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Preparation of a trial as a condition of effective civil procedure

Przygotowanie procesu jako warunek efektywnego postępowania cywilnego

1. Introduction

No exaggeration or overinterpretation could be found in a thesis that Roman jurists were practically oriented and so were the Roman legal institutions, especially those referring to the way of proceeding. It is considered as a widely shared view that Roman law has developed not on the basis of a penchant for theoretical explanations or definitions¹, but rather originated from a necessity of creating a good working, effective mechanism serving real needs of people². In other words the legal forms provided for in Roman law reflected the needs of developing and constantly changing Roman society.

The proves for such a practical feature of Roman law can be found distinctively in a history of a Roman civil procedure, which was governed by law but the law was not comprehensive and the procedure was not even technically described or defined. What is more – Roman civil procedure had come through significant changes – concerning also the preparation of a trial – and formed its basis

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¹ P.T. Thomas, The eternal values of Roman Law, [in:] Roman Law as Formative of Modern Legal System. Studies in Honour of Wiesław Litewski, edp. J. Sondel, J. Reszczyński, P. Ściślicki, Krawków 2003, p. 174.

² In the same spirit Ulpian is being described as not a philosopher neither a theoretician, but a jurist working for a state. Zob. T. Honoré, Ulpian, Oxford 1982, p. 30 i nast.

through practice which significantly supplemented the law³. This view could be related first of all to transformation of too formalised and too expensive legal suit (per *legis actiones*) into formulary procedure (per *formulas*), which offered much wider range of actions thanks to praetor's edicts announced yearly in advance and allowing for issuing additional claims, not recognised by previous *ius civile*. Praetors had considerable power to fashion remedies and to create new rules of procedure by incorporating the new claims in the edict for future cases⁴. Through this new kinds of claims had been made, called *bonae fidei iudicia*⁵ – in opposition to *actiones stricti iuris*, which were strictly based on *ius civile*. So as we can see it was a practical need that kept Roman civil procedure evolving.

This practical value of Roman law cannot be underestimated when deliberating upon effectiveness of modern civil proceedings. It is even more important to take this practical aspect of Roman civil procedure into account, when we realize that nowadays effectiveness is an aim determining and conditioning all changes in civil procedures worldwide⁶. The difference is that nowadays procedure should be efficient enough to serve both: 1) the needs of the new economic environment creating disputes as a mass phenomenon and 2) fair trial requirements. It is symptomatic – especially in comparison to Roman law – that nowadays – as prof. Adrian Zuckermann evaluated – it is “a widespread perception that the administration of civil justice is failing to meet the needs of the community”⁷.

One of the most significant aspect of this effectiveness is proper preparation of a lawsuit, without which it is impossible to conduct a trial in a reasonable time and at reasonable costs. Its significance was very clearly expressed in the first principle of the Council of Europe Recommendation on civil procedures designed to improve the functioning of justice adopted by the Committee of Ministers on 28 February 1984⁸. According to the Council “the proceedings should consist of not more than two hearings, the first of which might

³ W. Litewski, Rzymski proces cywilny, ZNUJ. Prace Prawnicze 1988, z. 123, p. 10, 105.

⁴ E. Metzger, An Outline of Roman Civil Procedure, Roman Legal Tradition 2013, vol. 9, p. 22. The Author states also that the praetor “was in a unique position both to see and to cure procedural abuses”.

⁵ They allowed to resolve a dispute according to rules of common honesty and with an account of all factual significant circumstances, even those not revealed yet.

⁶ The fight against procedural ineffectiveness, especially delays, was a major issue of procedural reform throughout the twentieth century f. e. in Austria. See more: P. Oberhammer, T. Domej, Improving the Efficiency of Civil Justice: some remarks from an Austrian Perspective, Civil Justice between Efficiency and Quality: From Ius Commune to the CEPEJ, C.H. van Rhee, A. Uzelac (edp.), Antwerp – Oxford – Portland 2008, p. 63-68.

⁷ A.A.P. Zuckermann, Preface, [in:] Civil Justice in Crisis. Comparative Perspectives of Civil Procedure, red. A.A.P. Zuckermann, Oxford 1999., p. V.

⁸ Recommendation No. R (84)5 adopted by the Committee of Ministers on 28 February 1984 at the 367th meeting of the Ministers' Deputies.

be a preliminary hearing of a preparatory nature and the second for taking evidence, hearing arguments and, if possible, giving judgment. The court should ensure that all steps necessary for the second hearing are taken in good time, and in principle no adjournment should be allowed except when new facts appear or in other exceptional and important circumstances". The same value of determining by the court the order in which issues are to be resolved, and fixing a timetable for all stages of the proceeding, including dates and deadlines was expressed in UNIDROIT Principles of Transnational Civil Procedure⁹.

Unquestionably – as it was accurately described – civil procedure should not be a journey without a timetable¹⁰, as it seems to be in many jurisdictions¹¹, in which lawyers are very much accustomed to the series of hearings giving occasions for proposing new evidence and making impression of a never-ending process.

This aspect of not only fast, but first of all just adjudication of civil matters accompanied also Roman civil procedure in which a preparatory orientation of certain actions may be distinguished. They are visible mostly in the formulary procedure consisting of two stages of proceedings having their origins – as it is believed – in *legis actiones* procedure¹², but gaining their definitive and obligatory form in a formulary procedure.

The first stage of the lawsuit was *in iure* phase, in which a praetor settled a formula, which contained a concise formulation of the plaintiff's claim and its factual basis (*intentio*) and an instruction of how *judex* should resolve the controversy in the next stage (*condemnatio*)¹³. *In iure* stage was devoted to framing and clarifying basic legal issues of a matter and determining whether litigants should be allowed to proceed and – if so – what form their action should take. During this preparatory stage magistrate decided upon admissibility of

⁹ Principle 14.3.

¹⁰ A. Uzelac, Reforming Mediterranean Civil Procedure, [in:] Civil Justice between Efficiency and Quality: From Ius Commune to the CEPEJ, C.H. van Rhee, A. Uzelac (edp.), Antwerp – Oxford – Portland 2008, p. 87.

¹¹ About underdevelopment of the pre-action stage in the Netherlands see more: C.H. van Rhee, Dutch Civil Procedure, [in:] Civil Justice between Efficiency and Quality: From Ius Commune to the CEPEJ, C.H. van Rhee, A. Uzelac (edp.), Antwerp – Oxford – Portland 2008, p. 53-54. Also in Finland before the reform, which came into force on 1 December 1993 and introduced a new Chapter on Preparation of the Trial, lawsuits consisted of a sequence of unstructured and unprepared hearings (J. Niemi Kiesiläinen, Efficiency and Justice in Procedural Reforms, [in:] Civil Justice between Efficiency and Quality: From Ius Commune to the CEPEJ, C.H. van Rhee, A. Uzelac (edp.), Antwerp – Oxford – Portland 2008, p. 34-35.

¹² B. Andrzejowski, Repetytorjum historii prawa rzymskiego w formie pytań i odpowiedzi według najnowszych podręczników i wykładów uniwersyteckich: dla kandydatów egzaminu prawno-histor. i rygorozantów, Lwów 1921, p. 15.

¹³ Additional elements of a formula were: *demonstratio* and *adiudicatio*.

a dispute, legal basis of an action, an authority competent to decide upon a dispute and procedural plan for a next stage¹⁴. However the view that a judge's task in the second stage was only to gather evidence, investigate the facts and decide upon a matter without answering any legal question is deceiving, nonetheless the first stage was undoubtedly oriented on preparation of a lawsuit.¹⁵ the magistrate in the first stage focused on deciding "the general legal basis to the claim in the course of allowing the actions and exceptions and ordering the trial"¹⁶. This preparation resulted in instructions given to a judge containing the parties' pleadings and allegations, the most important items of a lawsuit and facts being the core of the dispute which needed to be shown. This legal preparation required also a statement of a defendant whose defensive position allowed for determining contentious aspects of a lawsuit. It was actually a claim of a petitioner and a defendant's contradictory statement which made the basis for *litis contestatio* closing in *iure* stage. For these practically oriented reasons making a confession by a defendant was also reserved only for *in iure* stage¹⁷, because it allowed to finish the lawsuit without giving a judgment. The statement of *confession* created the bounding law between parties and was itself an executory title¹⁸.

It is symptomatic that also in previous, *legis actio* procedure, the main task of *in iure* stage was to obtain and define a claim in one of the permissible forms. Contemporary equivalent of this preparatory action could be found in a formal and procedural examination of claim, deciding upon its legal and factual basis – in other words: determining the scope of the lawsuit and its contentious aspects.

There are two more characteristics of Roman civil procedure which are significant from the point of view of proper shape of a preparation phase of a trial. First is that the parties to a dispute did not have a possibility to indicate a *magistrus* deciding on general legal issues in the first stage, still they could choose *iudex privatus* whose basic task was establishing facts in the second

¹⁴ W. Litewski, *Rzymski proces cywilny...*, p. 106. One of very few formulas which had survived was found near Pompeii and is dated to the 1st century AD. It states that: "Blossius Celadus shall be the judge. If it appears that C. Marcius Saturninus ought to give 18.000 sesterces to C. Sulpicius Cinnamus, which is the matter in dispute, C. Blossius Celadus, the judge, shall condemn C. Marcius Saturninus for 18.000 sesterces in favour of C. Sulpicius Cinnamus; otherwise he shall absolve".

¹⁵ D.I. Bekyasheva, *Preparation of Civil Case for Trial in the Russian Civil Procedure*, *Middle-East Journal of Scientific Research* (Special issue of Politics and Law) 2013, nr 13, p. 90.

¹⁶ E. Metzger, *Roman Judges, Case Law, and Principles of Procedure*, *Law and History Review* 2004, no 22/2, p. 17 and cited there G. F. Puchta, *Cursus der Institutionen*. [Geschichte des Rechts bei dem römischen Volk, vol. 1], 9th ed. (Leipzig: Breitkopf & Härtel, 1881), p. 435.

¹⁷ Not in an extraordinary (cognitory) procedure, which resigned from two phases and allowed for making such statements independently of the moment of litigation.

¹⁸ W. Litewski, *Rzymski proces cywilny...*, p. 110.

stage¹⁹. That also emphasizes the practical sens of dual mode of formulary (and earlier – *legis actiones*) procedure. The second characteristic is considerable freedom of deciding upon an order of procedural actions to be undertaken during both stages, which could be noticed at the beginnings of the functioning of formulary procedure, which eventually evolved into established practice formed by purposes of functionality and usefulness²⁰. That also proves how flexible, practically predisposed and judicious Roman law was. It is believed that Romans did not linger over modes of pleading. Nonetheless their rules of procedure were mended – actually without a view to the system of litigation as a whole – surely not because of their avocation for constant changes of law, but rather because of the rule being unfair or inappropriate. One may say that this prevented the Romans from appreciating that their procedural law had a tradition and that there was something to be learned from studying older law. The result is believed to be that the Romans treated old rules as if they were old newspapers²¹.

From all this practical mode of producing the procedural law by Romans one characteristic is of special significance for the subject of my paper and allows me to argue that Romans put much attention to proper and effective preparation of a trial and that attention was practically tested as useful and beneficial. That approach should broaden the scope of contemporary legislative initiatives – not necessarily as far as the two-stages division is concerned, but in a respect of proper shape and proper subject of preparatory phase of civil litigation.

The same purpose of guaranteeing effectiveness of civil procedure, which accompanied the process of creating Roman law, motivates contemporary legislative initiatives. It has been noticed that rational proceeding is plausible exclusively in result of skilful and efficient judicial management²², within the framework of which all competences and powers of court are used in the most possible efficient way. That could be clearly seen on a well known example of the English Procedural Law²³ after Lord Woolf's reform²⁴, which introduced the system of an active case management. According to art. 29 of CPR when

¹⁹ That competence existed only in *legis actiones* and *formulary* proceedings. W. Litewski, *Rzymski proces cywilny...*, p. 108.

²⁰ The Roman practice left the trial stage relatively unregulated. Zob. E. Metzger, *An Outline...*, p. 8.

²¹ E. Metzger, *An Outline...*, p. 3.

²² The important role of which is pointed out by F. Halpern, *Inicjatywa sędziowska w postępowaniu procesowym*, *Polski Proces Cywilny* 1939, no 1-2, p. 34-35.

²³ Civil Procedural Rules; hereinafter referred to as: CPR.

²⁴ The reform was preceded by a Report of Civil Justice Review Body from 1988 which listed four categories of problems of civil justice in Great Britain: delays, high costs, complicated procedures and lack of sufficient legal aid for people with low income. See J. Lapierre, *Angielska procedura w przededniu radykalnej reformy*, [in:] *Wokół problematyki cywilnoprosesowej. Studium*

allocating a complex case to the *multi-track* proceedings, the court gives directions for the management of the case and sets a timetable for the steps to be taken between the giving of directions and the trial or may – instead – fix a case management conference or a pre-trial review or both. In such actions the court may flexibly manage a case in a way appropriate to its particular needs²⁵. The court may for instance – after examining the statements of parties – indicate circumstances to be proved, prove to be presented and the form of presenting the proves. Also when allocating a case to the *fast track* proceedings the court gives directions for the management of the case and sets a timetable for the steps to be taken, including fixing the trial date and a period – not exceeding 3 weeks – within which the trial is to take place²⁶. That, however, requires a trust in judge's skills, competences and involvement. Such trust could be seen also in recent amendments to Polish Code of Civil Procedure, which replaced the system of preclusion with the system of discretionary power of a judge, but – unlike in Roman law – here a formal procedural change was not preceded by a practice, that's why we will have to wait some more years to assess effects of the amendment.

The trust in a judge's skills is not the only clue of the problem of proper preparation of a lawsuit nowadays. Contemporary realities are quite disparate than two thousand years ago. Millions of claims yearly, complicated legal and factual basis of disputes, transnational relations – and many others factors cause that mastering procedural dossier is much more difficult and time consuming. When we additionally take into account unskillfulness leading to frequent supplementing actual state of affairs, unfounded adjournment of hearing and allowing parties to submit additional pleadings excessively expanding actual state of affairs and legal consideration, we achieve unprepared lawsuit unable to satisfy two basic conditions of good administration of justice, namely: accuracy and speed²⁷. Despite the postulates to subject methods of compilation and consideration to regime disciplining parties and

teoretycznoprawne. Księga pamiątkowa dla uczczenia pracy naukowej Profesora Kazimierza Korzana, red. A. Nowak, Katowice 2001, p. 147.

²⁵ According to section 3.4-2.6 of Practice Direction to art. 29 „the court may give or vary directions at any hearing which may take place on the application of a party or of its own initiative. When any hearing has been fixed it is the duty of the parties to consider what directions the court should be asked to give and to make any application that may be appropriate to be dealt with then. The court holds a hearing to give directions whenever it appears necessary or desirable to do so, and where this happens because of the default of a party or his legal representative it will usually impose a sanction”.

²⁶ Art. 28.2 CPR.

²⁷ According to W. H. Puchty (Das Prozesleitungsamt des deutschen Zivilrichters, 1836, p. 70); as quoted in E. Wengerek, Koncentracja materiału procesowego w postępowaniu cywilnym, Warszawa 1958, p. 37 and the literature invoked in the 22nd footnote therein.

court,²⁸ measures taken in practice produce moderate benefits in terms of efficiency of proceeding and they lead to insufficient consideration of a claim and its legal grounds already in the pre-trial stage of proceeding.

Meanwhile one of the essential aspects of effective proceeding is efficient preparation of court hearing and, in particular, its first and the most important determinant, i.e. precise formulation of plaintiff's claims and equally precise implication of defendant's defence. Precisely indicated claims and detailed factual state of affairs, carefully selected from trivial facts, presented in a synthetic manner, not only precondition acceleration of proceeding (*inter alia*, by limiting additional corrective actions to a minimum) but also ensure proper implication substantive law.

In the following part of the paper there will be presented and specified stances of parties prior to court hearing in chosen procedures in order to assess what measures are capable of ensuring greater effectiveness and efficiency of civil proceeding through its proper preparation.

2. Detailed Specification of Procedural Stances of Parties in Legal and Comparative Aspect

2.1. Substantive Requirements regarding First Pleadings

Analysis of foreign regulations governing institution of civil proceeding is indicative of common obligation to ensure that content of petition specifically addresses the following formal requirements:

- subject matter of lawsuit and specific legal protection sought,
- facts, on the grounds of which claim is submitted,
- legal basis for claim (Argentina²⁹, Austria³⁰, Australia³¹, Denmark³², Canada³³,

²⁸ K. Piasecki, *Przewlekłość sądowego postępowania w sprawach cywilnych – przyczyny i środki zaradcze*, Nowe Prawo 1989, no 4, p. 32.

²⁹ M. Bribera, H. Verly, Argentina [in:] *International Civil Procedure*, ed. P.R. Grubbs, Hague – London – New York 2003, p. 4.

³⁰ T. Frad, B. Schimka, Austria [in:] *International Civil Procedure*, ed. P.R. Grubbs, Hague – London – New York 2003, p. 59-60.

³¹ B. Cairns, *Australian Civil Procedure*, Sydney 2009, pp. 200-201.

³² The legal justification of a claim is required especially when the essence of the dispute focuses more on legal issues rather than on actual one.

³³ E.L. Andersen, Denmark [in:] *International Civil Procedure*, ed. P.R. Grubbs, Hague – London – New York 2003, p. 165.

³³ Courts of Justice Act R.R.O. 1990, Regulation 194 – Rules of Civil Procedure, rule 25 point 20.04 (2a); [http://www.e-lawp.gov.on.ca/html/regs/english/elaws_regs_900194_e.htm, accessed on: 31st October 2013]; E. Veitch, Canada [in:] *International Civil Procedure*, vol. 1, ed. D. Campbell, pp. 58-59.

England and Wales³⁴, France³⁵, Korea³⁶, Mexico³⁷, Peru³⁸, Portugal³⁹, Spain⁴⁰, Italy⁴¹).

The importance attributed to clear, precise and exhaustive formulation of claim reflects the principles for drafting petition in the framework of the Canadian civil procedure, where it is required to divide pleadings into paragraphs numbered subsequently and to include each statement, as far as it is practically justified, in a separate paragraph⁴². Whereas lawsuit filed within the framework of the Singapore civil procedure should display facts in strict chronological order⁴³, while the Swiss law requires to submit lawsuit claims as precisely as possible, i.e. in a way that they can be used as content of legal conclusion of judicial decision upon settlement of lawsuit⁴⁴. Within the framework of the Spanish procedure, petition should also be divided in a clear and precise way, and displayed facts are to be linked⁴⁵.

In the case of certain legislations, proper fulfilment of formal conditions to be met by petition is guarded by the requirement to have petition drafted and signed by a professional attorney (Brazil⁴⁶).

³⁴ Art. 16.2 CPR; N. Haye, G. Prevett, England and Wales [in:] *International Civil Procedure*, ed. P.R. Grubbs, Hague – London – New York 2003, p. 182. Here, however, the written details of the claim can be attached within 14 days of service of the letter of claim.

³⁵ X. Vahramian, E. Wallenbrock, France [in:] *International Civil Procedure*, ed. P.R. Grubbs, Hague – London – New York 2003, p. 216.

³⁶ R.B. Han, Korea [in:] *International Civil Procedure*, ed. P.R. Grubbs, Hague – London – New York 2003, p. 396.

³⁷ J.F. Torres Landa, L.O. Guerrero, H.Z. Flores Barrera, Mexico [in:] *International Civil Procedure*, vol. 2, ed. D. Campbell, p. 131.

³⁸ J.C.P. Vargas, Peru [in:] *International Civil Procedure*, ed. P.R. Grubbs, Hague – London – New York 2003, p. 497.

³⁹ M.P. Barrocas, C.C. Ribeiro, Portugal [in:] *International Civil Procedure*, ed. P.R. Grubbs, Hague – London – New York 2003, p. 559.

⁴⁰ I. Quintana, E.de Nadal, J.F. Cortes, Spain [in:] *International Civil Procedure*, ed. P.R. Grubbs, Hague – London – New York 2003, pp. 683-684, A. Viñal, Spain [in:] *International Civil Procedure*, vol. 2, ed. D. Campbell, p. 177.

⁴¹ M. Beltramo, Italy [in:] *International Civil Procedure*, vol. 2, ed. D. Campbell, p. 61, 83.

⁴² Courts of Justice Act R.R.O. 1990, Regulation 194 – Rules of Civil Procedure, rule 25 point 20.04 (2a); [http://www.e-lawp.gov.on.ca/html/regs/english/elaws_regs_900194_e.htm, accessed on: 31st October 2013]. Similar stance has been expressed in art. 76 of the Code of the Civil Procedure in force in the Province of Quebec.

⁴³ G. Asokan, J. Low, Singapore [in:] *International Civil Procedure*, ed. P.R. Grubbs, Hague – London – New York 2003, p. 608.

⁴⁴ G. Naegeli, G. Nater-Bass, M. Orelli, N. Herzog, Switzerland [in:] *International Civil Procedure*, vol. 2, ed. D. Campbell, p. 259, 261.

⁴⁵ A. Viñal, Spain..., p. 177.

⁴⁶ F.E. Serec, Brazil [in:] *International Civil Procedure*, ed. P.R. Grubbs, Hague – London – New York 2003, p. 98-99.

Within the framework of the Dutch civil proceeding, the most extensive compilation of procedural dossier is to be achieved by means of the requirement (implemented in 2002) for counterarguments of a defendant, as long as they are available⁴⁷.

The obligation to submit response to petition by defined time limit is as common as the requirement for precise statement of factual and legal grounds. The main purpose of such response is to specify standpoint of a defendant towards claims including declaration on the fact and nature of defence, to take a stance towards facts defined in petition by accepting or denying them, to supplement actual state of affairs, to file charges or to submit a counter-claim (Ireland⁴⁸, Austria⁴⁹, Australia⁵⁰, Belgium⁵¹, Brazil⁵², Denmark⁵³, France⁵⁴, Spain⁵⁵, Canada⁵⁶, Germany⁵⁷, Norway⁵⁸, Japan⁵⁹, Switzerland⁶⁰, Italy⁶¹, Peru⁶²).

Fulfilment of the requirement to submit response to petition is frequently preceded by performance of the obligation to file (register) the defence. For example, in Ireland, defendant should declare defence in a letter submitted to court within 10 days following the date of service of a copy of petition; a similar case is with Scotland or in Singapore⁶³, where a 3-day period is provided

⁴⁷ J.M. Bosnak, M. Jonk, The Netherlands [in:] *International Civil Procedure*, ed. P.R. Grubbs, Hague – London – New York 2003, p. 459.

⁴⁸ B. Holohan, Ireland [in:] *International Civil Procedure*, vol. 2, ed. D. Campbell, p. 34.

⁴⁹ T. Frad, B. Schimka, Austria..., p. 60, B. Holohan, Ireland ..., p. 34.

⁵⁰ B. Cairns, Australian..., p. 211-212.

⁵¹ P. Lefebvre, Belgium [in:] *International Civil Procedure*, ed. P.R. Grubbs, Hague – London – New York 2003, p.79.

⁵² F.E. Serec, Brazil [in:] *International Civil Procedure*, ed. P.R. Grubbs, Hague – London – New York 2003, p. 100.

⁵³ E.L. Andersen, Denmark [in:] *International Civil Procedure*, ed. P.R. Grubbs, Hague – London – New York 2003, pp. 165-166.

⁵⁴ X. Vahramian, E. Wallenbrock, France..., p. 217 .

⁵⁵ I. Quintana, E.de Nadal, J.F. Cortes, Spain..., p. 685.

⁵⁶ J. Keefe, Canada – Common Law [in:] *International Civil Procedure*, ed. P.R. Grubbs, Hague – London – New York 2003, p.121; W. Brock, M. Bouchard, C. Cameron, Canada – Civil Law (Quebec) [in:] *International Civil Procedure*, ed. P.R. Grubbs, Hague – London – New York 2003, pp.142-143.

⁵⁷ T. Karst, Federal Republic of Germany..., p. 243.

⁵⁸ T. Thorkildsen, A. Kierulf, Norway [in:] *International Civil Procedure*, ed. P.R. Grubbs, Hague – London – New York 2003, p. 477.

⁵⁹ T. Sato, Japan [in:] *International Civil Procedure*, ed. P.R. Grubbs, Hague – London – New York 2003, pp. 381-382.

⁶⁰ G. Naegeli, G. Nater-Bass, M. Orelli, N. Herzog, Switzerland..., p. 262.

⁶¹ G.P.Romano, D. Vecchi, Italy [in:] *International Civil Procedure*, ed. P.R. Grubbs, Hague – London – New York 2003, p. 350.

⁶² J.C.P. Vargas, Peru..., p. 498.

⁶³ G. Asokan, J. Low, Singapore..., pp. 615-616.

for⁶⁴. Such declaration primarily serves informational purpose and constitutes confirmation that defendant is aware of initiated proceeding and intends to conduct defence. If defendant fails to file such declaration, court may issue default judgement.⁶⁵ The German civil procedure also requires defendant to declare intention to mount defence within two weeks following the date of service of a copy of petition⁶⁶.

In the case of a number of legislations, defendant is required not only to take a stance towards claims under lawsuit but also to determine nature and scope of mounted defence. Firstly, defendant may mount defence that confirms actual claims of plaintiff and raise charges only in terms of legal issues such as lack of jurisdiction or judicial capacity, gravity of adjudicated matter or dependence of dispute, judicial settlement, prescription of claims, and finally, legal deficiencies in claim (Ireland⁶⁷). In such cases, a party is required to expressly confirm facts that are not called into question; if defendant does not fulfil this obligation, it is assumed that facts which have not been clearly contradicted are confirmed (Canada⁶⁸, Portugal⁶⁹). In this case, there is no need to conduct evidence proceeding and actual state of affairs is ready to be settled, whereas court decides solely on legitimacy of legal grounds (Argentina⁷⁰, Japan⁷¹).

If defendant mounts defence that calls into question facts displayed by plaintiff, defendant should take a stance towards every fact that is disagreed with, even if it were to be performed only by means of mere negation (Ireland⁷², Spain⁷³). However, in the case of some legislations, denial is not sufficient; in order for defence to be mounted by defendant who claims that true version of events is different than the one presented by plaintiff, it is required to clearly define such different factual circumstances (Canada⁷⁴). Furthermore, in response to petition defendant is obliged to raise all charges relating both to substantive

⁶⁴ E.D. Brown, Scotland [in:] *International Civil Procedure*, ed. P.R. Grubbs, Hague – London – New York 2003, pp. 580-581.

⁶⁵ B. Holohan, Ireland..., p. 34.

⁶⁶ T. Karst, Federal Republic of Germany..., p. 243.

⁶⁷ B. Holohan, Ireland..., p. 34.

⁶⁸ Courts of Justice Act R.R.O. 1990, Regulation 194 – Rules of Civil Procedure, rule 25; [http://www.e-lawp.gov.on.ca/html/regs/english/elaws_regs_900194_e.htm, accessed on: 31st October 2013]. See also: J. Keefe, Canada – Common Law [in:] *International Civil Procedure*, ed. P.R. Grubbs, Hague – London – New York 2003, p.122.

⁶⁹ M.P.Barrocas, C.C.Ribeiro, Portugal, p. 561.

⁷⁰ M. Bribera, H. Verly, Argentina..., p. 5.

⁷¹ T. Sato, Japan..., p. 382.

⁷² B. Holohan, Ireland..., p. 34.

⁷³ In Spain, the term “weight of negation” is even mentioned, which means that the facts that are not explicitly called into question will not be subject to the argument. A. Viñal, Spain..., pp. 178, 181.

⁷⁴ Courts of Justice Act R.R.O. 1990, Regulation 194 – Rules of Civil Procedure, rule 25; [http://www.e-lawp.gov.on.ca/html/regs/english/elaws_regs_900194_e.htm, accessed on: 31st October 2013].

and procedural law, as well as statements concerning facts and law, on the basis of which defendant conducts defence (it is the case, for instance, in Italy⁷⁵ and Spain⁷⁶).

The obligation to indicate evidence to support statements of parties both in petition as well as in response to petition is common. (Belgium⁷⁷, Brazil⁷⁸, Denmark⁷⁹, Spain⁸⁰, Sweden⁸¹, Italy⁸², Korea⁸³, Switzerland⁸⁴, Peru⁸⁵).

For the purpose of ensuring that defendant takes exhaustive stance towards all essential constituents of petition, all available templates facilitating precise and detailed determination as well as classification of scope and nature of defence⁸⁶ are made use of.

Procedural sanctions as the consequence of failure to submit response to petition vary across various legal systems, ranging from lack of consequences for exceeding time limit for submission of response to petition (Belgium⁸⁷) through impossibility to interfere in any way with already undertaken steps and loss of the right to raise charges that are not taken into consideration by court *ex officio* (Italy⁸⁸) and through limited period for submission of statements, charges, claims and evidence that have not been submitted in response to petition (Brazil⁸⁹), ending with default judgement by reason of presumption that if defendant does not mount defence, defendant agrees with (actual) statements made by means of petition.⁹⁰

Within the framework of pre-trial standpoints of parties, plaintiff is granted the right to reply, especially when defence of defendant results in disclosure of new facts, evidence or circumstances, towards which plaintiff has not yet

⁷⁵ G.P.Romano, D. Vecchi, Italy..., p. 351, M. Beltramo, Italy [in:] International Civil Procedure, vol. 2, ed. D. Campbell, p. 84.

⁷⁶ A. Viñal, Spain..., p. 179.

⁷⁷ P. Lefebvre, Belgium..., p. 79-80.

⁷⁸ F.E. Serec, Brazil..., p. 100.

⁷⁹ E.L. Andersen, Denmark..., p. 165.

⁸⁰ I. Quintana, E.de Nadal, J.F. Cortes, Spain..., p. 684.

⁸¹ C. Broman, M. Granström, Sweden [in:] International Civil Procedure, ed. P.R. Grubbs, Hague – London – New York 2003, p. 708.

⁸² G.P.Romano, D. Vecchi, Italy..., p. 349, M. Beltramo, Italy..., p. 84.

⁸³ R.B. Han, Korea..., p. 396.

⁸⁴ G. Naegeli, G. Nater-Bass, M. Orelli, N. Herzog, Switzerland..., p. 261.

⁸⁵ J.C.P. Vargas, Peru..., p. 497.

⁸⁶ N. Haye, G. Prevett, England and Wales..., p. 182. Here, however, the written details of the claim can be attached within 14 days of service of the letter of claim.

⁸⁷ P. Lefebvre, Belgium..., p. 79.

⁸⁸ G.P.Romano, D. Vecchi, Italy..., p. 363, M. Beltramo, Italy..., p. 61.

⁸⁹ F.E. Serec, Brazil..., p. 101.

⁹⁰ In the majority of the analysed legislations, the facts that have not been called into question by defendant are deemed to be acknowledged and no evidence proceedings are conducted in relation to these factp.

taken stance, or when defendant submits counter-claim in response to petition (Belgium⁹¹, Spain⁹², Germany⁹³). Defendant is also granted the right to submit response to counterarguments displayed by plaintiff, especially in the framework of the procedures where possibility to submit subsequent factual and legal statements in the course of hearing is excluded (Switzerland⁹⁴, the United States⁹⁵).

2.2. Alternative – As Compared to Examination Proceeding – Options to Terminate Litigation

In foreign civil procedures there are various grounds justifying judicial decision without the need to conduct full extent of evidence examination proceeding.

In Australia, it is possible to propose amicable settlement in the content of the first petition; if such proposal is accepted by a procedural counter-party (and in some states – also by court), judicial judgement having content analogous to proposed amicable arrangement can be issued.⁹⁶ Notwithstanding the foregoing, plaintiff who, after becoming familiar with contents of response to petition, may decide that claim is obviously justified and mounted defence is insufficient to refute petition, may seek judicial decision under simplified procedure⁹⁷.

Evaluative premise constitutes also the basis for the right (for instance, provided for in the Belgian, German and Canadian procedure) to use simplified procedure when on the grounds of stances of parties presented both in the first pleadings and at the pre-trial hearing it appears that dispute is not complicated and does not require extensive exchange of pleadings⁹⁸; at the same time it is assumed that defendant does not mount defence⁹⁹. A slightly different premise of examining lawsuit under simplified procedure is provided for in the Spanish law and the Canadian law that is in force in the Province of Ontario, where initiation of such proceeding is possible only if claim is based on indisputable facts¹⁰⁰. as well as in the Italian law allowing to accelerate course of proceeding

⁹¹ P. Lefebvre, Belgium..., p. 80.

⁹² I. Quintana, E.de Nadal, J.F. Cortes, Spain..., p. 685.

⁹³ T. Karst, Federal Republic of Germany..., p. 243.

⁹⁴ G. Naegeli, G. Nater-Bass, M. Orelli, N. Herzog, Switzerland..., p. 259.

⁹⁵ F.T. Towner Jr., Ch. Carlsen, M.J. Di Resta, United States [in:] *International Civil Procedure*, vol. 2, ed. D. Campbell, p. 321.

⁹⁶ P. Chesterman, Australia..., p. 40.

⁹⁷ P. Chesterman, Australia..., p. 39.

⁹⁸ P. Lefebvre, Belgium..., p.79; Courts of Justice Act R.R.O. 1990, Regulation 194 – Rules of Civil Procedure, rule 20 point 20.04 (2a); [http://www.e-lawp.gov.on.ca/html/regs/english/elaws_regs_900194_e.htm, accessed on: 31st October 2013].

⁹⁹ T. Karst, Federal Republic of Germany..., p. 255.

¹⁰⁰ A. Viñal..., p. 179, J. Keefe, Canada – Common Law..., p.121.

when claim is based on strong evidence and is quite convincingly justified.¹⁰¹ On the other hand, in many cantonal procedural provisions in Switzerland, it is assumed that defendant may obtain a final and enforceable judgement under simplified proceeding if two conditions are concurrently met: legal matters are clear and facts are indisputable or easy to prove¹⁰².

Clear declaration of parties' standpoints in the first pleadings is obviously governed by the regulation adopted in the Mexican civil procedure where crucial contentious facts are indicated in petition and particularly in response to petition. If according to court, dispute arises solely from legal issues and not facts, parties are summoned to court hearing aimed at conferring upon contentious legal matter and arriving at judicial decision¹⁰³.

2.3. Consequences of Inactivity of Parties

In a number of legislations, obligations to institute court procedure are imposed on parties; however, due to the manner, in which defendant is involved in court procedure regardless of his will, such obligations affect defendant who has not taken on the duty to defend.

Generally acceptable consequence of failure to submit response to petition (alike failure to appearance at court hearing or failure to take a stance to counter-claim) is default judgement following the civil procedure for commercial lawsuits that has already been abolished in the Polish civil procedure (Australia¹⁰⁴, Austria¹⁰⁵, England and Wales¹⁰⁶, Ireland¹⁰⁷); at the same time it is presumed that by failing to mount defence, defendant confirms that facts constituting grounds for submitted claim are true (Canada¹⁰⁸).

In the Irish¹⁰⁹, German¹¹⁰ and Chinese procedure¹¹¹, defendant is obliged to report so-called registration of appearance by time limit following the date of receipt of a copy of petition. Registration takes a form of declarative information

¹⁰¹ G.P.Romano, D. Vecchi, Italy..., p. 365.

¹⁰² G. Naegeli, G. Nater-Bass, M. Orelli, N. Herzog, Switzerland..., p. 272.

¹⁰³ J.F. Torres Landa, L.O. Guerrero, H.Z. Flores Barrera, Mexico..., p. 145.

¹⁰⁴ P. Chesterman, Australia..., pp. 39-40.

¹⁰⁵ T. Frad, B. Schimka, Austria..., p. 65.

¹⁰⁶ N. Haye, G. Prevett, England and Wales..., p. 191.

¹⁰⁷ E. Gilvarry, Ireland [in:] *International Civil Procedure*, ed. P.R. Grubbs, Hague – London – New York 2003, pp. 316-317.

¹⁰⁸ Courts of Justice Act R.R.O. 1990, Regulation 194 – Rules of Civil Procedure, rule 19 [http://www.e-lawp.gov.on.ca/html/regs/english/elaws_regs_900194_e.htm, accessed on: 31st October 2013].

¹⁰⁹ B. Holohan, Ireland..., p. 34; E. Gilvarry..., p. 309.

¹¹⁰ T. Karst, Federal Republic of Germany..., p. 250.

¹¹¹ P. Lee, M. Dalton, Hong Kong Special Administrative Region of The People's Republic of China [in:] *International Civil Procedure*, ed. P.R. Grubbs, Hague – London – New York 2003, p. 274.

confirming that defendant has received pleading and intends to mount defence. Failure to fulfil the aforementioned obligation results in default judgement.

There are also procedural consequences of plaintiff's failure to take a stance towards defendant's statements contained in response to petition. The most radical arrangement is to dismiss petition due to a delay caused by plaintiff's lack of response to inactivity of defendant (i.e. failure to submit a request for statement of non-appearance of defendant)¹¹².

In a number of legal systems, termination of proceeding without substantive settlement of lawsuit is acceptable consequence of inactivity of parties who do not undertake any procedural actions within the time limit indicated in an act of law. An example of such a regulation is provided for in the Mexican and Italian Code of Civil Procedure. It governs termination of procedure without settlement *ex officio* or at the request of a party in the event of failure to undertake any procedural steps within at least a year, resulting in cancellation of all steps undertaken in the course of proceeding, however, not leading to expiry of claim that may be sought in the course of separate proceeding¹¹³.

3. Clear Stances of Parties and Current and Postulated Significance for Subsequent Course of Proceeding under Polish Civil Procedure

3.1. Clear Declaration of Stances and Subject Matter of Proceeding

Clear declaration of stances by parties in reference to claim contained in petition is a prerequisite for proper preparation of lawsuit. Plaintiff's statement that conditions for granting legal protection are met, based on relevant facts and legal grounds, determines subject matter of proceeding and, consequently, accounts for content of judicial decision, its factual basis and therefore, gravity of adjudicated matter¹¹⁴ (art. 321 of the Code of Civil Procedure). Clarification of procedural claim by plaintiff (also by means of indicating nature of legal protection sought and how it is to be provided) performs also function of guarantee as it provides a procedural party with information on expectations of a counter-party, and therefore, it allows to mount effective defence. In this sense, precise clarification of claim constitutes also the pre-condition to ensure the so-called: equality of arms. Bearing the aforementioned in mind, it should be consistently noted that any deficiencies (regarded by the legislature as formal deficiencies) in terms of

¹¹² Courts of Justice Act R.R.O. 1990, Regulation 194 – Rules of Civil Procedure, rule 24 [http://www.e-lawp.gov.on.ca/html/regs/english/elaws_regs_900194_e.htm, accessed on: 31st October 2013].

¹¹³ M. Beltramo, Italy..., p. 80.

¹¹⁴ P. Osowy, Zapobieganie przewlekłości postępowania cywilnego z uwzględnieniem znaczenia zasady koncentracji materiału procesowego (zagadnienia wybrane), Rejent 2002, no 11, p. 143.

precise claim cannot be left to be explained at court hearing, as it would mean that parties appearing at the first hearing will not know what subject matter of proceeding is and, consequently, will not be able to properly conduct effective defence. Postponing such explanations until court hearing may result in the fact that a certain kind of facts will be disclosed not until court hearing and this kind of facts may cause the necessity to adjourn court hearing in order to enable a counter-party to take a stance towards new and previously unknown statements and affidavits and to possibly file further evidence motions.

Actual quotations justifying filed claims that are not *expressis verbis* required to be precise by an act of law (art. 187 § 1 item 2 of the Code of Civil Procedure) are equally important. Nevertheless, it should be emphasised that provisions of art. 187 § 1 item 2 of the Code of Civil Procedure obliges plaintiff to indicate facts that justify every claim rather than just remain related to submitted claims or even constitute their basis. This attribute of actual quotations implies that formal requirements regarding petition can be satisfied only by such actual quotations that justify claims. Aside from the above, it should be noted that only a clear statutory interference, that leads to imposing obligation on plaintiff to precisely indicate facts justifying every claim, would allow to account for enormous procedural significance of these quotations as an instrument serving proper preparation of court hearing involving only necessary evidence proceeding.

Implementation of the requirement to indicate legal basis for a claim is worth considering, particularly in cases where a party is represented by a professional attorney. Another thing is the fact that such a basis, as well as claims, could be indicated otherwise; then, a party would avoid the risk that court might not take into account claims only because in the opinion of court, it should have legal basis other than the indicated one.

One should deem reasonable the postulate to statutorily formulate another mandatory structural requirement regarding petition to indicate evidence claimed in order to demonstrate quoted facts,¹¹⁵ and even including them (in the case of material evidence) in petition. This obligation should be correlated with sanction disciplining parties to exhaustively indicate evidence, otherwise, parties would lose their right to indicate subsequent evidence in the course of proceedings. The sanction should be binding also when delayed indication of evidence would not cause a delay in the examination proceedings.

It seems that the Polish civil procedure still underestimates importance of response to petition that can focus dispute only on selected facts or/and legal matters. In many cases, subordination of the course of proceedings only to procedural statements of plaintiff may lead to undertaking unnecessary pre-trial steps or even evidence proceedings. Furthermore, obtaining information

¹¹⁵ P. Osowy, *Zapobieganie przewlekłości postępowania...*, p. 145.

on stance of defendant not until court hearing, which is pursuant to art. 212 of the Code of Civil Procedure, seems to be too late. Selection of contentious facts and focusing the course of proceedings on them should be the result of pre-trial and written phase prior to opening court hearing.

Legal and comparative analysis of legal regulations adopted in selected legislations allows to consider the statement that it is impossible to implement the institution of mandatory response to petition into the Polish Civil Procedure, to be obsolete.¹¹⁶

Judicial procedure neither relieves plaintiff of the obligation to display facts before court and to prove claims, from which legal effects are derived, nor leads to replacing defendant in mounting defence. The fact that defendant does not become a party to procedure at defendant's free will, does not mean that defensive actions will be instead undertaken by court. Such conclusion would constitute outright denial of the principle of equality of parties. Given the developmental advancement of the science of law of civil procedure subordinated to the rules of procedural justice, passing over the above-mentioned approach and emphasising plaintiff's procedural obligations is groundless and undermines not only effectiveness of procedure but also the principle of contradiction and equality of parties¹¹⁷. In view of statutorily legitimate obligation of supporting procedure and conducting it with respect for good practice, and at the same time in the context of the principle of contradiction being in force within the framework of the Polish civil procedure, it is therefore reasonable to rely on the obligation to defend imposed on defendant, which is correlated with the obligation placed on plaintiff to prove the statements supporting claims referred to in petition. The obligation to mount defence is not only natural consequence of private (personal) nature of dispute subjected to examination under the civil proceeding¹¹⁸ but also constitutes manifestation of concern for one's own interests¹¹⁹, i.e. the obligation that should be characteristic of every human action. Nevertheless, expression of defendant's opinion on petition is not only the obligation but also,

¹¹⁶ Similar stance is expressed by W. Siedlecki, *O usprawienie i zwiększenie efektywności sądowego postępowania cywilnego*, Nowe Prawo 1979, no 4, p. 17. This view has been justified by the conditions of the socialist civil procedure based on the principle of objective truth; in this procedure "it is impossible to impose an appropriate sanction securing the performance of the obligation by defendant without prejudice to the clarification of the truth."

¹¹⁷ Similar stance, in the context of the stance expressed by the Supreme Court in respect of the obligations of the parties to the writ proceedings, has been expressed by H. Pietrzkowski, *Prawo do rzetelnego procesu ...*, p. 51

¹¹⁸ Cf. T. Ereciński [in:] *Kodeks postępowania cywilnego. Komentarz. Część pierwsza – postępowanie rozpoznawcze*, tom 1, T. Ereciński (ed.), Warszawa 2009, p. 103-105.

¹¹⁹ For more information see: A. Łazarska, *Należyta dbałość o swoją sprawę w procesie cywilnym*, Przegląd Sądowy 2009, no. 5, p. 49-50.

or perhaps above all, the right resulting from the principle of equal treatment of parties involved in the procedure¹²⁰.

In view of the foregoing considerations, one should postulate attributing greater importance to response to petition also by means of imposing obligation to submit it in writing in every or almost every civil lawsuit (instead of the binding options – art. 207 § 1), or at least a possibility to oblige a party to submit it in every case, in which a presiding judge deems it necessary or useful to clarify lawsuit¹²¹. Currently, restricting a presiding judge's right to require submission of response to petition only to complicated lawsuits is unfounded and certainly appears to be conscious resignation of the legislator from the possibility to compile procedure dossier and prepare court hearing duly. Obtaining knowledge about the stance of defendant may significantly reduce the number and extent of necessary procedural steps or even exclude the need for conducting evidence proceedings. This may be the case especially when defendant confirms facts displayed as the basis for claim. If such confirmation is not dubious or illegal or intended to circumvent the law, then one may assume that court hearing may be limited only to hearing stances of parties regarding legal interpretation of indisputable facts implied by parties. However, in such situations, limitation or discontinuation of evidence proceeding could be a result of the analysis of stances expressed in the first pleadings, whereas the first court session (in compliance with the postulate provided for in art. 6 § 1 of the Code of Civil Procedure) could serve the purpose of clarification of contentious legal facts and judicial decision terminating lawsuit in the instance.

Unquestionable advantage of precise, yet mandatory, stance to be taken by parties as far as facts are concerned gives the possibility to limit evidence proceedings only to contentious facts.

Obligation to submit response to petition in the majority of civil lawsuits should be accompanied by more specific formal requirements to be met by petition. To maximise measurable effects of such legal arrangement, defendant should be imposed with the obligation to declare precise procedural stance (in imitation of plaintiff's duty to submit precise claim) by means of indicating whether defendant mounts defence while contradicting both facts and legal

¹²⁰ A. Góra-Błaszczykowska, Zasada równości stron w aspekcie zmiany przepisów art. 5 i 212 k.p.c. i wynikających z nich obowiązków sądu w postępowaniu cywilnym (uwagi na tle orzecznictwa Sądu Najwyższego), Przegląd Sądowy 2005, p. 10, p. 88.

¹²¹ The latter postulate indicated by Sz. Rożek (Sprawność postępowania cywilnego – uwagi praktyczne i postulaty *de lege ferenda*, Monitor Prawniczy 2006, no. 21, p. 1145) has met with approval. See for instance: P. Ryłski, Aktywność sądu w zakresie zbierania materiału faktycznego sprawy w przygotowawczej fazie postępowania cywilnego (art. 207 § 2 i 3 KPC) [in:] Ewolucja polskiego postępowania cywilnego wobec przemian politycznych, społecznych i gospodarczych. Materiały konferencyjne Ogólnopolskiego Zjazdu Katedr Postępowania Cywilnego. Szczecin – Niechorze 28th – 30th September 2007, H. Dolecki, K. Flaga-Gieruszyńska (eds.), Warszawa 2009, p. 391.

outstanding issues or mounts affirmative defence consisting in confirming facts but at the same time negating the right, protection of which is sought by plaintiff or does not mount defence and accepts petition. Each of these stances would require subsequent and as precise as possible explanation, including indication of which facts are contradicted by defendant, which essential facts omitted by plaintiff are additionally displayed and what evidence motions are submitted by defendant in order to demonstrate factual quotations or to contradict facts and legal quotations of plaintiff, or alternatively to indicate what charges based on specific rights defendant are contradictory to plaintiff's claims.

Even greater simplicity could be accepted in the event of accepting petition which essentially does not even require court hearing and could serve the grounds for judicial decision "based on consideration" during a closed sitting. Although rejection of open and oral court hearing generally raises the question of conformity of this kind of court ruling with the Constitution, nevertheless, it should be noted that inactivity of defendant does not raise concerns about constitutionality and correctness, and provides for default judgement during a closed sitting under the conditions of factual uncertainty about the stance of defendant, it seems even more reasonable to take advantage of such an opportunity when it is known that defendant has given consent to take into account claim raised by plaintiff. However, in such a case, in order to provide defendant with a greater extent of protection, with regard to judicial decisions to accept petition, one should consider petition to follow the model of default judgements; although conscious acceptance of petition by defendant would constitute an argument for abandoning such legal arrangement.

Consequently, response to petition, that is manifestation of defendant's obligation to supporting the procedure, should disclose the entirety of defendant's stance, including the attitude towards claims referred to in petition, and factual quotations and evidence motions. It should be emphasised that presentation of any defensive statements will reduce the need for subsequent pleadings.

3.2. Factual and Evidential Quotations of Parties as Precondition for Compilation of Procedure Dossier, Due Evidence Proceedings and Efficient Examination of Lawsuit

The manner in which facts are displayed by parties is of particular significance for execution of the postulate of effective proceedings as full accessibility to facts preconditions not only quick examination of lawsuit but also greater rationality and reliability of judicial decision adjudicated on the basis of dossier complied within a given time frame. Precise claims define subject matter and framework of proceedings that court cannot (both at the stage of evidence proceedings

and final judicial decision) divert from; whereas invoked facts individualise submitted claims and motions,¹²² define subject matter of proceedings and therefore determine the line and extent of evidence proceedings.

In terms of compilation of facts and evidence, particular importance should be attributed to the Act of 16 September 2011 that amended the Act – the Code of Civil Procedure and certain other laws.¹²³ The aim of the new regulation was to persuade parties to display facts and evidence as quickly as possible in order to compile the procedural dossier and therefore efficiently and effectively conduct the proceedings. This objective is *inter alia* achievable by means of the duty of parties to present without delay all facts and evidence so that the proceedings could be carried out quickly and efficiently (art. 6 § 2 of the Code of Civil Procedure), under the penalty of statutory liability for procedural costs and costs related to omission of late statements and evidence (art. 207 § 6, art. 217 § 2, art. 344 § 2, art. 493, § 1, art. 503 § 1). It seems that despite the far-reaching assumptions, the amendment of art 217 of the Code of Civil Procedure does not achieve the aforementioned target. New regulations allow and even oblige the court to disregard late statements and evidence, unless a party proves that they have not been submitted in a timely manner not due to causes blameable on a party or that taking late statements and evidence into consideration will not cause delay in examination of lawsuit or that there are other extraordinary circumstances. According to the third paragraph, court ignores statements and evidence if they are invoked only for delay or if contentious circumstances have already been sufficiently explained. However, it should be regarded as reasonable to let the court assess correctness of submission of evidence motions in the course of proceedings as it is consistent with the postulates of informalisation and “flexibilisation” of judicial actions; but in practice, that is still insufficient. Until parties precisely declare their standpoints as well as specify facts, on the basis of which they formulate their claims and defence, it will be impossible to anticipatorily recognise the motions and statements submitted in the course of the procedure as the ones invoked for delay or late.¹²⁴ Effective execution of the discretionary power of a judge to the extent of formal and substantive management of the procedure is feasible only when court commences examination proceeding while having complete knowledge about subject matter of lawsuit and well thought-out yet flexible action plan resulting from the aforementioned factors. This plan assumes that procedure is managed in such a way that it effectively allows to clarify definitively contentiously outstanding issues in a timely and as efficient as possible manner.

¹²² W. Siedlecki, *Zasady wyrokowania w procesie cywilnym*, Warszawa 1957, p. 33.

¹²³ *Journal of Laws*, No. 233, item 1381.

¹²⁴ Sz. Rożek, *Sprawność postępowania cywilnego...*, p. 1147.

The aforementioned goal is achievable also by means of restrictions on freedom to submit pre-trial pleadings, limitless multiplication of which basically boils down to duplication of already submitted statements and do not contribute to settlement of lawsuit but rather inundates court with irrelevant information. Court order to exchange subsequent pleadings before court hearing may however be expedient¹²⁵ for example, when, in response to petition, defendant invokes new facts, raises charges against plaintiff and related claims or submits counter-claim. In such a case, it is not only legitimate but also necessary for proper preparation of court hearing to obtain plaintiff's stance.

Although the Code of Civil Procedure provides for evidence proceeding to involve exclusively facts relevant from the point of view of settling lawsuit, in practice (even despite evidence statement precisely formulated in court ruling), all available information relating (or not relating) to lawsuit, including indisputable or irrelevant facts, are quite often obtained in result of evidence proceeding. Basically in every case, the related causes come down to improper preparation of lawsuit in its pre-trial phase. The causes should be particularly sought in failure of court to clarify contentious issues (including application of art. 212 of the Code of Civil Procedure), and earlier, in factual grounds underspecified by plaintiff and in mounting the so-called "procedural caution" of defence in advance by defendant, and at the same time hypothetically refuting all possible statements of a counter-party, even if they have not yet been reported or have not been clearly recognised as factual grounds of claims, which obviously leads to extensively lengthy court procedure.¹²⁶ In such cases it is obviously difficult for court to effectively manage evidence proceedings and efficiently exercise power for the purpose of dismissing irrelevant questions.

Crucial criterion for effective proceedings is limitation of evidence proceedings only to those facts that have been clearly contested by a counter-party and that remain contentious to some extent. Although regulations stipulated in the Polish Code of Civil Procedure provide the basis for such efficient management of evidence proceedings, lack of appropriate procedural tools that enable substantive assessment to the extent necessary to conduct evidence proceedings constitutes important factor inhibiting effective use of such a basis.

A particularly valuable requirement, stipulated in other legal systems, for facts to be displayed in petition as the grounds for claim but also any evidence to be attached to petition, that plaintiff intends to make use of within the framework of evidence proceedings, governs submission of parties' stances, which has considerable impact upon successful compilation of evidentiary dossier. Later

¹²⁵ Sz. Rożek, *Sprawność postępowania cywilnego...*, p. 1145.

¹²⁶ E. Wengerek, *Koncentracja materiału procesowego ...*, p. 71.

presentation of evidence is permitted only if plaintiff convinces court that plaintiff has learnt about a document (evidence) after bringing action to court. The same requirements provided for in relation to the mandatory response to petition, and possibly also in relation to parties' replies regarding new statements or stances of procedural counter-parties, would bring invaluable benefits in terms of defining relevant contentiously outstanding issues and successful compilation of entire factual or even evidentiary dossier even before court hearing. Implementation of such legal arrangements could be accompanied by regulations that contribute to submission all statements, motions and evidence known to a party as well as claims based on them at the pre-trial stage of proceedings; such regulations might be associated even with the guarantee of partial reimbursement of legal costs in the event of rapid settlement of lawsuit.¹²⁷

3.3. Approach of Parties Towards Counterclaims Preconditions Simplified or Accelerated Procedures

Clear stances of parties not only allow to successfully compile procedural dossier in a short time but also can constitute a starting point for application of simplified or specific procedural institutions. The analysis presented above accounts for the possibility, or even the need justified by targeted efficiency of proceedings, to implement legal arrangements that allow to rationalise the procedure, *inter alia*, by reducing costs and volume of unnecessary procedural actions. This would call for implementation of legal arrangements that allow for pre-selection of petitions, for instance, according to the criterion of indisputability of facts, failure to mount defence by defendant, obvious groundlessness or obvious legitimacy of petition, and that subsequently enable to adjust appropriate, i.e. rational procedures to status of dispute. This is undoubtedly an uneasy task since any legal arrangement must conform to constitutional standards and particularly respect the right to reliable and just court procedure. Therefore, it may be helpful to refer the issue under consideration to procedural standards of the Council of Europe. The following recommendations of the Committee of Ministers of the Council of Europe are noteworthy:

- proceedings should not include more than two sittings, the first of which may be of a preparatory nature, while the other can serve conducting evidence, hearing arguments of parties and, if possible, adjudicating (principle 1 point 1

¹²⁷ Such arrangement is accepted to some extent by the Polish legislature that has predicted the partial reimbursement of court fee, for instance, in the event of reaching settlement or withdrawal of a letter of claim in a timely manner (art. 79 of the Act on Court Fees in Civil Cases).

of the Recommendation No R (84)5 on principles of civil procedure aimed at improving the judiciary¹²⁸;

- if a party initiates obviously groundless proceedings, court should have the possibility to settle matter in a simplified procedure with possible imposition of fines or obligation to pay compensation on a party (principle 2 point 1 of Recommendation RE (84)5);

- claims, charges and defence of parties, as well as evidence should be presented at the earliest possible stage of proceedings (principle 5 of Recommendation RE (84)5);

- in order to quickly terminate proceedings in selected categories of cases (e.g. in cases concerning incontestable rights), it is acceptable to use one or more measures including, *inter alia*, simplified method of initiating proceedings, resignation from sittings or limiting oneself to one sitting or pre-trial hearing, prohibition or restriction on presentation of charges or defence (principle 9 of Recommendation RE (84)5);

- obviously little chance of achieving success in a case may justify refusal to grant a destitute person legal assistance of a professional attorney appointed *ex officio* (point 3 item d of the Recommendation No. R (93)1 on effective access to law and justice of people in a situation of extreme destitution).

The aforementioned recommendations prompt to consider the possibility to implement instruments serving the purpose rapid or even immediate termination of proceedings in cases where claim is obviously groundless. It seems purposeful to implement general regulations authorising dismissal of action without the necessity to conduct court hearing. The aptly raised postulates in this regard¹²⁹ should be approved while indicating that there are no grounds to limit such simplification (pursuant to art. 514 § 2 of the Code of Civil Procedure) to non-litigious proceedings.

It bears noting that institutions aimed at terminating proceedings in the event of bringing action that has no chance of success without unnecessary steps are being implemented in foreign legal systems. For example, in the Danish civil procedure, court may dismiss action, if claim formulated by plaintiff is unclear.¹³⁰ Whereas within the framework of Australian procedure, conceptual framework of a “tiresome” party (*vexatious litigant*) has been invented to refer to a person who initiates groundless proceedings. Proceedings intended to persistently harass or annoy, cause delay, realise other hidden agenda or lacking reasonable grounds

¹²⁸ Hereinafter referred to as: Recomm. RE (84)5.

¹²⁹ M.G. Plebanek, *Nadużycie praw procesowych w postępowaniu cywilnym*, Warszawa 2012, p. 183.

¹³⁰ P. Fogh, F. Dalgaard-Knudsen, Denmark [in:] *International Civil Procedure*, vol. 1, ed. D. Campbell, p. 103.

are considered to be tiresome proceedings.¹³¹ A party referred to as “tiresome” will be the one made unable to initiate subsequent proceedings without court’s consent. Legal arrangement aimed at protecting the judiciary from unnecessary procedures has been also implemented in Switzerland. In this country, in many cases initiation of court proceedings is preceded by presentation of claim before magistrate justice independent from court or a servant responsible for conciliation. Their mission is to encourage parties to terminate dispute amicable (by reaching settlement) especially in situations where court procedure is obviously or to a large extent groundless¹³².

3.4. Court Accountable for Due Preparation of Court Hearing

The scope of activity of court at the pre-trial stage of proceedings for the purpose of preparation of court hearing, *inter alia*, by means of relevant court rulings is regarded as outstanding issue that derives from the matter elaborated upon above. Although the civil procedure of protective type in principle cannot be efficient and well-organised procedure¹³³, it is difficult to imagine reliable court proceedings leading to fair settlement, challengeable by total inactivity of court examining lawsuit¹³⁴.

In Poland, due to pejoratively perceived activity of court aimed at searching for evidence and facts, after political transformation, the legislature began to consistently move away from manifestation of activity of court for more and more successful execution of the principle of contradiction, implicitly assuming that the more one moves away from manifestation of inquisitive manner

¹³¹ B. Cairns, Australian..., p. 106-107.

¹³² G. Naegeli, G. Nater-Bass, M. Orelli, N. Herzog, Switzerland..., p. 257.

¹³³ For the driving force that dynamises the proceedings is the activity of the parties protecting their own interest. Cf. T. Ereciński [in:] Kodeks postępowania cywilnego. Komentarz..., p. 103.

¹⁴ It has also been stressed that wherever the parties are relieved from the responsibility for the conduct of the procedure, the phenomenon of lengthiness takes place. Cf. P. Osowy, Aktywność informacyjna sądu a ustawowe granice pomocy stronie – rozważania na tle art. 5 k.p.c., Rejent 2003, no. 7-8, p. 110.

¹³⁴ The principle 3 of the Recommendation No. R (84)5 on the principles of the civil procedure aimed at improving the judiciary clearly suggest that the court should, at least during the pre-trial meeting, and if possible, during the entire proceedings, play an active role in ensuring a smooth conduct of the proceedings and at the same time in respecting the rights of the parties, including the right to equal treatment; the court should particularly be able to oblige the parties to explain their standpoints, appear in person, as well as to present the evidence (particularly when it is supported by reasons other than the interests of the parties); the court should also have the possibility to ask questions concerning the legal issues, excluding witnesses whose testimonies would not have relevance to the settlement of the case, limiting the number of witnesses to give testimony in relation to the same factp.

for leaving all initiative in the hands of parties, the greater is the guarantees to discover truth.

Meanwhile, the continental civil procedure that is uncontaminated with such adverse correlation and at the same showing positive approach to legitimate forms of activity of court in obtaining evidence, constitutes (in the opinion of representatives of fully contradictory American civil procedure) the address to shortcomings of the system, which reduces the role of a judge to an impartial arbitrator. The new English Procedural Law (Civil Procedural Rules) has also highlighted the importance of active case management involving, *inter alia*, encouragement for parties to cooperate with each other, set subject matter of dispute in pre-trial stage of proceedings and immediately decide which of them require evidence proceedings, and consequently settle other lawsuits.¹³⁵ Within the framework of case management, court sets necessary evidence and requires a party to disclose it; court also sets timing of court hearing and plans evidence proceedings.¹³⁶

In order to ensure efficiency of proceedings, court, as a host, should plan its conduct and watch (in a flexible manner) over proper execution of such a plan. The aforementioned Act of 16 September 2011 is of particular importance in this respect. By imposing the obligation to support court procedure and the duty to act in accordance with morality on parties,¹³⁷ the aforementioned Act also provides for detailed specification of court's duties to the extent of compiling procedural dossier within the framework of the so-called informative hearing of parties. It seems that the legislator's attention and concern for enforcement of principles of fair procedure have not been fully properly targeted. Without denying importance of the legislative initiative, it should be noted that the role of court in obtaining evidentiary dossier should not focus on verification of timeliness (with no delay) of submission of evidence; however, this right is invaluable especially as a tool to discipline parties. Nevertheless, activity of court should facilitate to obtain – as complete as possible and relevant for settlement purposes – the case dossier by means of properly targeted evidence proceedings, including “filtering” evidence-related initiative of parties.

¹³⁵ Art. 1.4 (1) and (2) CPR.

¹³⁶ N. Andrews, *English Civil Procedure: Fundamentals of the New Civil Justice System*, Oxford 2003, p. 337.

¹³⁷ The observance of which is in principle intended to promote the proper development of the procedure. See: E. Wengerek, *Koncentracja materiału procesowego...*, p. 73.

4. Summary

The analysis of legal arrangements provided in selected foreign procedural acts of law is indicative of global concern about effectiveness of proceedings. This concern is expressed in a convincing manner in the Part 1 of the English Code of Civil Procedure of 1999 which provides for the essential purpose of proceedings to be the target of fair court procedure and to conform to principle of proportionality of costs.¹³⁸ One of the means to achieve this goal is examination of lawsuit in proportionate manner, *inter alia*, in terms of importance and complexity of lawsuit.¹³⁹ This last principle should be paid a little more attention, because it explains in simple terms why not all lawsuits initiated before civil court deserve the same commitment of court's time and court's effort as well as the same costs. Although the civil procedure is dynamic, it is possible and purposeful to ground assessment of reasons for petition and related action plan merely on pre-trial stances of parties. Effectiveness of this arrangement depends on prior development of awareness of future subjects of court civil procedure that conscientious, active and consistent with good practice presentation of facts truthfully and without concealing anything, pursuant to art. 3 of the Code of Civil Procedure, primarily lies in the interest of those subjects.

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¹³⁸ Art. 1.1 (1) CPR.

¹³⁹ Art. 1.1 (2)(c) CPR.

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Summary:

It is considered as a widely shared view that Roman jurists were practically oriented, and so were Roman legal institutions, which evolved not on a basis of theoretical explanations, but rather originated from a necessity of creating a good working, effective mechanism serving real needs of developing and constantly changing Roman society. Amongst Roman procedural regulations which

were practically tested as useful and beneficial there are many of preparatory orientation, especially as far as in iure stage of a formulary proceedings is concerned. During this phase admissibility of a dispute was decided, as well as legal basis of a claim, an authority competent to decide upon a dispute and procedural plan for the second stage. That orientation allows to consider whether in contemporary civil procedural rules proper attention is drawn to preparatory phase of civil litigation. The paper presents and specifies stances of parties prior to court hearing in chosen procedures in order to assess what measures are capable of ensuring greater effectiveness of civil proceeding through its proper preparation.

Keywords: Effectiveness of civil procedure, preparation of a lawsuit.

Przygotowanie procesu jako warunek efektywnego postępowania cywilnego

Streszczenie:

Przewidziane w prawie rzymskim instytucje prawne ewoluowały nie w oparciu o teoretyczne rozważania, lecz na bazie praktycznych potrzeb zmieniającego się i rozwijającego wciąż społeczeństwa. Wśród proceduralnych rozwiązań przewidzianych w prawie rzymskim można wyróżnić i takie, które ukierunkowane były na właściwe przygotowanie procesu cywilnego. Są one dostrzegalne zwłaszcza w pierwszej fazie procesu formułkowego, tj. w fazie *in iure*, w ramach której decydowano o dopuszczalności kontynuowania procesu, podstawach prawnych sporu, organie kompetentnym do rozstrzygnięcia sprawy oraz o planie, według którego toczyć się miała druga faza. Takie ukierunkowanie wstępnego etapu procesu rzymskiego pozwala z podobnej perspektywy przeanalizować współczesne regulacje prawne. Niniejszy artykuł ma na celu dokonanie tego rodzaju prawnoporównawczej analizy i wskazanie jakie środki procesowe są obecnie wykorzystywane w celu przygotowania procesu i zapewnienia jego sprawnego przebiegu.

Słowa kluczowe: efektywność postępowania cywilnego, przygotowanie procesu.
