litiges: la médiation" in J.-L. Baudouin, ed., *Médiation et modes alternatifs de règlement des conflits: aspects nationaux et internationaux* (Cowansville, Qc: Yvon Blais, 1997) at 193; A. Wellington, "Taking Codes of Ethics Seriously: Alternative Dispute Resolution and Reconstitutive Liberalism" (1999) 12 Canadian Journal of Law and Jurisprudence 297; C. Nélisse, "Le règlement déjudiciarisé: entre la flexibilité technique et la pluralité juridique" (1992) 23 Revue de Droit de l'Université de Sherbrooke 269; D.L Marston, "Project-based Dispute Resolution: ADR Momentum Increases Into the Millenium" (2000) 48 Canadian Law Review 221.

functional conflict resolution structure. Approximately 450 cases have already been deferred to judicial conciliation by joint request. Of this number, 80% reached a final settlement between January 1998 and June 2002.

The conciliation process is based on the expressed *consent* of all parties involved and is characterized by the *flexibility,* the *confidentiality* and the *breadth* of the intervention negotiated with the help of the *judge*.

- *Consent*

Judicial conciliation is accessible to all parties involved in civil, commercial or matrimonial litigation at the appellate level. Public law and penal litigation are obviously excluded from the conciliation procedure.

In order to initiate the conciliatory process, the parties must sign a « joint conciliation request ». This request is handed in to the Court's clerk, at the earliest, after the filing of the inscription in appeal, or at the latest, before a final judgment is rendered. Thus, the settlement of a case might occur a few days after the filing of the inscription in appeal, or, during the Court's deliberations on the case. This illustrates that judicial conflict is constantly evolving and that litigants entrenched in a position of firm opposition may, in light of circumstances, wish to –temporarily and voluntarily - exit the adjudicative track at any point in the course of litigation in order to take steps towards a judicial settlement negotiated under the authority of a judge of the Court of Appeal.

Thus, judicial conciliation is based on and justified by the expressed will of the parties who remain entirely free to engage in a conciliational process and to withdraw from it, at any stage of the process, in order to return to the formal system.[16]

- *Confidentiality*

The joint conciliation request contains an undertaking that marks the exchanges between parties with the seal of confidentiality.[17] This undertaking assures the fluidity of communication and negotiation, and guarantees the reciprocal impenetrability of conciliational justice and formal justice which coexist independently.

The undertaking signed by the parties is of a contractual nature and entails an ethical obligation for attorneys.

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16 The Court of Appeal has adopted a voluntary rather than mandatory judicial conciliation system since it is the highest Court whose mission is to state the law. Certain lower courts (Canadian and American) have opted for mandatory modes of judicial dispute resolution. This often successful choice can be explained by the fact that alternative modes are directly integrated in case management and that the contradictory debate has only just begun.

17 O.V. Gray, "Protecting the Confidentiality of Communications in Mediation" (1998) 36 Osgoode Hall Law Journal 667; J. Watson-Hamilton, "Protecting Confidentiality in Mandatory Mediation: Lessons from Ontario and Saskatchewan" (1999) 24 Queen's Law Journal 561; R. McConomy, "La portée et les limites de la confidentialité des séances en médiation", in Barreau du Québec, Service de la formation permanente, *Développements récents en médiation* (Cowansville, Qc: Yvon Blais, 1996) at 111.

It seemed unnecessary to add coercive measures to the obligation of confidentiality considering that the conciliation system rests on the willingness of the parties, good faith and procedural flexibility. Furthermore, the experience of four years of judicial conciliation has confirmed this proposed principle.

Moreover, it must be emphasized that the conciliation file is kept in the conciliator-judge's chambers and not at the office of the court. Conciliation sessions are never mechanically recorded and the conciliator-judge's hand-written notes are destroyed at the end of conciliation.

- *Procedural Flexibility*

The appellate conciliation session is preceded by the forwarding of the case summary (inscription in appeal and the lower court's judgment), as well as the written and testimonial evidence deemed important by the parties. By eliminating the need to transcribe stenographic notes and to prepare a factum, conciliation procedure has been considerably simplified, and, as a result, costs have been reduced to the basic essentials.

The parties choose, with the help of the conciliator judge, the rules that will govern the conciliation session by combining the flexibility of the process and the maximization (caucusing; plenary; meeting with attorneys; video-conference; conference calls, etc.). The objective sought by the parties is to find, by way of compromise, the best solution possible to a common problem without having to abdicate their material and personal interests.

It is interesting to note that – at the end of a three hour session[18]- the parties usually can not only clearly and concisely expose the juridical nature of their case, but, equally, begin a dialogue towards resolution that is divorced from the acrimonious enunciation of the problem, providing an opening towards a joint participative solution which will preserve the interests of all.[19] Sometimes, calling upon an expert (engineer, land-surveyor, accountant…) allows an immediate measurement of the feasibility of the solution negotiated by the parties so as to extinguish all possibility of future conflict. Acting as an ochestrator, the conciliator judge conducts, in a subtle manner, the negotiation unfolding between the parties. Cleverly, he keeps the parties from veering off the track of the main dispute and abates discussions likely to lead to a break down in communication. Through control without interference, he induces the parties to remain focused, in a constructive manner, on the juridical problem they are confronted with.

- *The breadth of the mandate*

As soon as the case is referred to the court, at the time of the filing of the inscription in appeal, the conciliator-judge can intervene, as an arbitrator, not only in

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18 An appellate judicial conciliation session lasts, on average, three hours. A single session usually suffices to break the deadlock or to come to the conclusion that the case must proceed on its track towards adjudication.

19 J. Macfarlane, "Why Do People Settle" (2001) 46 McGill Law Journal 663; C. Lickson, "The Use of Alternative Dispute Resolution in Intellectual Property, Technology-Related or Innovation-based Disputes" (1995) American Jurisprudence Trials 483.

the dispute giving rise to the appeal, but also in all related litigation pending before the Court of Appeal or even before other tribunals. All that is needed to set the mechanism in motion is the joint request of the parties, and the judge's assessment, further to a summary examination, that the dispute is susceptible to be resolved by way of judicial conciliation.

This particular feature of the system has made it into an instrument of global conflict-management that enables the parties to eliminate many cases pending before the courts. Experience has revealed that once the conciliation procedure gets under way and the parties are sincerely engaged in the dynamics of communication and negotiation, it is preferable to associate related litigation to the appeal case, resulting in saved time and resources for all involved.

- *The Judge's Role*

Each conciliation session in presided by a regular judge of the Court of Appeal.

Many reasons explain the choice of a judge rather than a private conciliator. These reasons are related to the perceptions of both the parties and lower-courts, as well as the moral and judicial authority of appeal court judges.

The independence of the judicial institution, the impartiality of its judges, their profound knowledge of law and conflict, their traditional mission of determining the outcome of disputes and rendering justice explain why a conciliator-judge is perceived by the parties as a strong moral authority.

These reasons apply to both trial court mediator judges as well as appellate conciliator-judges.

However, in the particular circumstances of an appellate case, it appeared essential that a judge of the Court of Appeal be appointed to preside over the conciliation session in order to assure that respect and deference are shown towards the trial judge, whose decision forms the basis of the appeal.

While exercising a conciliatory role, a judge pursues a narrower course of intervention than a private mediator in that the judge cannot, in any way, bind the Court nor alter the course of the adversary debate in the event conciliation fails. His in-depth knowledge of judicial cases (procedures, documentary evidence and judgment) will enable him to evaluate the rightfulness of the parties' respective claims in the perspective of compromise rather than adjudication.

Within the framework of his intervention, the conciliator-judge must allow the parties to examine the case in all its aspects, to define the essential questions as well as the underlying interest of a settlement. In short, the conciliator-judge must create a secure environment, enabling the parties to sincerely, openly and spontaneously enter into the negotiation process without fear of altering the balance of powers.

The privileged role of the conciliator-judge, as a neutral facilitator, will enable him to present to the parties – in due course - their options for a solution. After all,

parties who have chosen the judicial track have often alienated their objective perception of the conflict. By his broad vision, the conciliator steers the parties away from the narrow frame of the judicial dispute so as to lead them to explore avenues likely to constitute valuable settlement options.

The judge-conciliator is entirely responsible for the progress of the conciliation process. However, the responsibility of the outcome rests entirely on the parties. It is a true judicial transfer. Though the process encourages the parties to take the necessary risks to put an end to the dispute that opposes them, never does it take from them their decision-making power.

Conclusion

The emergence of alternative modes of conflict resolution within state-controlled justice systems bears witness to societies' shouldering responsibility with regard to law, which it no longer perceives as a transcendent and immutable matter against which it is powerless. Because of the scarcity of resources, the realisation of the adverse dynamics of conflict and the efficiency crisis affecting judicial institutions, whenever possible, people are reclaiming the power to resolve their disputes. Rather than a sign of loss of legitimacy of the judicial norm, this new alternative system reflects a democratic renewal. The fact that judges - guardians of societal order and democratic values - participate with the community in the transformation of the classical system of civil justice bears witness to the reduction of the distance between judicial and social matters, and that society, better understood, will be better served.

Case management - a pro-active and innovative but impartial judiciary

by

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This paper will deal with case management in civil cases by the judiciary in The Netherlands. Recently there have been some developments that could possibly be of interest in a European perspective and serve as a starting point for further debate.

Civil procedures in The Netherlands: developments up to the year 1997

The current code of rules governing civil procedure in The Netherlands dates from the year 1838. Since then, civil lawsuits gradually evolved from mainly oral procedures to a judicial process that is for the greater part conducted in writing. Traditionally the litigating parties were considered to be "domini litis" who determined not only the scope but also the pace of judicial proceedings. This resulted in a passive role of the judge, in which he tended only to act if the parties, or one of them, asked him to do so. Barristers usually were compliant in granting each other postponements and thus proceedings could drag on for years. The law permitted the judge to order a conference of the judge and the litigating parties, a socalled *comparitie* (conference), in order to try to reach an amicable settlement or to gather information, but he tended to do so only after two (and sometimes more) rounds of exchanging written statements of claims, pleas and counterclaims had already gone by. At that point the attitudes of the opposing parties had usually hardened and the stakes had been raised because a lot of time and money had already been spent. Also judges were selected mainly for their legal capacities, not for their abilities in case management or their talents with regard to facilitating negotiations. Thus, the *comparaties* quite often did not result in a negotiated settlement or in a speeding-up of proceedings. Finally, the law permitted parties to present their arguments orally, even if several rounds of exchanging of written statements had gone by, and this tended to cause even further delay. No wonder then that, when at last the parties got round to ask the judge to give his verdict, he too –overburdened with work as he often was- did not always feel a sufficient sense of urgency and tended to "take his time".

The "*Versneld Regime*"- experiment

In due course dissatisfaction with the length and the costs of civil proceedings grew, not least among judges themselves. This led to a more active participation of judges in case management, to a strong increase in short and efficient summary proceedings (which tended not only to precede but also replace "normal" civil lawsuits), and to experiments in new forms of civil proceedings, one of which was called *'Versneld Regime"* (accelerated regime).
This experiment, which was initiated by the judges themselves and was introduced in all courts of first instance of The Netherlands in 1997, enabled the barrister and his client who had decided to start a civil lawsuit either to choose the usual path of

proceedings, with ample opportunity for exchanging, at a relatively leisurely pace, written claims, pleas and counterclaims, or to go for *Versneld Regime*. If the claimant opted for the second route, he had to formulate in one written statement all his claims, the legal and factual foundation for these claims, the arguments thus far used by the defendant, and their rebuttal. The opposing party likewise had to put all his cards on the table in one written statement, after which, as a matter of course, the judge ordered a *comparitie*, if necessary accompanied by an order to bring along witnesses or provide written evidence. The parties were allowed only a short period of time for their statements (three to six weeks), the judge usually ordered the conference to take place within a month after the statement for the defence and at the conference itself the judge played an active part and actively tried to lead parties into an amicable settlement. If at the conference a settlement was not reached, the judge could, and often did, state immediately which points of fact had to be proven, which party had the burden of proof, at what date witnesses could be heard, etcetera.
The experiment was very successful. After two years, more than one third of all new civil lawsuits (family proceedings not included) were dealt with according to *Versneld Regime* and in about one third of those cases a settlement was reached at the *comparitie* itself, while in practically all of the other cases a significant reduction of the length of the proceedings was achieved.

The "Flying Brigade"

If *Versneld Regime* was to be a success, the judges would have to speed up their own performance, too. The scheme was a voluntary one, and the enthusiasm of barristers and their clients to take that route would, of course, quickly diminish if they for their part had to conform to strict periods of time while the judges allowed themselves months and months before presenting their verdicts. Some courts of first instance, struggling with backlogs and/or problems of understaffing, would not be able to cope with the new requirements. To provide temporary relief to these courts, in the year 2000 the "*Flying Brigade*" was set up. This was a task force of five experienced judges and about twenty-eight law clerks (mostly young , talented law graduates) who after a few months of training did nothing else but churn out written interim decisions and final verdicts on behalf of the courts that needed help[1]. These decisions tended to concern "run of the mill" cases[2], in which the advantages of being able to delegate work to able law clerks could be best exploited.
The Flying Brigade proved to be quite successful. In 2002 it already produced no less than 1.858 decisions. It will be continued until the year 2006.

Change in the law

The *Versneld Regime* experiment contributed significantly to a far-reaching statutory amendment. Since January 1, 2002, the code of rules governing civil proceedings has more or less prescribed the *Versneld Regime*-model as obligatory for all new cases, unless the parties, or one of them, can convince the judge that special circumstances necessitate another mode. In other words: proceedings in which the parties have to put all their cards on the table in one written statement, followed by a conference in which the judge takes an active part, are now the rule and not the exception.

[1] The law permits judges of a court in The Netherlands to act as a judge in another court of the same instance. The judges seconded to the Flying Brigade retain their position of judge in their own court and thus can take the decisions in their own name as an acting-judge of the court that has sent in the files.

[2] Though it did also happen from time to time that courts sent in files they had avoided tackling themselves because of their daunting complexity!

The new law provides the judge with a number of tools aimed at concentrating and accelerating proceedings:

- In the first stage of proceedings ("at the gates") the judge in charge of supervising progress of all pending and yet to be admitted civil cases (the *"rolrechter*") decides on applications by the claimant or the defendant to have his case tried in a way different from the usual regime, such as requests for more time to present their written statements, or an extra round of exchanging these statements. These applications have to be made promptly, either by letter of by e-mail; the opposing party is allowed only a few days in which to make his views known and the judge too rules within days. No appeal is allowed.

- During proceedings ("along the way") the *rolrechter* decides on requests by the parties for respite due to unforeseen circumstances; there is no appeal against his decision.

- Shortly after the claims and the pleas have been presented, a judge is assigned to the case; this judge appoints the date for the *comparitie* and can order a party to present information, submit documents or answer certain questions at this conference. If the party fails to do so in a satisfactory way, the judge can draw conclusions from this omission with regard to the facts of the case or the opportunities to be granted to the party to supply proof.

- If he is of the opinion that both parties have had sufficient opportunity to present their case in their written statements and at the conference, the judge can rule that there will be no further written or oral exchange of arguments.

- At the *comparitie* itself, the judge can give a preliminary ruling. In this ruling he can, for instance, decide which facts have to be proven, which party has the burden of proof and in which way the evidence will have to be presented (by witnesses, through the findings of a court-appointed expert, by presenting written statements etc). If witnesses will have to be heard , the judge can immediately appoint the date of the hearing.

- the judge can rule that no appeal of preliminary rulings will be allowed before the final verdict is pronounced.

In this context it is interesting to note that the rules concerning the time granted to the litigating parties to present their written statements and concerning incidents in proceedings "along the way" are not prescribed by law. The judges themselves appointed a commission that succeeded in establishing a code that was acceptable to all the nineteen courts of first instance in the country. Delegates from all these courts regularly come together to update and synchronise the rules and a help-desk is at hand to give guidance in problems of interpretation and implementation of the rules.

Fundamental reflections on the principles of civil procedures

The legal reform of January 1, 2001, was not intended to be much more than an emergency repair job. It provided redress for some flagrant shortcomings in the system, but a fundamental rethinking on the principles of civil procedure was considered to be

long overdue. Accordingly, a committee of three leading legal scholars[3] was appointed to address this issue. In august 2003 the committee presented its preliminary findings in an interim report[4].

The findings, arguments and conclusions of this detailed and far-reaching report are too extensive to be summarised. However, in the context of this paper some opinions and ideas of the committee deserve to be mentioned:

- The committee found that the public (NB: not only in The Netherlands but in every other country they had included in their research!) was of the opinion that civil law procedures were too slow, too expensive and too formalistic.

- In order to provide redress for these shortcomings, the speedy progress of judicial proceedings - in a way that is fair to both parties- , should be considered a shared responsibility of both the parties and the judge. However, once proceedings have been initiated, it will have to be the judge and not the litigating parties who should have the last word in dictating the pace of proceedings and the space granted to the parties to present their arguments, furnish proof etc..

- The law should be changed in order to encourage the parties to exchange relevant information and to try to settle, either by way of mediation or by entering into negotiations in some other way, before they were allowed to go to court. In this context the "pre-action protocols" now in force in England and Wales are considered to be an example worth following.

- Once parties have gone to court, their dispute should be slotted into the most convenient "track" at the earliest possible stage[5]. The existing "small claims track" should be streamlined and adapted to resemble the German "*Mahnverfahren*" or the French "*Injonction de payer*" . Most of the other cases will have to be assigned to the "fast track" (more or less in the mode of the abovementioned "*Versneld regime*") and only exceptionally complicated cases will be allowed to enter a custom-made track comparable to the English "multi-track".

- The judge should be allowed more leeway to use information from outside sources and to cut off futile attempts to furnish proof (if, taking into account documents earlier supplied, statements and the like, he deems further attempts to prove certain facts a "mission impossible", the judge should be permitted to deny a party the opportunity to bring forward witnesses etc.)

- Summary proceedings should not be curtailed. In this so-called *Kort Geding* (an immediate descendant of the French *jugement sur référé*) the judge can provide a ruling if and when (as the law expresses it) "taking into account the interests of both parties an immediate provision is required". At present, in spite

[3] Professors Asser, Groen & Vranken.

[4] 'Een nieuwe balans – interimrapport fundamentele herbezinning Nederlands burgerlijk procesrecht' published by Boom Juridische uitgevers.

[5] Here again the Woolf reforms have led the way.

of the fact that the Supreme Court emphasises that in summary proceedings the immediacy-criterion still stands, the lower courts are quick to accept that this criterion has been met. As a result, and also because of their speed and cost-effectiveness, summary proceedings have grown ever more popular and now account for roughly one quarter of all civil cases representing an interest of € 5000 or more. The committee acknowledges that the way the judiciary in The Netherlands accepts cases in summary proceedings is not in line with most of the other European countries, but it is very reluctant to give up its proven advantages.

- Communication between one party and the other and between the parties and the judge should get more attention. Communication should start earlier –even before judicial proceedings are initiated- and it should be less formal. Full use should be made of ICT.

Conclusions

"A pro-active and innovative judiciary". Has the Dutch judiciary started fulfilling these qualifications? Of course there still is a long way to go, but a start has been made. A significant aspect of the *Versneld Regime*-experiment is, in my opinion, that this experiment was initiated and brought about by the judiciary itself, within the existing framework of the law. In this case the judiciary led the way, the law followed.
This approach could perhaps also be adopted in other countries.

More or less the same applies for the *Flying Brigade*. This, too, was a new phenomenon. The existing laws and doctrines did not help to bring it about, but they did not prove to be insurmountable obstacles either.

In line with developments elsewhere in Europe, in The Netherlands case management by the judge in civil proceedings is on the rise. The overall tendency seems to be that, once judicial proceedings have been initiated, it will be the judge and not the litigating parties who determines the mode in which and speed at which the case will progress. Further debate will probably concern the way in which parties should be encouraged to enter into negotiations or try alternative dispute resolution before going to court, the best way to make cases follow different tracks once judicial proceedings have been started, the balance that should be preserved between the autonomy of the litigating parties and the authority of the judge and the tools that should be given to the judge for successful case management.

The title of this paper also mentions the impartiality of the judge. Of course, total impartiality and independence of the judge will always be an absolute requirement. But this is not enough. Parties and their counsel must also have faith in the judge and in his impartiality. The more the judge assumes case management and adopts a "hands on" approach, the more this trust in his impartiality will be essential. Otherwise the judge will find that parties will not cooperate and will try to hamper all efforts by the judge to accelerate and concentrate proceedings -even up to the point of challenging the judge- because they fear that by cooperating they might possibly harm their own interests.

“The judge must not only be impartial, he must also be trusted to be impartial”.

Perhaps one “caveat” should be added. There is a lot the judiciary can do to make judicial proceedings faster, more cost-effective and in general more acceptable to the litigating parties and the general public, without first waiting for a helping hand by the government. But in the long run, all efforts to modernise will come to naught if the judiciary –as seems to be the case in some countries - remains chronically understaffed and underfunded.

WRITTEN CONTRIBUTIONS

Court ordered mediation in England and Wales

by

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1 Background

Court "ADR orders " for mediation have been made by Commercial Court Judges (who are involved in case management throughout) for the last 8 or 9 years. Many practices which started in the Commercial Court have been acknowledged and adopted more generally. The Civil Procedure Rules 1998 ("the CPR") were implemented in April 1999, and while the Commercial Court kept its practice largely separate, the new Rules gave a major push towards the wider use of mediation. Decided cases in the Court of Appeal since then have consolidated what the CPR initiated.

How far can parties properly and safely be required to mediate unless there are good reasons for not doing so, thus perhaps creating an opt-out regime? Mandatory, or at least opt-out, mediation is familiar in many other jurisdictions, and certainly in Ontario, where the independent research on its 2 year mandatory mediation project can be found at www.attorneygeneral.jus.gov.on.ca/english/courts/manmed. The debate in England is beginning, with a recently announced pilot of an opt-out scheme at the Central London County Court.

The Centre for Effective Dispute Resolution's (CEDR) own mediation statistics show that there was a huge 141% rise in its mediations in the year 1999-2000 following the introduction of the CPR, followed by a year with roughly the same number of mediations in 2000-01, followed by an actual fall in the total by 24% in 2001-02 – linked, we believe, to lack of direction by judges over ADR use. Not until an element of pressure was put on parties as a result of first *Cowl v Plymouth CC*[79] and then particularly *Dunnett v Railtrack*[80] and *Hurst v Leeming*[81] has there been a further uplift in annual figures, which is now continuing into its second year. Perhaps parties found ways around having to mediate until compelled by court decision to adopt the process. There seems little appreciable drop in settlement rates since the Court's new initiatives despite the fact that parties might be thought to be coming more reluctantly into mediation. Judicial intervention, whether by use of

[79] The Times 9 Jan 2002, in which the Lord Chief Justice castigated ignorance of ADR and threatened costs sanctions.
[80] [2002] 2 All ER 850, in which a successful appellant was deprived of costs for refusing to mediate.
[81] [2003] 1 Lloyds Reps 379, in which Lightman J said that a refusing part y must show that mediation had no reasonable prospect of success to avoid costs sanctions.

recommendations, orders or case law, appears to be helping even reluctant parties actively to use mediation.

But there are still relatively small numbers of commercial mediations of all types per year here. It is impossible to estimate an accurate figure. CEDR Solve has always published its figures and two other providers have begun recently to do so, but these account for less than 1000 mediations per year. To these must be added mediations undertaken by self-employed mediators, counsel and providers all probably operating at lower numbers. Thus the figure may be about 1500-2000 per year at present at most. That is still a very low proportion of issued claims, even with the fall in cases issued, with less than 20,000 High Court claim forms issued and a 6% drop in County Court proceedings in the last reported year.

The overall strategy is still to shift the balance further from court to settlement, including encouragement of mediation, being the policy of the Government and the intention of the CPR, with trial litigation being the last resort. So the court's approach involves persuading or pressuring more parties to mediate at some point and ideally earlier, while seeking to identify which cases possess features that make mediation a waste of time and money. Such decisions will probably mean disagreeing with parties' assertions as to suitability more often than agreeing with them.

Judicial pressure to mediate, whether by orders or recommendations to mediate, deals with recalcitrant or uninformed parties (or advisers) who in the procedural judge's view have got their refusal to mediate wrong. Such parties should perhaps not merely be allowed unreasonably to occupy court time by having their unreasonableness exposed and punished at trial by indemnity costs orders, but should be required to give mediation a try. The mediator's skills can then seek to move participants through to a mutually acceptable solution, as happens even with the most stubborn of parties and advisers. At least the process can be expected to define and narrow differences significantly, so as to save court time.

In two cases since *Dunnett v Railtrack,* trial judges have declined to penalise a successful party for declining to mediate, thereby rejecting the *Dunnett* approach. Park J did so in *SITA v Watson Wyatt: Maxwell Batley* [Pt 20 Defendant], as did Judge Reid QC sitting as Deputy High Court Judge in *Corenso Ltd v The Burden Group plc.* Both decisions are frustrating to experienced mediators, as both clearly had potential for settlement through the mediation process. In *SITA,* the main action did settle through determined mediation spread over several months, and it was the Part 20 proceedings where the defendant declined on the basis that they had a good case (a position clearly in conflict with *Dunnett* and *Hurst*. An argument that mediation had no reasonable prospect of success because the Part 20 claimant closed its mind to the possibility of having to accept total failure just about sits with *Hurst v Leeming.*

No such argument arose in *Corenso,* where the parties actually did settle shortly before trial, after indulging in a familiar litigation dance for 2¾ years. The claim could have been mediated early, perhaps even before issue of proceedings. There was a stay under Part 26.4, but this led nowhere. The gap between claim and counterclaim in *SITA* and *Corenso,* buttressed by fierce cross assertions of position, is utterly familiar to mediators, who settle such cases daily. What each may well have

needed was a court order requiring mediation to be tried in accordance with a set timetable. In neither case was there a cost benefit argument. The cost of preparing for and attending mediation would have been trivial in contrast with the costs expended on the litigation.

The Queen's Bench Masters assigned to clinical negligence work, who often have two CMCs in complex cases, have designed model directions for the second CMC which require ADR to be tried within 6 weeks of the trial window opening, and for any party who does not comply to lodge written reasons with the court which can be considered by the Judge when dealing with costs at the end of the trial. This is a welcome innovation which retains discretion by giving the opportunity for opt-out to be justified, but which brings pressure to bear on parties when they should have all relevant evidence available for appraisal of their risk assessment.

The problem in the lower courts is that the opportunities for judicial intervention are limited. At allocation stage, questionnaires are not completed with consistent completeness, and to take up such points in each case would consume enormous amounts of time for judges and court staff. The portion dealing with stays for settlement under CPR Part 26.4 gives no real scope for assessing the quality of judgement exercised by the parties who complete it, and the rest of the form is of similarly limited use.

The most effective tool however is for District Judge to recommend mediation at hearings when the court or the parties initiate a case management conference. This gives a losing party disgruntled at the winning party's refusal to mediate the opportunity to initiate a *Dunnett* costs order.

It is noticeably easier for District Judges to refer parties to mediation where a court has its own mediation scheme, as exist in about 8 courts at present and in the Court of Appeal. More court schemes are required to make referral simple, and it is encouraging to hear that the DCA is taking steps along these lines.

CEDR Solve has always identified each of its mediations as either court-referred or voluntarily referred. In earlier years there were year on year increases in court-referred cases, regarded broadly as a measure of judicial support for the process and a good trend. In 2002-03 (year ending March 2003) CEDR Solve's statistics for the first time showed a 30% drop in court-referred cases, from 104 to 71, with a corresponding increase in cases voluntarily referred. With the 22% increase in cases overall, this meant a huge rise in voluntarily referred cases.

This of course makes perfect sense when it is recalled that *Cowl v Plymouth CC* was decided in November 2001, and in particular *Dunnett v Railtrack* in February 2002 and *Hurst v Leeming* in May 2002. CEDR Solve has found parties specifically referring to *Dunnett* in a substantial proportion of voluntarily referred cases since that decision, and this is all to the good. It means that, without specific orders in individual cases (which would require time at allocation hearings, case management conferences or application notice hearings), parties are increasingly anticipating the need to try mediation without being told to do so by the court.

In each of *Dunnett v Railtrack, Neal v Jones Motors* and *Virani v Manuel Revert,* the three leading Court of Appeal cases on costs sanctions, it was a single judge's recommendation, and **not** an actual order, which was the basis for the costs sanction imposed for refusing to mediate. In *Hurst v Leeming,* it was the pre-action protocol that was relied on as the basis for giving rise to a duty to mediate. In *Royal Bank of Scotland v MoD,* it was the Government Department's failure to observe its own pledge to use ADR. In *Leicester Circuits v Coats Industries,* the sanction was imposed because one party withdrew very late from an agreed mediation, making it hard to argue that mediation had no reasonable prospect of success.

None of these required an actual ADR Order to set up a default leading to consideration of a costs sanction. Thus ADR orders may come to be used in cases where there is no protocol obligation and no opportunity for a judge to make a recommendation. As to the former, while there is no specific pre-action protocol for commercial cases, the revised Practice Direction to the Protocols, to be found in the 30th edition onwards of the CPR, and in force since April 2003, appears to bite on such cases. The parties are enjoined to "follow a reasonable procedure" intended to avoid litigation, which is not to be predicated on the assumption that litigation is inevitable. This should normally include a letter from the claimant giving details of the claim, with copies of essential documents, requiring an acknowledgement and a detailed response within a stated period (normally a month), making it clear that court proceedings will follow in the absence of a full response and asking for copies of documents which the claimant wishes to see. It then adds to the list of requirements (set out in paragraph 4.3):

> *(f) state (if this is so) that the claimant wishes to enter* ***into mediation or another alternative method of dispute resolution****; and*
> *(g) draw attention to the court's powers to impose sanctions for failure to comply with this practice direction and, if the recipient is likely to be unrepresented, enclose a copy of this practice direction.*

Paragraph 4.7 contains reciprocal provisions relating to the defendant's response, including the requirement to:

> *(e) state whether the defendant is prepared to enter into* ***mediation or another alternative method of dispute resolution.***

The effect of this practice direction will in due course emerge. On the face of it, its obligations apply to all commercial cases.

As to post-issue involvement, Commercial Court judges, with their case management role, are ideally placed to assess and recommend ADR to parties without necessarily ordering it. It would be a foolish party who ignored any such recommendation in the light of the authorities set by the Court of Appeal. At first sight it will only be in cases where the parties are apparently unable to co-operate even to the extent of agreeing to mediate at all, or over who the mediator should be, or as to when and where the mediation should take place, that specific orders may be needed. But cases like *Corenso v The Burnden group* serve as a reminder that parties may simply have to be chivvied into mediation even if they pay lip service to the process.

Alternative dispute resolution: mediation in Italy. Is it Really moving?

by

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The private and voluntary mediation, both within and outside of courts, of civil disputes is certainly at the very beginning in Italy, as it is in many other European countries with the sole exception of England and Wales.

In Italy, the interest on mediation is also growing very fast in the legal community, including the in-house counsels and the judges.

I will concentrate on mediation-conciliation, which are taken as the same procedure, where the only difference is the less or more active role played by the third neutral (mediator-conciliator).

For now on I will use the term mediation which is more commonly used in the international arena, even if in Italy we use the term conciliation, which can be translated in our language, while the term mediation has a completely different meaning in the Italian language and cannot therefore be translated.

Mediation has been traditionally - even under the laws of the many states which existed in the Italian peninsula before the time Italy was unified under only but one state – a judicial mediation, where the mediator is the same adjudicating judge, who should attempt to conciliate the parties.

Therefore, not the mediation as is internationally known with its essential requisites of voluntarity and confidentiality, as well as the neutrality of the mediator.

The Italian drafter of the civil procedure code of 1865 and of its successor of 1942, intended to speed the civil proceeding, but Italy is still the last in the EU (the EU Commission has calculated that the average duration of the civil proceedings in Italy, throughout the three degrees, is 116 months, while the average duration in the EU is 69 months).

Some recent laws provide for mandatory mediation in some situations before starting litigation. I shall only mention: the mediation between supplier and customer in the public utilities sector (energy, gas and communication) by the authority, or delegated to the chamber of commerce; and the mediation of disputes arising out of industrial subcontracts, again administered by the chamber of commerce.

Also these mandatory mediations had very little success, a bit more the mediation by the authority in the communication sector, for the simple reason that they lack the essential requisites of the ADR: voluntarity and confidentiality.

I will now mention a very recent law and a draft law pending at the Parliament, which both promote optional, conventional and professional mediation of civil disputes: law n.5 of 17 January 2003, which will enter into force on 1 January 2004, which promotes the mediation of the (new) corporate law disputes; and draft law n.2463 of March 2002, pending at the justice commission of the Chamber of Deputies together with other draft laws, similar in scope, but less interesting.

Both the law and the draft law contain provisions designed to encourage the use of mediation before starting a litigation in court or an arbitration, especially in a country like Italy where the culture of ADR is not yet developed. I refer, in particular to: the enforceability of the mediation clause; the direct enforceability of the mediation agreement; the confidentiality of the mediation proceeding; the tax incentives; the suspension of the terms of the statute of limitations; the bar of the forfeiture of rights.

Unfortunately, both the law and the draft law contain also provisions which risk to jeopardize the development of the private and voluntary mediation.

Most probably because our culture is too litigation oriented

I shall start from law n.5 of 17 January 2003.

- If the parties do not reach an agreement, the mediator must present a settlement proposal (art.40.2): this provision is manifestly against the nature of the mediation, where the mediator only makes a proposal when requested by the parties, which really own the mediation procedure and are free to "leave" at any moment, before the conclusion of an agreement.

- If the mediation is not successful, the judge can take into account the behaviour and the positions of the parties, which the mediator must record in the minutes of the procedure, but to the sole purpose of assessing the expenses of the proceedings, or imposing cost sanctions provided by the code of civil procedure (art.40.6): this provision is very critical, even if the intention was good, e.g. discourage the mediation initiated to the sole purpose of loosing time. But the "medicine" could be worse than the illness, risking to cause fatal effects!

The parties would be seriously discouraged to initiate a mediation and, even if they finally decide to start a mediation attempt, would certainly avoid to open "their boxes". Simply because what they say during the proceeding can be disclosed to the judge who, in any event, could be influenced when deciding on the merit of the dispute not settled through mediation.

I shall now turn to draft law 2463 pending at the Chamber of Deputies.

- The draft law contains the same critical provision of Law n.5 of 17 January 2003, as regards the duty of the mediator, when the mediation proceeding is administered by the public organizations envisaged by the draft law, to inform the judge of the positions of the parties only to the purpose of assessing the expenses of the process (art.11.8).

- The action in Court cannot be initiated – and this provision implies also a modification to the code of civil procedure - if the parties have not been informed by their counsel of the possibility to resolve the dispute by mediation, or have not stated in writing that they have decided not to go to mediation (art.14).

- The judge should always invite the parties to try the mediation – if not already done, or if the parties have decided that it is not the case – and not only when he determines that the mediation can be useful (art.15).

I should also mention that the government has very recently approved a draft law which, when approved by the Parliament will delegate the government to draft a new code of civil procedure, which will include the voluntary mediation delegated by the judge.

This very quick panorama shows that mediation in Italy is slowly finding the way through an effective alternative dispute resolution method.

However, as I have mentioned earlier, some provisions, both in the law and the draft law, do not respect the internationally known principles of ADR (and the most important is certainly the confidentiality) which have been developed by the practice and are reflected in the UNCITRAL model law, in the EU Green Book and, last but not least, in the Council of Europe recommendations on mediation and, therefore, could really jeopardize the use of the mediation by the parties in Italy.

At least that mediation regulated by the law!

French only

Exemple de médiation judiciaire dans les conflits individuels pratiquée à Grenoble (France)

présenté par

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Président de chambre
de la Cour d'Appel de Grenoble (France)

En qualité de Présidente de la Chambre sociale de la Cour d'appel de GRENOBLE, j'ai mis en place à compter de 1997 un service de médiation judiciaire dans les conflits individuels du travail. 700 médiations ont été ordonnées avec un taux d'accords de 70%.

La médiation a été institutionnalisée à la Chambre sociale de Grenoble, avec la création d'audiences judiciaires de proposition de médiation (où le juge, après avoir préalablement trié les dossiers selon certains critères, explique ce qu'est cette mesure, et voit avec les parties si leur affaire en relève. Des médiateurs extérieurs assistent bénévolement à ces audiences et renseignent les parties qui en font la demande). La médiation revient à 530 € qui est répartie par le juge entre les deux parties (l'employeur ayant généralement la plus grosse part, selon l'importance de l'entreprise).

Le succès de cette mesure ordonnée par la Cour d'appel a fini par être reconnu par les conseils de Prud'hommes du ressort qui, depuis l'an dernier, ordonnent des médiations (une vingtaine, pour le Conseil de Prud'hommes de Grenoble, en 2002 et d'avantage en 2003)

Les médiateurs nommés par la Cour d'appel se sont regroupés en associations qui assurent une formation continue. (La formation des médiateurs est indispensable et est la garantie de la pérennité de la médiation).

Deux juges de la Cour d'appel (ayant suivi une formation à la technique de la médiation) concilient également les personnes et ne jugent pas l'affaire en cas d'échec de la conciliation.

Voici un bref aperçu de notre pratique à Grenoble.

The present law concerning settlement in procedure and the law proposal about separate court mediation in Finland

by

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CODE OF PROCEDURE

Chapter 5; 26 §

In a matter, in which a settlement is permitted, the court is obliged to lead the parties to reach a settlement.

THE LAW PROPOSAL OF COURT MEDIATION

In Finland the Government will within a few months give a legislative proposal for the approval of Parliament as follows.

Chapter 1; General regulations

1 §; *Coverage*

Civil matters handled in general courts can be mediated as enacted in this law (court mediation).

Court mediation is alternative to a trial. In mediation the case is attempted to be resolved by reconciliation or facilitate the procedure by conciliating.

2 §; *Premises for court mediation*

Precondition for court mediation is that the parties want mediation and that the court considers the case suitable for mediation and mediation appropriate.

Chapter 2; Regulations for commencing court mediation and for mediator

3 §; *Commencement of court mediation*

In a case which has not become pending in a court, mediation can be commenced by a written application of the parties. In a case that is pending in a court, mediation can be commenced on request or on consent of the parties.

The application is directed to a district court. The application should include the case in which mediation is requested and the grounds, why the case is suitable for

mediation. Additionally the parties and their contact information have to be notified, conformed suitably to what is prescribed about an application of summons in Code of Procedure.

The court of law decides the commencement of court mediation in same composition that it decides the action connected to preparation.

4 §; *Mediator*

Mediator takes care of mediation. A judge of the court where the case is pending acts as a mediator.

On consent of the parties the mediator can use a person with expertise on issues concerning the case as a consultant.

5 §; *Disqualification of the mediator*

Things that have been prescribed about disqualification of a judge are valid on disqualification of a mediator.

The mediating judge is automatically barred from the bench that subsequently hears the appeal.

Chapter 3; Proceedings in mediation and assignment of a mediator

6 §; *Proceedings*

After negotiations with parties, the mediator decides on proceedings.

On consent of parties, persons can be heard informally and other establishment can be put forward in mediation.

Mediator may negotiate with parties without other parties present.

7 §; *Assignment of a mediator*

A mediator has to act impartially and objectively. A mediator must primarily help parties in their striving to mutual understanding and conciliatory resolution.

On request or on consent of parties mediator can make a proposal on a conciliatory resolution. When evaluating the case he has to base on his judicial and other expertise.

Settlement can be based on what is considered to be appropriate.

8 §; *Ratification of a settlement*

A settlement can be ratified on request of all parties. The settlement has to be written up as a document that includes the case and contents of the settlement. Mediating judge can ratify a settlement personally.

With ratification, complaint and enforcement of the settlement is complied what is enacted in the law about settlement in a pending case and about enforcement of settlement ratified by a court.

Chapter 4; Openness of mediation

9 §; *Confidentiality of proceedings*

Mediation is conducted without general public. On consent of parties, mediation can be conducted also according to regulations regarding openness of judicial proceedings.

Openness of a settlement ratified in court mediation is valid as is enacted about a judgment.

10 §; *Concealment*

A party may without opposing party's approval in later handling of the matter neither expose what he has in mediation expressed nor invoke these things.

Mediator or his assistant may not expose anything expressed in mediation.

Chapter 5; Regulations concerning the costs of mediation

11 §; *Compensation to mediator*

12 §; *Obligation to perform costs of mediation*

All parties account for their own legal costs due to the mediation and, per capita, other costs due to the mediation unless otherwise agreed.

The parties have no right to claim opposing party compensation for legal costs due to the mediation or mediation costs he has paid if the judicial proceedings continue or in an unrelated trial.

Chapter 6; Particular regulations

13 §; *Conclusion of court mediation*

Court mediation has to be concluded if

1) parties settle the case;
2) if the mediator decides there are no grounds left to continue the mediation;
3) if a party tells the mediator or another party that he wants the mediation to end.

14 §; *Appealing*

An appeal is not allowed to file for a decision concerning commencing mediation, a decision concerning dismissal of a request for mediation on a pending case or a decision concerning concluding of mediation.

A decision concerning dismissal of a request for mediation on a not pending case can be appealed by conformed suitably to what is prescribed in Code of Procedure.

15 §; *Relation to other regulations*

This act notwithstanding is complied what elsewhere in law has been enacted about conciliating and confirming a settlement.

About a court's jurisdiction and attorneys is complied what has been enacted in Code of Procedure.

16 §; *Implementing provision*

This law becomes effective on…

French only

Procédure civile et processus de médiation: passer d'un mode à l'autre, sans en altérer la nature

présenté par

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1. Remarques générales

Comme d'autres pays d'Europe, la Suisse connaît divers ADR : la conciliation (étatique et privée), les bureaux d'ombudsmen (en matière bancaire et d'assurances) et la médiation.
Trois exemples illustrent l'importance de la médiation dans notre Histoire.

1. L'anachorète Nicolas de FLUE, par sa médiation dans le litige opposant les Cantons-ville aux Cantons-campagne, permit d'éviter la guerre civile par le "Convenant de Stans" (1481). On reconnaît déjà dans sa démarche les caractéristiques du processus : absence de pouvoir, indépendance, neutralité et impartialité du médiateur, confidentialité et caucus.
2. Le traité de Westphalie (1648), qui reconnaît l'indépendance des cantons suisses, est issu d'un long processus de médiation internationale suite à la guerre de 30 ans. Le diplomate vénitien CONTORINI (médiateur pendant près de cinq ans avec les représentants d'une vingtaine d'Etats), consigna par écrit les principes de la médiation européenne moderne.
3. L"acte de médiation (1802) imposé aux Cantons suisses par Napoléon Bonaparte a concilié les Fédéralistes et les Unitaires, sans toutefois que l'on sache si un véritable processus de médiation s'est déroulé.
   Par ailleurs, sous l'influence des Eglises, la médiation a résolu de nombreux litiges entre personnes et communautés, jusqu'à la fin du XVIIIè siècle, dans nos cantons.
   Et pourtant, malgré la renaissance de ce mode depuis les années 1990 avec l'éclosion de nombreuses Associations de médiation en matière familiale, puis en matière civile et commerciale (la chambre suisse de médiation commerciale) il n'existe encore aucune loi en vigueur, ni sur le plan fédéral, ni sur le plan cantonal, traitant de la médiation civile et commerciale.

2. Le Projet de loi du Pouvoir judiciaire genevois (PLMC)

Or, l'absence de législation pose des problèmes procéduraux aux magistrats civils qui encouragent l'entrée en médiation des plaideurs auprès d'un tiers : ils sont liés essentiellement à la relation entre la procédure civile et le processus de médiation, et inversément (on en retrouvera une liste non exhaustive en annexe I).

Après avoir consulté les associations de médiation et étudié les solutions en droit comparé, le pouvoir judiciaire genevois a retenu le concept de ***médiation métajudiciaire*** : le projet de loi tend à régler les problèmes découlant de l'articulation entre les deux modes tout en préservant la nature, la spécificité et les règles de chacun d'eux : le médiateur n'interviendra pas dans la procédure civile ni le juge dans le processus, mais tous deux faciliteront les passages de l'un à l'autre. Il n'y a entre eux ni dépendance, ni interférence, ni confusion.

3. L'articulation procédure civile / processus de médiation

3.1. *"Trois itinéraires"* (annexe II)

Dans la pratique, on rencontre trois "itinéraires" possibles entre la procédure et le processus, avec – pour chacun – des variantes :

a) *Le processus de médiation précède la conciliation* (qu'elle soit facultative ou obligatoire)

Les parties qui sont parvenues à une convention finale de médiation en dehors de toute procédure auront désormais la faculté de la faire homologuer par le conciliateur : Chambre de conciliation pour le Tribunal de première instance ou Justice de paix en matière civile, commission paritaire en matière de baux et loyers, et conciliateur en matière prud'homale.

b) *La médiation est initiée en conciliation*

Le conciliateur, respectivement le juge de paix, les conciliateurs paritaires en matière de baux et loyers et en matière prud'homales, peuvent, à ce stade déjà, proposer aux parties de recourir à la médiation.
En cas d'acceptation, les parties peuvent demander à être reconvoquées dans un délai n'excédant pas six mois, en règle générale.

c) *La médiation est initiée en cours de procédure*

Cela peut être à tous les stades, y compris en appel.
En cas d'acceptation, la cause est suspendue.
Le PLMC examine, dans chacun des trois cas, les conséquences procédurales du succès de la médiation (retrait ou homologation), et celles de son échec.

L'information donnée par le juge, sur la médiation, le libre choix du médiateur ou de l'institution de médiation, le délai de réflexion de trente jours, qui s'appliquent aux trois "itinéraires" sauvegardent la liberté des futurs médiés et le caractère volontaire du processus.

3.2. *Les conséquences procédurales de la convention finale de médiation*

Le PLMC mentionne l'alternative suivante, en cas de succès: le retrait de l'action ou l'homologation de la convention.
Le choix offert aux parties entre le retrait et l'homologation, en cas de transaction, ne vaut que pour celle portant sur un objet dont les parties ont la libre disposition.

Etant donné qu'aujourd'hui, à Genève, le Tribunal de première instance enregistre, à son rôle, entre 60 et 70% d'affaires de famille, les cas d'homologation vont prendre une place importante en pratique.
Il faut à cet égard distinguer deux situations:

a) Lorsque l'accord porte sur un objet dont les parties ont la libre disposition.

   Le pouvoir du conciliateur, ou du juge, sera nécessairement limité. Encore qu'il ait, bien sûr, le devoir de refuser d'homologuer un accord dont le contenu serait illicite ou contraire aux mœurs (art. 19 al. 2 et 20 du Code des Obligations) ou, si son objet est impossible (art. 119 CO).

b) Lorsque l'accord porte sur un objet dont les parties ne peuvent pas disposer.

   Il est évident qu'une transaction portant sur un tel objet ne lie pas le juge. Comme le relèvent *B. Bertossa et.al*., dans leur commentaire à la loi de procédure civile (LPC), "il conserve un libre pouvoir d'appréciation (SJ 1985 p. 531-532), dont il fera cependant usage en tenant compte de la transaction". Une telle transaction, de *lege lata*, ne peut être recueillie par le conciliateur, parce qu'il devrait assortir son refus par des motifs, "exigence qui est incompatible avec l'esprit de l'art. 66 LPC".
   Le mécanisme prévu en cas de refus d'homologation suite à une médiation consiste à donner une nouvelle chance aux médiés/justiciables, à leur permettre de modifier leur accord (en déclenchant, éventuellement, un complément de médiation, le médiateur est informé de l'éventualité et des motifs du refus), et, si l'accord n'est pas modifié, la faculté leur est donnée de recourir contre le jugement de refus, ce qui n'est pas ou pas toujours le cas dans la législation étrangère.
   En cas d'échec, l'instance est reprise.

Comme pour la conciliation, les parties ne pourront se prévaloir dans la suite du procès de ce qui a été déclaré devant le médiateur, et le témoignage du médiateur est exclu (confidentialité).

Conclusions

D'ici peu, le Parlement genevois examinera le PLMC pour la période où la procédure civile demeurera de la compétence des cantons suisses.
A son assemblée générale à Fribourg du 22.11.2003, **l'Association suisse des magistrats** a débattu du thème "Justice et Médiation : autonomie ou complémentarité ?" La question a été posée dans la perspective de la future loi de procédure civile suisse, dont l'entrée en vigueur serait prévue pour 2008…
Il est sans doute non seulement intéressant, mais indispensable, pour les juges des pays qui n'ont pas encore légiféré en matière de médiation civile et commerciale, de connaître et confronter les expériences vécues par leurs collègues de ceux qui l'ont fait.
Il faut donc à la fois remercier le Conseil de l'Europe et le Conseil consultatif des juges d'Europe de nous donner l'occasion de cet échange sur la médiation civile et commerciale, et espérer qu'elle sera renouvelée et approfondie, par exemple à propos de **l'élaboration d'une loi-type** concernant l'articulation entre procédure civile et processus de médiation.

Annexe I : Liste des problèmes procéduraux découlant de l'articulation

Annexe II: 3 "itinéraires"

Annexe III: Schéma des sœurs jumelles

Annexe I :

Liste, non exhaustive, des principaux problèmes posés par l'articulation procédure civile / processus de médiation :

1. Comment, procéduralement, la médiation civile et commerciale est-elle initiée par le magistrat civil ?
(proposition de médiation, délégation de médiation, mandat quasi-impératif).
Cette première option – éthique – orientera, nécessairement les suivantes, techniques.

2. Quelles sont les conséquences procédurales de l'entrée en médiation ?

2.1. au stade de la conciliation (durée des délais pour reconvoquer)
2.2. au stade de la procédure (suspension de l'instruction, ou suspension de l'instance).

3. Quelles sont les conditions d'homologation de la transaction de médiation ?

3.1. en vue de la conciliation ;
3.2. au stade de la conciliation ;
3.3. au stade de la procédure.

4.1. Quelles sont les modalités, et les conséquences, du refus d'homologuer du magistrat civil ?

4.1.1. au stade de la conciliation ;
4.1.2. au stade de la procédure.

4.2. Le retour en médiation en cas d'éventualité d'un refus est-il opportun, et quelles en sont les modalités procédurales ?

5. Comment, et par qui, le magistrat civil est-il prévenu de l'issue (favorable ou défavorable) de la médiation ?

6.1. Quelle portée donner à la confidentialité ?

6.2. Quelles sont les mesures adéquates (procédurales, administratives ou pénales), pour garantir la confidentialité ?

7. Comment peut-on faire intervenir l'assistance juridique ?

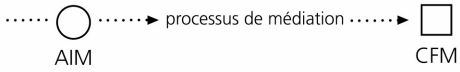
MÉDIATION CIVILE (MÉTA-JUDICIAIRE)

aiguillages et passages entre la procédure civile et le processus de médiation

schéma n°1: les 3 itinéraires

1) a) Procédure civile actuelle

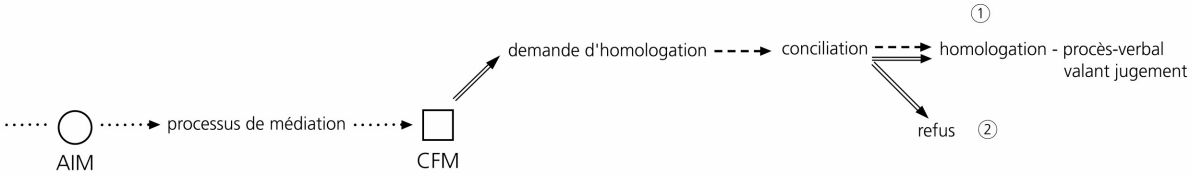
b) Processus de médiation



2) Procédure civile et processus de médiation: trois itinéraires

a) 1er itinéraire : médiation avant conciliation et homologation

(avec ses deux hypothèses)



AIM = accord initial de médiation

CFM = convention finale de médiation

procédure civile

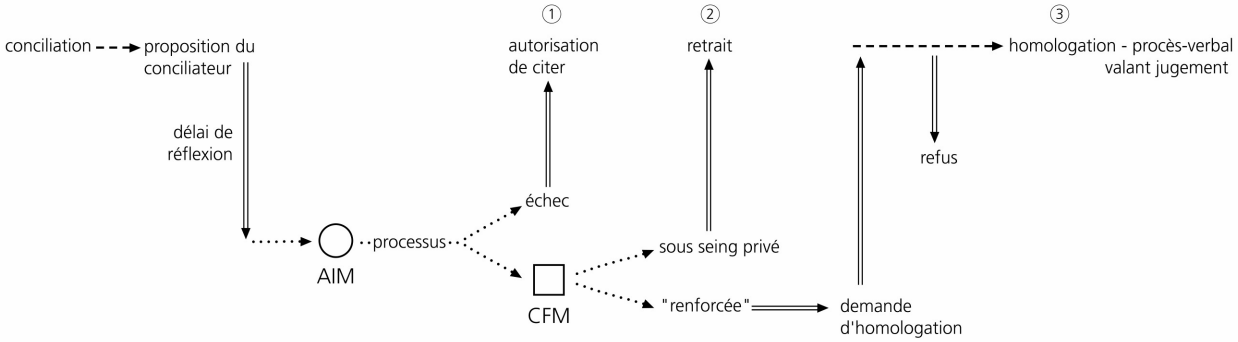
conciliation

processus de médiation

passages

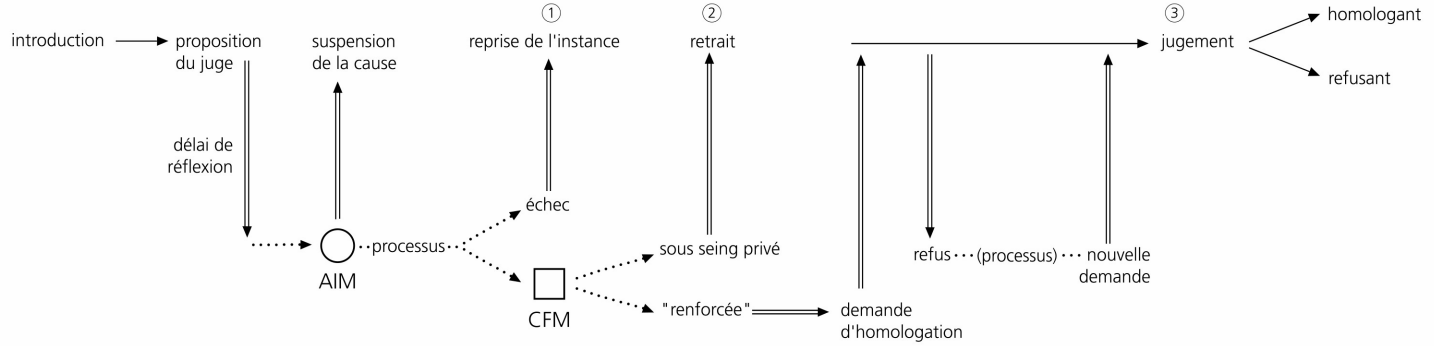
b) 2ème itinéraire : médiation en cours de conciliation

(avec ses trois hypothèses)



c) 3ème itinéraire : médiation après introduction de la cause

(avec ses trois hypothèses)



AIM = accord initial de médiation

CFM = convention finale de médiation

procédure civile

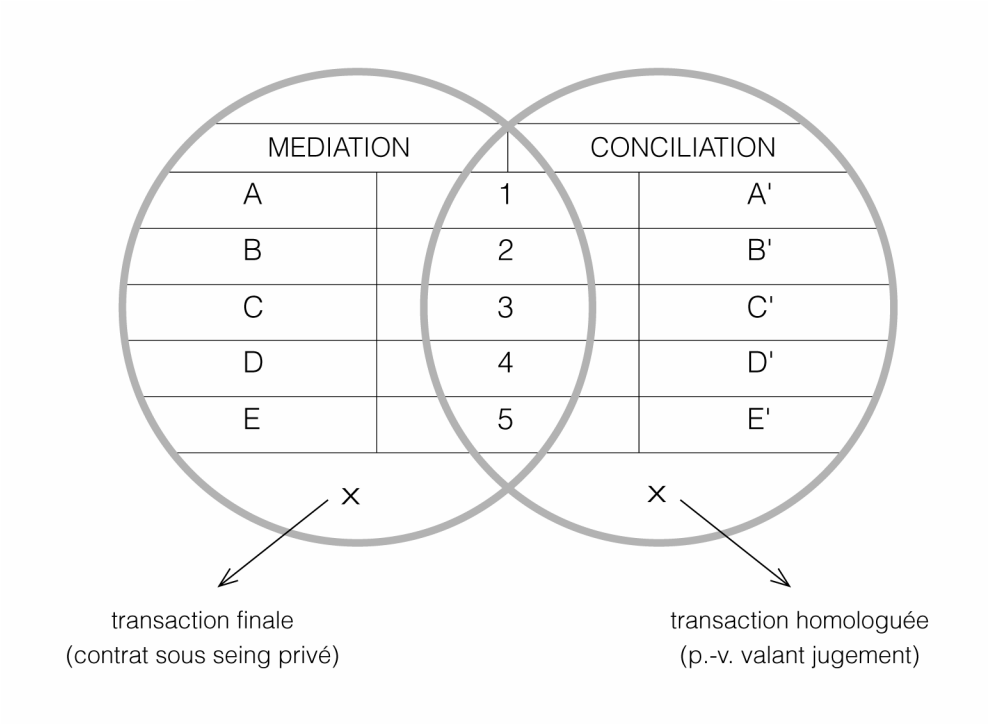
conciliation

processus de médiation

passages

MARL
(ADR)

comparaison entre
la médiation (non judiciaire)
et
la conciliation (judiciaire)
ou
Schéma n° 2 : les " sœurs jumelles "



Zone de convergence :

1. Solution librement acceptée
2. Indépendance, neutralité, impartialité du tiers
3. Confidentialité
4. Efficacité, rapidité, réduction des coûts
5. Reprise du dialogue

Zone de divergence :

A) Concentration sur les personnes
B) Cadre non juridique
C) Déroulement formel
D) Solution issue des médiés
E) Libre choix du médiateur

A') Concentration sur les faits
B') Cadre juridique
C') Déroulement informel
D') Solution issue du conciliateur
E') Absence de choix du conciliateur

N.B. La confidentialité, pilier de la conciliation et de la médiation, interdit la pluralité des rôles. Ainsi à Genève notamment, le conciliateur, (lors de l'essai préalable), en matière prud'homale ou de baux et loyers ne statuera jamais sur le fond.
En revanche le juge du fond peut se muer en conciliateur (art. 54 LPC) ; le processus a lieu " en chambre du conseil ", à huis clos, sans procès-verbal.

Dans les deux cas de figure, la confidentialité est prévue par la loi (art. 57 LPC).

Contribution

by

Stelios NATHANAEL,
President of the District Court, Nicosia, Cyprus
Member of the Consultative Council of European Judges (CCJE)

?he following are certain preliminary comments on the matter drawing also from the Cyprus experience.

It is becoming increasingly more acceptable that Judges should be more actively involved in the early settlement of disputes by a variety of means, ranging from case-management to alternative dispute resolution. This is so even in countries following the Anglo-Saxon Common Law System (like Cyprus) where the traditional view deeply entrenched in the judicial system is that the Judge is an arbitrer of facts and does not enter the arena of the judicial battle unfolding in the court room, nor does he takes an active role in the selection and kind of evidence to be presented.

The need for Judges to assist parties to reach an early settlement could be viewed as a corollative obligation imposed on the judiciary for a speedy, but effective and just trial, under the right to a fair hearing in accordance with Article 6 of the European Convention on Human Rights, which incidentally has been part of the statute law of Cyprus since 1962 (Law No. 39/62). The entitlement to a fair trial with its twin right of hearing the case within a reasonable time, are fundamental pillars of human rights and should be viewed as imposing on the states the corresponding obligation of providing a fair and speedy trial. The European Court of Human Rights case law is consistent in finding violations of Art. 6 for lengthy proceedings and finalization of the parties´ rights. [**Bock v. Federal Republic of Germany (1989), H. v. France (1989), etc]**. Therefore, due to the ever increasing workload of cases and the lengthening of proceedings, alternative judicial mechanisms for early dispute resolution are a welcome innovative step.

Such attempts for early dispute resolution should, however, never compromise the basic principles of judicial expression of impartiality, fairness and justice. In other words, early resolution of disputes should never become an alternative or parallel process, where parties should feel coerced into due to the relative inability of the judicial process proper, to produce a quick system of administering justice and handing down judgements.

Since the basic theme to be discussed has to do with the role of judges, we should confine ourselves to a discussion of settling disputes within the framework of the judicial process. Anything outside that framework involves the judge in an extra-judicial capacity not compatible with the role of the judge.

Encouragement of early settlement should most effectively be done at the very early stages of the judicial confrontation. There should be a pre-trial stage, where the parties having filed their pleadings and having disclosed all relative evidence – oral

and documentary – should attend a meeting with a judge/mediator (other than the one who will try the case), who will assist them in trying to come to an amicable solution in the light of their alternative and conflicting allegations. Indeed such a pre-trial stage should be made a prerequisite and an absolute necessity before proceeding to the next procedural step. Cyprus is in the process of considerably amending the Civil Procedure Rules, emphasis given on a speedy and effective procedure. It is hoped that the new rules will include a time span of 12-24 months for the hearing of civil cases according to their complexity. Order 30, which deals with summons for directions, will be radically altered so as to enable the parties to air their views with the purpose of coming to an early amicable settlement. Such mediator should feel free to guide the parties and express his views on the adequacy and strength of the prospective evidence and the law applicable. Should this exercise fail, then during the trial process itself, the trial Judge could discreetly, but effectively, intervene pointing out certain weaknesses in the case of the one or the other of the litigants, giving them time to reflect on their relative positions, also helping with the understanding of the legal principles involved, especially in complicated cases, adjourning the case for "mention" where a re-assessment of the whole dispute could take place in the light of the evidence already given. This practice has proved very useful in the Cyprus jurisdiction and many cases are settled in this way at the earliest possible moment once the trial has started.

SUMMARY REPORT

SUMMARY REPORT

by

The Right Honourable Lord Justice MANCE
Court of Appeal of England and Wales, United Kingdom,
Chair of the Conference, Chair of the Consultative
Council of European Judges (CCJE)

Thank you very much for that introduction. It is clear that we have to tailor our systems of justice to cater proportionately for the various different disputes which come before our courts. But we have also to bear in the mind that the world would be a better place if many disputes never came before the court at all or could be resolved amicably.

We are, however, judges first and foremost, part of the system of justice which is one of the three pillars of society. Justice Otis, in her powerful explanation and endorsement of the virtues of mediation, did not suggest for a moment that we have reached the end of history as far as concerns litigation. We clearly have not. There will always be a need for some form of imposed dispute resolution and she said that this would remain the judge's primary function. Some disputes simply need adversarial resolution. The value of court judgments as future precedents or standards setting guidelines is in an English context regarded as particularly important. It has set the tone of English contract and commercial law. But I can think also of a custody dispute between parents, one or other of whom has clearly been involved in child abuse. It seems to me there is little room for mediation there, in relation to who should have proper custody of the child.

Article 6 of the Convention on Human Rights requires us to implement fair, efficient and speedy systems of public justice in our respective states. So we as judges must address the need for reform and change within our systems, learning as we do so from each other through conferences like this. The conference topics studied summarise the themes on which we have concentrated. They all fall under the general head of case management, a concept which originated in the United States and has been given, in common law countries and I think more widely, a very great impetus by the Woolf reforms. The introduction of case management has been accompanied to a considerable extent by a diminution of the orality principle. That is a recognition of the fact that time spent in court is expensive time, it occupies a lot of people and it occupies courts which imposes its own pressures on states.

Judges can do much by themselves but states need also to respond. We have heard about steps taken in Russia, where some proposals for procedural reforms were accepted, and others not accepted. We heard also about other countries, such as Norway, where a reform is in contemplation which would enable judge to restrict the evidence adduced. That is something which in the common law system has also only been possible through state intervention. With a limited exception of certain prosecution evidence in criminal cases, there was previously a right to adduce all relevant evidence - and relevant evidence was a wide concept. More recently we have

introduced (as Norway now is proposing) greater judicial control of evidence, though obviously only within certain limits.

We have also discussed the control of manifestly unfounded claims or defences. Different countries are pursuing different steps in that regard. We have just heard that the Russian legislature refused to introduce a requirement of permission to appeal, based on a similar test. So, as far as I know, England remains isolated in that regard with our almost general requirement to show a real prospect of success as a condition of permission to appeal.

But it's not just judges and states who need to take action. Lawyers need to change their habits. The new procedures of case management aim at persuading or obliging lawyers to co-operate, by putting their cards on the table. They contain numerous provisions intended to prevent ambush. Alain Lacabarats spoke of the "principe de loyauté", the principle that lawyers must be frank, which is an important element of the new culture change which is sought. Experts also must be freed from partisan attitudes. Again this may well require the introduction of new rules, for example to introduced a duty to asist thecourt. Otherwise experts may be vulnerable to complaints from their clients that, by being frank about difficulties in their clients' case, they are not performing their duty to their clients.

The culture change needed for proper case management therefore affects all persons involved in litigation. It will go some way towards changing the figure of the judge from one of authority half way up the wall (which is the English practice) to a position perhaps more like that in which I now sit in relation to you.

When we look at each other, we must of course remember the risks, to which one speaker adverted, of wholesale importation of foreign institutions. That cannot be done lightly. The European constitution with its aspiration towards harmonisation of laws looks to a future, and I suspect rather distant, prospect on some fronts. But this emphasizes the need for pilot projects, for the pragmatically tested and carefully undertaken introduction of reform measures which has been mentioned. The experience we have gained in England through pilot projects, including projects relating to mediation, has been very valuable.

hat brings me to the vital second side of a modern judge's activity. We must not just improve our litigation procedures. We should offer and encourage the alternative of conciliation and mediation. I learned for the first time, I think (though as a history student I may have known and forgotten it), that Switzerland came into existence at the Treaty of Westphalia through the energy of a Venetian doge. I shall look at John Julius Norwich's history of Venice when I get home to remind myself more precisely. I do recall however - and this is not directed at Switzerland - that Grotius reportedly said that the Treaty of Westphalia was, by inventing the nation state, guilty of the greatest mistake since the fall from grace in the Garden of Eden!

The Bosnian representative said that all states should in their laws accept the legal possibility of mediation. I think that is an important thought. Mediation should certainly not be seen as a desperate measure to avoid court congestion, delay and costs. Those have all been motives for the growth in mediation. But, if justice were to become "privatized" solely for such reasons, it would be a sad comment on our

systems of justice; and it would involve a failure to recognize the full virtues of mediation. I could not possibly improve on the presentation which we have had of those by Justice Otis. She made very clear the positive advantages of mediation, its democratic aspects, its ability to fulfil the rights of the individual to shape his or her destiny rather than have one imposed by a figure of state authority. Of course, there may always be situations where mediation could be appropriate, but one or other parties is simply unwilling to co-operate. I should say in that respect that Russia is certainly not the only country where, in my experience as a barrister, there has been a tendency to prefer a resolution of a dispute by state authority over any amicable settlement.

Judges and states should take steps to provide for and encourage mediation before litigation and during it. The earlier the better. At later stages in litigation – and despite the success story which we have heard about in the Quebec Court of Appeal - costs and embedded attitudes may prejudice attempts at mediation. We have had a very interesting discussion about the virtues of a judge as distinct, as from third party, acting as mediator. It seems evident that this can be most productive. Whether every country will adopt such an approach is of course a different matter. We have not in England. But, whatever approach is adopted, it is clearly essential that judges should be familiar with mediation. They need to have information about it, they need to attend seminars and, if they are going to act as mediators, they also need training. I think our conclusions should reflect those points.

Mediation should of course be a voluntary process. It may be a process which can be incentivised by costs and in other ways. But it should certainly not be incentivised by the disclosure to the court dealing with the merits of detailed conduct within the mediation. The course of discussions during any mediation must remain confidential. Justice Otis emphasized the need for a strict separation of functions and files between a judge mediator and any judge dealing subsequently with the merits. A judge mediator cannot decide on the merits if the mediation fails.

These few remarks of mine will be transcribed. For the moment, you have before you some draft conclusions which are quite short and general. It is hoped that they can be agreed as a broad framework for further progress.

CONCLUSIONS

Conclusions

1. The first European Conference of Judges, held on 24 and 25 November 2003 in Strasbourg on the theme of "Early settlement of disputes and the role of judges", was organised by the Council of Europe, following a proposal by the Consultative Council of European Judges and in the context of the implementation of the framework global action plan for judges in Europe.

2. The participants welcomed the initiative to hold this Conference which offered them a first pan-European forum for an exchange of ideas on the role of judges in the early settlement of disputes (ESD).

3. In bringing together representatives of judicial power in member and observer States, each one with its own national practice in the field of the early settlement of disputes, the Conference launched an initial exchange of wide-ranging views on the legal and procedural framework aiming at strengthening the role of judges as far as the possibilities for more rapid and efficient resolution of disputes between the parties are concerned.

4. After the experts' reports, detailed discussions took place on the following themes: procedures to avoid litigation and procedures to make it effective, including provisional measures protecting parties during litigation; production of the parties' cases and evidence, time limits, accelerated and summary procedures and interlocutory judgments; legislative and judicial incentives to early resolution; legislative and judicial incentives to early resolution; case management – a proactive and innovative but impartial judiciary.

5. The Conference took account of the work of the Council of Europe in the field of mediation, culminating in the adoption by the Committee of Ministers of four Recommendations which the Conference took into consideration: Recommendation No. R (99) 19 concerning mediation in penal matters, Recommendation No. R (98) 1 on family mediation, Recommendation Rec. (2001) 9 on alternatives to litigation between administrative authorities and private persons and Recommendation Rec. (2002) 10 on mediation in civil matters.

6. The participants recognised that an efficient system of justice is a cornerstone of the modern democratic state but that alternative dispute resolution procedures need also to be developed and encouraged.

7. Accordingly, judges and member states need not only to take steps to make the resolution of disputes in court speedier and easier for parties who cannot agree other means of settling them, but also to promote such other means of settling disputes both before as well as during the course of litigation.

8. To that end, judges need to study each others' procedures, with a view to introducing improved case management techniques and also need information and (where judges themselves undertake mediation) training regarding the benefits and techniques of mediation.

9. The participants recommended the Council of Europe to undertake work to promote ESD in litigation and by mediation, in particular through the Consultative Council of European Judges (CCJE), the European Commission for the efficiency of justice (CEPEJ), the European Committee on Legal Cooperation (CDCJ) and the European Network for the exchange of information between the persons and entities responsible for the training of judges and public prosecutors (Lisbon network).

10. The participants expressed their thanks to everyone who had contributed to the success of the Conference and invited the Council of Europe to hold European Conferences of Judges at regular intervals in order to assist judges in their essential role of upholding and implementing the Rule of Law in the member States of the Council of Europe.

11. The participants warmly welcomed the proposal made by the Polish delegation to host the next European Conference of Judges in May 2005 in Poland, on the occasion of its presidency of the Committee of Ministers of the Council of Europe.

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List of participants / Liste des participants

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APPENDIX

The Council of Europe's Recommendations concerning mediation

Recommendation No. R (98)1
of the Committee of Ministers to member States
on Family Mediation

(Adopted by the Committee of Ministers on 21 January 1998
at the 616th meeting of the Ministers' Deputies)

1. The Committee of Ministers, under the terms of Article 15.b of the Statute of the Council of Europe,

2. Recognising the growing number of family disputes, particularly those resulting from separation or divorce, and noting the detrimental consequences of conflict for families and the high social and economic cost to States;

3. Considering the need to ensure the protection of the best interests and welfare of the child as enshrined in international instruments, especially taking into account problems concerning custody and access arising as a result of a separation or divorce;

4. Having regard to the development of ways of resolving disputes in a consensual manner and the recognition of the necessity to reduce conflict in the interest of all the members of the family;

5. Acknowledging the special characteristics of family disputes, namely:

- the fact that family disputes involve persons who, by definition, will have interdependent and continued relationships;

- the fact that family disputes arise in a context of distressing emotions and increase them;

- the fact that separation and divorce impact on all the members of the family, especially children;

6. Referring to the European Convention on the Exercise of Children's Rights, and in particular to Article 13 of this convention, which deals with the provision of mediation or other processes to resolve disputes affecting children;

7. Taking into account the results of research into the use of mediation and experiences in this area in several countries, which show that the use of family mediation has the potential to:

- improve communication between members of the family;

- reduce conflict between parties in dispute;

- produce amicable settlements;

- provide continuity of personal contacts between parents and children;

- lower the social and economic costs of separation and divorce for the parties themselves and States;

- reduce the length of time otherwise required to settle conflict;

8. Emphasising the increasing internationalisation of family relationships and the very particular problems associated with this phenomenon;

9. Realising that a number of States are considering the introduction of family mediation;

10. Convinced of the need to make greater use of family mediation, a process in which a third party, the mediator, impartial and neutral, assists the parties themselves to negotiate over the issues in dispute and reach their own joint agreements,

11. Recommends the governments of member States:

i. to introduce or promote family mediation or, where necessary, strengthen existing family mediation;

ii. to take or reinforce all measures they consider necessary with a view to the implementation of the following principles for the promotion and use of family mediation as an appropriate means of resolving family disputes.

PRINCIPLES OF FAMILY MEDIATION

I. *Scope of mediation*

a. Family mediation may be applied to all disputes between members of the same family, whether related by blood or marriage, and to those who are living or have lived in family relationships as defined by national law.

b. However, states are free to determine the specific issues or cases covered by family mediation.

II. *Organisation of mediation*

a. Mediation should not, in principle, be compulsory.

b. States are free to organise and deliver mediation as they see fit, whether through the public or private sector.

c. Irrespective of how mediation is organised and delivered, States should see to it that there are appropriate mechanisms to ensure the existence of:

- procedures for the selection, training and qualification of mediators;

- standards to be achieved and maintained by mediators.

III. *Process of mediation*

States should ensure that there are appropriate mechanisms to enable the process of mediation to be conducted according to the following principles:

i. the mediator is impartial between the parties;

ii. the mediator is neutral as to the outcome of the mediation process;

iii. the mediator respects the point of view of the parties and preserves the equality of their bargaining positions;

iv. the mediator has no power to impose a solution on the parties;

v. the conditions in which family mediation takes place should guarantee privacy;

vi. discussions in mediation are confidential and may not be used subsequently, except with the agreement of the parties or in those cases allowed by national law;

vii. the mediator should, in appropriate cases, inform the parties of the possibility for them to use marriage counselling or other forms of counselling as a means of resolving their marital or family problems;

viii. the mediator should have a special concern for the welfare and best interests of the children, should encourage parents to focus on the needs of children and should remind parents of their prime responsibility relating to the welfare of their children and the need for them to inform and consult their children;

ix. the mediator should pay particular regard to whether violence has occurred in the past or may occur in the future between the parties and the effect this may have on the parties' bargaining positions, and should consider whether in these circumstances the mediation process is appropriate;

x. the mediator may give legal information but should not give legal advice. He or she should, in appropriate cases, inform the parties of the possibility for them to consult a lawyer or any other relevant professional person.

IV. *The status of mediated agreements*

States should facilitate the approval of mediated agreements by a judicial authority or other competent authority where parties request it, and provide mechanisms for enforcement of such approved agreements, according to national law.

V. *Relationship between mediation and proceedings before the judicial or other competent authority*

a. States should recognise the autonomy of mediation and the possibility that mediation may take place before, during or after legal proceedings.

b. States should set up mechanisms which would:

i. enable legal proceedings to be interrupted for mediation to take place;

ii. ensure that in such a case the judicial or other competent authority retains the power to make urgent decisions in order to protect the parties or their children, or their property;

iii. inform the judicial or other competent authority whether or not the parties are continuing with mediation and whether the parties have reached an agreement.

VI. *Promotion of and access to mediation*

a. States should promote the development of family mediation, in particular through information programmes given to the public to enable better understanding about this way of resolving disputes in a consensual manner.

b. States are free to establish methods in individual cases to provide relevant information on mediation as an alternative process to resolve family disputes (for example, by making it compulsory for parties to meet with a mediator), and by this enable the parties to consider whether it is possible and appropriate to mediate the matters in dispute.

c. States should also endeavour to take the necessary measures to allow access to family mediation, including international mediation, in order to contribute to the development of this way of resolving family disputes in a consensual manner.

VII. *Other means of resolving disputes*

States may examine the desirability of applying, in an appropriate manner, the principles for mediation contained in this recommendation, to other means of resolving disputes.

VIII. *International matters*

a. States should consider setting up mechanisms for the use of mediation in cases with an international element when appropriate, especially in all matters relating to children, and particularly those concerning custody and access when the parents are living or expect to live in different States.

b. International mediation should be considered as an appropriate process in order to enable parents to organise or reorganise custody and access, or to resolve disputes

arising following decisions having been made in relation to those matters. However, in the event of an improper removal or retention of the child, international mediation should not be used if it would delay the prompt return of the child.

c. All the principles outlined above are applicable to international mediation.

d. States should, as far as possible, promote co-operation between existing services dealing with family mediation with a view to facilitating the use of international mediation.

e. Taking into account the particular nature of international mediation, international mediators should be required to undergo specific training.

Recommendation No. R (99) 19
of the Committee of Ministers to member States
concerning mediation in penal matters

(Adopted by the Committee of Ministers on 15 September 1999
at the 679th meeting of the Ministers' Deputies)

The Committee of Ministers, under the terms of Article 15.*b* of the Statute of the Council of Europe,

Noting the developments in member States in the use of mediation in penal matters as a flexible, comprehensive, problem-solving, participatory option complementary or alternative to traditional criminal proceedings;

Considering the need to enhance active personal participation in criminal proceedings of the victim and the offender and others who may be affected as parties as well as the involvement of the community;

Recognising the legitimate interest of victims to have a stronger voice in dealing with the consequences of their victimisation, to communicate with the offender and to obtain apology and reparation;

Considering the importance of encouraging the offenders' sense of responsibility and offering them practical opportunities to make amends, which may further their reintegration and rehabilitation;

Recognising that mediation may increase awareness of the important role of the individual and the community in preventing and handling crime and resolving its associated conflicts, thus encouraging more constructive and less repressive criminal justice outcomes;

Recognising that mediation requires specific skills and calls for codes of practice and accredited training;

Considering the potentially substantial contribution to be made by non-governmental organisations and local communities in the field of mediation in penal matters and the need to combine and to co-ordinate the efforts of public and private initiatives;

Having regard to the requirements of the Convention for the Protection of Human Rights and Fundamental Freedoms;

Bearing in mind the European Convention on the Exercise of Children's Rights as well as Recommendations No. R (85) 11 on the position of the victim in the framework of criminal law and procedure, No. R (87) 18 concerning the simplification of criminal justice, No. R (87) 21 on assistance to victims and the prevention of victimisation, No. R (87) 20 on social reactions to juvenile delinquency, No. R (88) 6 on social reactions to juvenile delinquency among young people coming from migrant families, No. R (92) 16

on the European Rules on community sanctions and measures, No. R (95) 12 on the management of criminal justice and No. R (98) 1 on family mediation;

Recommends that the governments of member States consider the principles set out in the appendix to this Recommendation when developing mediation in penal matters, and give the widest possible circulation to this text.

Appendix to Recommendation No. R (99) 19

I. Definition

These guidelines apply to any process whereby the victim and the offender are enabled, if they freely consent, to participate actively in the resolution of matters arising from the crime through the help of an impartial third party (mediator).

II. General principles

1. Mediation in penal matters should only take place if the parties freely consent. The parties should be able to withdraw such consent at any time during the mediation.

2. Discussions in mediation are confidential and may not be used subsequently, except with the agreement of the parties.

3. Mediation in penal matters should be a generally available service.

4. Mediation in penal matters should be available at all stages of the criminal justice process.

5. Mediation services should be given sufficient autonomy within the criminal justice system.

III. Legal basis

6. Legislation should facilitate mediation in penal matters.

7. There should be guidelines defining the use of mediation in penal matters. Such guidelines should in particular address the conditions for the referral of cases to the mediation service and the handling of cases following mediation.

8. Fundamental procedural safeguards should be applied to mediation; in particular, the parties should have the right to legal assistance and, where necessary, to translation/interpretation. Minors should, in addition, have the right to parental assistance.

IV. The operation of criminal justice in relation to mediation

9. A decision to refer a criminal case to mediation, as well as the assessment of the outcome of a mediation procedure, should be reserved to the criminal justice authorities.

10. Before agreeing to mediation, the parties should be fully informed of their rights, the nature of the mediation process and the possible consequences of their decision.

11. Neither the victim nor the offender should be induced by unfair means to accept mediation.

12. Special regulations and legal safeguards governing minors' participation in legal proceedings should also be applied to their participation in mediation in penal matters.

13. Mediation should not proceed if any of the main parties involved is not capable of understanding the meaning of the process.

14. The basic facts of a case should normally be acknowledged by both parties as a basis for mediation. Participation in mediation should not be used as evidence of admission of guilt in subsequent legal proceedings.

15. Obvious disparities with respect to factors such as the parties' age, maturity or intellectual capacity should be taken into consideration before a case is referred to mediation.

16. A decision to refer a criminal case to mediation should be accompanied by a reasonable time-limit within which the competent criminal justice authorities should be informed of the state of the mediation procedure.

17. Discharges based on mediated agreements should have the same status as judicial decisions or judgments and should preclude prosecution in respect of the same facts (*ne bis in idem*).

18. When a case is referred back to the criminal justice authorities without an agreement between the parties or after failure to implement such an agreement, the decision as to how to proceed should be taken without delay.

V. The operation of mediation services

V.1. Standards

19. Mediation services should be governed by recognised standards.

20. Mediation services should have sufficient autonomy in performing their duties. Standards of competence and ethical rules, as well as procedures for the selection, training and assessment of mediators should be developed.

21. Mediation services should be monitored by a competent body.

V.2. Qualifications and training of mediators

22. Mediators should be recruited from all sections of society and should generally possess good understanding of local cultures and communities.

23. Mediators should be able to demonstrate sound judgment and interpersonal skills necessary to mediation.

24. Mediators should receive initial training before taking up mediation duties as well as in-service training. Their training should aim at providing for a high level of competence, taking into account conflict resolution skills, the specific requirements of working with victims and offenders and basic knowledge of the criminal justice system.

V.3. Handling of individual cases

25. Before mediation starts, the mediator should be informed of all relevant facts of the case and be provided with the necessary documents by the competent criminal justice authorities.

26. Mediation should be performed in an impartial manner, based on the facts of the case and on the needs and wishes of the parties. The mediator should always respect the dignity of the parties and ensure that the parties act with respect towards each other.

27. The mediator should be responsible for providing a safe and comfortable environment for the mediation. The mediator should be sensitive to the vulnerability of the parties.

28. Mediation should be carried out efficiently, but at a pace that is manageable for the parties.

29. Mediation should be performed *in camera*.

30. Notwithstanding the principle of confidentiality, the mediator should convey any information about imminent serious crimes, which may come to light in the course of mediation, to the appropriate authorities or to the persons concerned.

V.4. Outcome of mediation

31. Agreements should be arrived at voluntarily by the parties. They should contain only reasonable and proportionate obligations.

32. The mediator should report to the criminal justice authorities on the steps taken and on the outcome of the mediation. The mediator's report should not reveal the contents of mediation sessions, nor express any judgment on the parties' behaviour during mediation.

VI. Continuing development of mediation

33. There should be regular consultation between criminal justice authorities and mediation services to develop common understanding.

34. Member States should promote research on, and evaluation of, mediation in penal matters.

Recommendation Rec(2001)9
of the Committee of Ministers to member states
on alternatives to litigation between
administrative authorities and private parties

(Adopted by the Committee of Ministers
on 5 September 2001
at the 762nd meeting of the Ministers' Deputies)

1. The Committee of Ministers, under the terms of Article 15.*b* of the Statute of the Council of Europe,

2. Considering that the aim of the Council of Europe is to achieve a greater unity between its members;

3. Recalling Recommendation No. R (81) 7 on measures facilitating access to justice, which in its appendix called for measures to encourage the use of conciliation and mediation;

4. Recalling Recommendation No. R (86) 12 concerning measures to prevent and reduce the excessive workload in the courts, which calls for encouraging, in appropriate cases, the use of friendly settlement of disputes, either outside the judicial system altogether or before or during legal proceedings;

5. Considering, on the one hand, that the large amount of cases and, in certain states, its constant increase can impair the ability of courts competent for administrative cases to hear cases in a reasonable time, within the meaning of Article 6.1 of the European Convention on Human Rights;

6. Considering, on the other hand, that the courts' procedures in practice may not always be the most appropriate to resolve administrative disputes;

7. Considering that the widespread use of alternative means of resolving administrative disputes can allow these problems to be dealt with and can bring administrative authorities closer to the public;

8. Considering that the principal advantages of alternative means of resolving administrative disputes may be, depending on the case, simpler and more flexible procedures, allowing for a speedier and less expensive resolution, friendly settlement, expert dispute resolution, resolving of disputes according to equitable principles and not just according to strict legal rules, and greater discretion;

9. Considering, therefore, that in appropriate cases it should be possible to resolve administrative disputes by means other than the use of courts;

10. Considering that the use of alternative means should not serve administrative authorities or private parties as a means of avoiding their obligations or the rule of law;

11. Considering that, in all cases, alternative means should allow judicial review, as this constitutes the ultimate guarantee for protecting both users' rights and the rights of the administration;

12. Considering that alternative means to litigation must respect the principles of equality and impartiality and the rights of the parties;

13. Recommends that the governments of member states promote the use of alternative means for resolving disputes between administrative authorities and private parties by following, in their legislation and their practice, the principles of good practice contained in the appendix to this recommendation.

Appendix to Recommendation Rec(2001)9

I. General provisions

1. Subject of the recommendation

i. This recommendation deals with alternative means for resolving disputes between administrative authorities and private parties.

ii. This recommendation deals with the following alternative means : internal reviews, conciliation, mediation, negotiated settlement and arbitration.

iii. Although the recommendation deals with resolving disputes between administrative authorities and private parties, some alternative means may also serve to prevent disputes before they arise; this is particularly the case in respect of conciliation, mediation and negotiated settlement.

2. Scope of alternative means

i. Alternative means to litigation should be either generally permitted or permitted in certain types of cases deemed appropriate, in particular those concerning individual administrative acts, contracts, civil liability, and generally speaking, claims relating to a sum of money.

ii. The appropriateness of alternative means will vary according to the dispute in question.

3. Regulating alternative means

i. The regulation of alternative means should provide either for their institutionalisation or their use on a case-by-case basis, according to the decision of the parties involved.

ii. The regulation of alternative means should:

a. ensure that parties receive appropriate information about the possible use of alternative means;

b. ensure the independence and impartiality of conciliators, mediators and arbitrators;

c. guarantee fair proceedings allowing in particular for the respect of the rights of the parties and the principle of equality;

d. guarantee, as far as possible, transparency in the use of alternative means and a certain level of discretion;

e. ensure the execution of the solutions reached using alternative means.

iii. The regulation should promote the conclusion of alternative procedures within a reasonable time by setting time-limits or otherwise.

iv. The regulation may provide that the use of some alternative means to litigation will in certain cases result in the suspension of the execution of an act, either automatically or following a decision by the competent authority.

II. Relationship with courts

i. Some alternative means, such as internal reviews, conciliation, mediation and the search for a negotiated settlement, may be used prior to legal proceedings. The use of these means could be made compulsory as a prerequisite to the commencement of legal proceedings.

ii. Some alternative means, such as conciliation, mediation and negotiated settlement, may be used during legal proceedings, possibly following a recommendation by the judge.

iii. The use of arbitration should, in principle, exclude legal proceedings.

iv. In all cases, the use of alternative means should allow for appropriate judicial review which constitutes the ultimate guarantee for protecting both users' rights and the rights of the administration.

v. Judicial review will depend upon the alternative means chosen. Depending on the case, the types and extent of this review will cover the procedure, in particular the respect for the principles stated under section I.3.ii.*a, b, c*, and *d*, and/or the merits.

vi. In principle and subject to the law, the use of alternative means should result in the suspension or interruption of the time-limits for legal proceedings.

III. Special features of each alternative means

1. Internal reviews

i. In principle, internal reviews should be possible in relation to any act. They may concern the expediency and/or legality of an administrative act.

ii. Internal reviews may, in some cases, be compulsory, as a prerequisite to legal proceedings.

iii. Internal reviews should be examined and decided upon by the competent authorities.

2. Conciliation and mediation

i. Conciliation and mediation can be initiated by the parties concerned, by a judge or be made compulsory by law.

ii. Conciliators and mediators should arrange meetings with each party individually or simultaneously in order to reach a solution.

iii. Conciliators and mediators can invite an administrative authority to repeal, withdraw or modify an act on grounds of expediency or legality.

3. Negotiated Settlement

i. Unless otherwise provided by law, administrative authorities shall not use a negotiated settlement to disregard their obligations.

ii. In accordance with the law, public officials participating in a procedure aimed at reaching a negotiated settlement shall be provided with sufficient powers to be able to compromise.

4. Arbitration

i. The parties should be able to choose the law and procedure for the arbitration within the limits prescribed by law. Subject to the law and the wishes of the parties, the arbitrators' decisions can be based upon equitable principles.

ii. Arbitrators should be able to review the legality of an act as a preliminary issue with a view to reaching a decision on the merits even if they are not authorised to rule on the legality of an act with a view to it being quashed.

Recommendation Rec (2002)10
of the Committee of Ministers to member States
on mediation in civil matters

(Adopted by the Committee of Ministers on 18 September 2002
at the 808th meeting of the Ministers' Deputies)

The Committee of Ministers, under the terms of Article 15.*b* of the Statute of the Council of Europe,

Welcoming the development of means of resolving disputes alternative to judicial decisions and agreeing on the desirability of rules providing guarantees when using such means;

Underlining the need to make continuous efforts to improve the methods of resolving disputes, while taking into account the special features of each jurisdiction;

Convinced of the advantages of providing specific rules for mediation, a process where a "mediator" assists the parties to negotiate over the issues in dispute and reach their own joint agreement;

Recognising the advantages of mediation in civil matters in appropriate cases;

Conscious of the necessity to organise mediation in other branches of the law;

Having in mind Recommendation No. R(98)1 on family mediation, Recommendation No. R(99)19 on mediation in penal matters and Recommendation Rec(2001)9 on alternatives to litigation between administrative authorities and private parties, as well as the results of other activities and research carried out by the Council of Europe and at a national level;

Having regard more particularly to Resolution No. 1 on "Delivering justice in the 21st century" adopted by the European Ministers of Justice at their 23rd Conference in London on 8-9 June 2000 and in particular to the invitation addressed by the European Ministers of Justice to the Committee of Ministers of the Council of Europe to draw up, in co-operation in particular with the European Union, a programme of work aimed at encouraging the use, where appropriate, of extra-judicial dispute resolution procedures;

Aware of the important role of courts in promoting mediation;

Noting that, although mediation may help to reduce conflicts and the workload of courts, it cannot be a substitute for an efficient, fair and easily accessible judicial system;

A. Recommends the governments of member states:

i. to facilitate mediation in civil matters whenever appropriate;

ii. to take or reinforce, as the case may be, all measures which they consider necessary with a view to the progressive implementation of the "Guiding Principles concerning mediation in civil matters" set out below.

Guiding Principles concerning mediation in civil matters

I. Definition of mediation

For the purposes of this Recommendation, "mediation" refers to a dispute resolution process whereby parties negotiate over the issues in dispute in order to reach an agreement with the assistance of one or more mediators.

II. Scope of application

This Recommendation applies to civil matters. For the purpose of this Recommendation, the term "civil matters" refers to matters involving civil rights and obligations including matters of a commercial, consumer and labour law nature, but excluding administrative or penal matters. This Recommendation is without prejudice to the provisions of Recommendation No. R(98)1 on family mediation.

III. Organisation of mediation

States are free to organise and set up mediation in civil matters in the most appropriate way, either through the public or the private sector.

Mediation may take place within or outside court procedures.

Even if parties make use of mediation, access to the court should be available as it constitutes the ultimate guarantee for the protection of the rights of the parties.

When organising mediation, States should strike a balance between the needs for and the effects of limitation periods and the promotion of speedy and easily accessible mediation procedures.

When organising mediation, States should pay attention to the need to avoid (i) unnecessary delay and (ii) the use of mediation as a delaying tactic.

Mediation may be particularly useful where judicial procedures alone are less appropriate for the parties, especially owing to the costs, the formal nature of judicial procedures, or where there is a need to maintain dialogue or contacts between the parties.

States should take into consideration the opportunity of setting up and providing wholly or partly free mediation or providing legal aid for mediation in particular if the interests of one of the parties require special protection.

Where mediation gives rise to costs, they should be reasonable and proportionate to the importance of the issue at stake and to the amount of work carried out by the mediator.

IV. Mediation process

States should consider the extent, if any, to which agreements to submit a dispute to mediation may restrict the parties' rights of action.

Mediators should act independently and impartially and should ensure that the principle of equality of arms be respected during the mediation process. The mediator has no power to impose a solution on the parties.

Information on the mediation process is confidential and may not be used subsequently, unless agreed by the parties or allowed by national law.

Mediation processes should ensure that the parties be given sufficient time to consider the issues at stake and any other possible settlement of the dispute.

V. Training and responsibility of mediators

States should consider taking measures to promote the adoption of appropriate standards for the selection, responsibilities, training and qualification of mediators, including mediators dealing with international issues.

VI. Agreements reached in mediation

In order to define the subject-matter, the scope and the conclusions of the agreement, a written document should usually be drawn up at the end of every mediation procedure, and the parties should be allowed a limited time for reflection, which is agreed by the parties, after the document has been drawn up and before signing it.

Mediators should inform the parties of the effect of agreements reached and of the steps which have to be taken if one or both parties wish to enforce their agreement. Such agreements should not run counter to public order.

VII. Information on mediation

States should provide the public and the persons with civil disputes with general information on mediation.

States should collect and distribute detailed information on mediation in civil matters including, *inter alia,* the costs and efficiency of mediation.

Steps should be taken to set up, in accordance with national law and practice, a network of regional and/or local centres where individuals can obtain impartial advice and information on mediation, including by telephone, correspondence or e-mail.

States should provide information on mediation in civil matters to professionals involved in the functioning of justice.

VIII. International aspects

States should encourage the setting up of mechanisms to promote the use of mediation to resolve issues with an international element.

23. States should promote co-operation between existing services dealing with mediation in civil matters with a view to facilitating the use of international mediation.

B. Instructs the Secretary General of the Council of Europe to transmit this Recommendation to the competent authorities of the European Union, with a view to:

promoting co-operation between the Council of Europe and the European Union in any follow-up to this Recommendation and, in particular, to disseminate information on the laws and procedures in States on the matters mentioned in this Recommendation through an Internet web site;
and encouraging the European Union, when preparing rules at the European Community level, to draw up provisions aiming at supplementing or strengthening the provisions of this Recommendation or facilitating the application of the principles embodied in it.