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Summary

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Recent Reforms in italian Civil Procedure: the process and the ADRs*

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Abstract: The article intends to highlight some important features of the legal reforms operated in Italy in recent times, specially regarding the so-called ADRs.

Keywords: Italian Civil Procedure. Reforms.

Summary: 1. *Introduction*.- 2. *The reform of Article 111 Constitution.*- 3. *The reform of process as introduced by Law no. 69 of June 18, 2009.*- 4. *The class action as introduced by Article 140-bis Consumers' Code.*- 5. *The mediation of civil and commercial controversies.*

1. Introduction

Before introducing the subject of this article, which is related to some recent important reforms in the Italian system of process law, a few words must be spent on some reasons for

* This essay has been prepared for the Conference organized by the Peoples' Friendship University of Russia on "Civil law and civil law of procedure in Russia and abroad: development trends and changes" (Moscow, November 19, 2010).

which it was written. It is dedicated for the memory of the eminent Russian jurist Professor V.K. Puchinsky, who took part in a collective research project that was co-edited by one of the authors of this paper. He published, in Italian, what is likely to be his last academic work[1].

But that research was only one of the latest collaborations between Russian and Italian jurists. If we limit our analysis to civil procedure, one cannot forget the several relationships, during the '70s, with Professor M.A. Gurvic, particularly well known in Western countries for taking part in drafting the "*Fundamental Principles of Civil Procedure of USSR and of the Federated Republics*" and for acting as Counsel to the USSR Supreme Tribunal[2].

There have also been several publications of Italian scholars in Russia. Just to limit to the area of civil procedure, the recent essays of M. De Meo (on mediation and conciliation) and N. Picardi (on the reform of procedural law in Italy) have been published in a collective book published in Moscow in 2010[3].

It can be thus concluded that the old relationships between Russian and Italian jurists have brought to the emersion of important experiences that – although formed under different

[1] V.K. PUCHINSKY-E.V. KUDRYAVTSENA, *Il nuovo codice di procedura civile della Federazione Russa*, in N. PICARDI-R. MARTINO (eds.), *Codice di procedura civile della Federazione Russa del 2003*, Cacucci Editore, Bari, 2007, pp. 81-93.

[2] Without his guide and continuous collaboration for several years it would not have been possible to publish the book on Soviet civil procedure (N. PICARDI-A. GIULIANI (eds.), *Processo civile sovietico*, Padova, 1976, which is opened by Professor Gurvic's essay, *Introduzione: profili generali del processo civile sovietico*, pp. 3-27, followed by the Italian version of the mentioned Fundamental Principles and of the Code of Civil Procedure, commented in each of its articles).Then, there was the chance of publishing Professor Gurvic's essay on *La responsabilité des juges en droit sovietique*, in A. GIULIANI-N. PICARDI (eds.), *La responsabilità del giudice*, in *L'Educazione giuridica*, III, Perugia, 1978, pp. 201-221. In this latter book it was also announced with deep sorrow that the eminent colleague (whose last academic work was being published) had died in Moscow on October 12, 1977.
Thereafter, in N. PICARDI-A. GIULIANI (eds.), *L'ordinamento giudiziario II: Documentazione comparativa*, Maggioli Editore, Rimini, 1983, pp. 537-565, an essay written by M.S. Chakariane was published on *La formation et le choix de juges en URSS*. Then, on February 14, 1990, Professors S.V. Bobotof and S. Chadajev gave a lecture in Rome on *L'insolvenza e il fallimento delle imprese in crisi alla luce della nuova politica economica russa*. The updated lecture was then published in N. PICARDI-A. GIULIANI (eds.), *La restaurazione del fallimento negli Stati socialisti*, in "Ricerche sul processo", 5, Maggioli Editore, Rimini, 1994, pp. 131-146, in the 5th Part, whose title was *Dall'URSS alla Russia*.
In the book series *Testi e documenti per la storia del processo* the Code of Civil Procedure of the Federal Soviet Republic of Russia of 1964 was published by Giuffrè Editore, Milan, 2004, introduced by the essay N. PICARDI-R.L. LANTIERI, *La giustizia civile in Russia da Pietro il Grande a Kruscev*, pp. XI-XLIV.
Recently in the book on the *Codice di procedura civile della Federazione Russa del 2003*, cited, Professor D.Y. Maleshin's, Vice Dean and Professor in the State University of Moscow, essay on *La riforma della procedura civile in Russia: l'aspetto socio culturale* (pp. 67-87) was published.

[3] Respectively, pp. 117-183 and 134-141.

historic and political contexts – may reciprocally contribute to the solution of the problems of our times. After all, this is the function of legal scholars' communities in the era of globalization.

During the last decade in Italy a number of reforms has been passed in order to achieve a more effective access to justice.

The legislative development has followed three directions:

a) there have been specific interventions on the civil process, aiming at simplifying and accelerating the process itself, in order to recover competitiveness and make it an efficient venue for resolving both domestic and cross-border controversies that might get to the actual satisfaction of violated rights[4];

b) ADRs – such as conciliation/mediation – have been introduced in order to prevent the commencement of lawsuits or at least the issuance of the judgment.

2. The reform of Article 111 Constitution

As to the amendments to the law of civil process, the starting point is the new Article 111 of the Constitution as amended by Constitutional Law no. 2 of November 23, 1999, that has provided the principle of the due process of law with constitutional rank, as in the common law systems.

That of the "due process" is a short phrase for indicating the necessary requisites that are mandated by the Constitution to the ordinary procedural law: *a)* the statutory (pre-)regulation of procedural law; and *b)* the compliance of civil procedure to the fundamental principles of procedural justice, such as the adversarial principle, the parity of the parties, the impartiality of the judge and thus the effectiveness of judicial protection and finally, the

[4] DE CRISTOFARO, *Il nuovo processo civile "competitivo" secondo la l. n. 80 del 2005*, in *Riv. trim. dir. e proc. civ.*, 2006, p. 171 ss.

reasonable duration of the process, in order to recover the ethical side of the process[5]. The last requisite, also in the light of the related remedies (as introduced by Law no. 89 of March 24, 2001) and of the several judgments issued against the Republic of Italy by the European Court in Strasbourg for breach of Article 6 of the European Convention on Human Rights, is the main point of reform for the contemporary Italian legislature.

3. The reform of process as introduced by Law no. 69 of June 18, 2009

Not considering some less recent amendments (of 2003 and 2005-2006), the focus of this paper is on the reforms of 2009-2010.

Law no. 69 of June 18, 2009, has renewed many aspects of civil procedure (although not introducing a global reform) in order to implement the constitutional guarantees of the due process and of its reasonable duration, therefore aiming to achieve the purposes of accelerating, simplifying, rationalizing and moralizing the ordinary process, as well as making jurisdictional protection more effective[6].

We will then consider the most important reforms.

Preliminarily, the prohibition for the judge to render judgments which are not requested by the parties (the so called "third solution"), already arguable from Article 183, para. 4, of the Code of Civil Procedure ("CPC"), is reinforced. Article 101, para. 2, CPC provides now for the nullity in case the prohibition is violated. In other words, the adversarial principle must be respected by the parties and by the judge. Thus, if the latter opts for a solution of the case

[5] COMOGLIO, *Ideologie consolidate e riforme contingenti del processo civile*, in *Riv. dir. proc.*, 2010, p. 521 ss., *ivi*, p. 527.

[6] BALENA, *La nuova pseudo-riforma della giustizia civile*, in www.judicium.it; BRIGUGLIO, *Le novità sul processo ordinario di cognizione nell'ultima, ennesima riforma in materia di giustizia*, in www.judicium.it; COMOGLIO, *Ideologie consolidate*, cit., p. 528 s.

based on an argument which is raised by the judge *ex officio* must allow the parties to file briefs in order to comment upon that argument[7].

Article 115, para. 1, CPC, then, confers evidentiary relevance to the facts that are not challenged by the opposing party: "*… the judge must decide on evidence provided by the parties or by the public prosecutor, as well as on those fact that are not specifically challenged by the party appearing before the judge*". Thus, not challenging the facts that are presented by one party means that those facts are treated as admitted and need not to be proven[8].

A meaningful intervention is also the one on the regulation of the process schedule.

Many of the procedural deadlines have been reduced, in order to shorten the periods of process stay, and appropriately the general rule that deadlines may not be continued by the judge even upon the parties' agreement is derogated from through the broadening of the scope of the "re-admission", already contained in former Article 184-*bis* CPC (now, repealed and replaced by Article 153)[9].

In order to safeguard the constitutional clause of the reasonable duration of the process, the *ex officio* powers of the judge have been enhanced. Articles 307, para. 4, and 630, para. 2, CPC allow the judge to declare the end of the process in case of the inactivity of the parties[10].

Always in the acceleration perspective, two additional statutory interventions must be recalled: the process calendar (Article 81-*bis* of the implementing provisions of the CPC) and the written witness statement (Article 257-*bis* CPC).

[7] COMOGLIO, *Ideologie consolidate*, cit., p. 535; BUONCRISTIANI, *Il principio del contraddittorio tra parti e giudice*, in *www.judicium.it*.
[8] SASSANI-TISCINI, *Prime osservazioni sulla l. 18 giugno 2009, n. 69*, in *www.judicium.it*.; COMOGLIO, *Ideologie consolidate*, cit., p. 536.
[9] COMOGLIO, *Ideologie consolidate*, cit., p. 536 s.
[10] SASSANI-TISCINI, *Prime osservazioni sulla l. 18 giugno 2009, n. 69*, in *www.judicium.it*.

As to the first, the judge has the power to define, after hearing the parties, the process calendar, in order to rationally and efficiently organizing the procedural steps, preventing the proliferation of hearings[11].

The written witness statement is inspired by foreign experiences (the Anglo-American affidavit, the French *attestation*) and combines the purpose of accelerating the times to get to the definition of the process and that of moralizing it. The goal is that of amending the non-virtuous practice of having the witnesses examined by the attorneys rather than the judge. Some authors have shown pessimistic about such possibility, as it requires the parties' previous agreement and the respect of a number of formalities, so that some consider it a mere "legislative marketing" initiative[12].

The moralizing purpose may also be found in other amendments: the sanctions to which the parties of the process as well as third parties may be condemned; the punitive order to the winning party that has previously and unjustifiably refused a conciliation proposal, in case its claim is accepted for an amount not higher than that of the conciliation proposed (Article 91, para. 1, CPC); the introduction of an additional case of compensation for damages in case of liability in the process, which may be ordered by the judge *ex officio* and also if no damage is proven or even exists (Article 96, para. 3, CPC)[13].

As to the process before the Court of Cassation, two new cases have been introduced in which the claim is declared not admissible (or, better, is manifestly ungrounded), in order to achieve the dual purpose of both reducing the number of cases before the Court and preventing the abuse of the remedy. They join the already existing "filters" (Article 360-*bis* CPC) and are the following: (i) "*when the judgment that is being challenged has decided the legal issues consistently with previous Court's decisions and the exam of the arguments does not bring either to confirm or to change such case law*"; (ii) "*when the challenge is based on the due process principles and it is manifestly ungrounded*".

[11] PICARDI, *Manuale del processo civile*, Milano, 2010, p. 287.
[12] PICARDI, *Manuale del processo civile*, cit., p. 325 s.; SASSANI-TISCINI, *Prime osservazioni sulla l. 18 giugno 2009, n. 69*, in www.judicium.it.
[13] COMOGLIO, *Ideologie consolidate*, cit., p. 539.

Actually, a part of the legal literature has argued that the amendment, rather than an actual filter before accessing the Supreme Court, is a mechanism allowing the Court to make a preliminary exam aiming at reducing the number of the cases to be decided in the merits and rapidly defining those claims that cannot be admitted or are manifestly grounded or ungrounded[14].

Coming to the procedure for forced performance, Article 614-*bis* CPC now provides for a sort of indirect performance, inspired by the French *astreintes*, intended to ensure a more effective judicial protection. It is thought for the performance of obligations to keep a certain behavior or refrain from keeping a certain behavior, which are not otherwise replaceable by the court requested to grant such forced performance. That Article provides that the judge may order the debtor, upon claimant's request, to pay an amount of money (actually, an indemnity) – provided that it is not manifestly unfair – for each subsequent breach or delay in the performance of the order. The amount of the indemnity will take into account the value of the controversy, the nature of the obligation, the amount of actual or predictable damages and any other relevant circumstances[15].

As to the so called special processes, the law now provides for a new procedural model, the summary judgment (Article 702-*bis* ff. CPC). It is organized in accordance with a procedural scheme discretionarily elaborated by the judge, thus derogating from the traditional principle that procedural law is always originated by the State. The outcome of this new process is a judgment that, being based on a full trial of facts, is due to get the stability of *res judicata*[16].

In the framework of the legislative reform (currently delegated to the Government) that should bring to reducing and simplifying the several existing civil processes regulated by statutes outside the Code of Civil Procedure (see Article 54, paras. 1-4, Law no. 69/2009), the

[14] PICARDI, *Manuale del processo civile*, cit., p. 447 s.; SASSANI-TISCINI, *Prime osservazioni sulla l. 18 giugno 2009, n. 69*, in www.judicium.it.
[15] PICARDI, *Manuale del processo civile*, cit., p. 561 ss.
[16] MENCHINI, *L'ultima "idea" del legislatore per accelerare i tempi della tutela dichiarativa dei diritti: il processo sommario di cognizione*, in www.judicium.it.

procedural scheme should apply to all such special processes in which the declared aim is that of simplifying the trial of facts, with no possibility to go back to the ordinary process[17].

4. The class action as introduced by Article 140-bis Consumers' Code

In addition to the amendments to the Code of Civil Procedure, Article 140-*bis* of the Consumers' Code has been amended as well (by Article 49 Law no. 99 of July 23, 2009). The provision originally introduced the class action in Italy and the amendments are intended to correct some imperfections due to the inaccurate drafting of 2007, before it entered into force at the beginning of 2010.

In the legislative intention, the class action, as an alternative to the individual one in the protection of homogeneous individual rights of consumers of goods and users of services, aims to provide a better protection than the individual action, as it should grant procedural economy (i.e., the uniformity of *res judicata*), the reduction of the cost to access justice and the achievement of an optimal level of deterrence from unlawful actions damaging a more or less wide group of people.

The fact of expressly recalling the class action might bring to think of a mere translation into the Italian system of the American class action as regulated by Chapter 23 of the Federal Rules of Civil Procedure.

But that is not entirely true. The Italian class action is only partially debtor to the American one, as it does not indeed abandon the continental European legal tradition[18].

First of all, the Italian law does not adopt the American opt-out, but rather the opt-in system. Thus, who wants to take advantage of the class action and to be included among those who benefit from a favorable judgment must participate in the action. What is protected by the action is an individual and homogeneous consumer's or user's right *vis-à-vis* a business: not

[17] COMOGLIO, *Ideologie consolidate*, cit., p. 533.
[18] SANTAGADA, *Il processo di classe davanti ai tribunali macro regionali*, in *Giust. civ.*, 2010, p. 433 s.

superindividual, collective or widespread interests that do not allow the single individuals' exclusive exercise[19].

Each member of the damaged class has the authority to sue individually or collectively through consumers' associations or committees. But associations and committees have no authority by themselves, as they act through a voluntary power of attorney released by who proposes the class action[20].

Once the class action is commenced, those consumers and users who are damaged by the same unlawful act, provided that they have an identical or at least homogeneous right and want to profit from collective protection, may participate in the class action, thus waiving the individual action arising from the same facts. The most evident feature of such process is the existence of a (merely voluntary: "*litisconsorzio facoltativo*") aggregation of parties, as it is indeed an aggregation of a plurality of individual actions, mostly serial ones, of consumers and users of services toward the defendant business.

The venue of the class action is the Tribunal of the district where the place of business is located, so clearly derogating from the exclusive venue of consumer's domicile. The reasons for such choice are clear: it would be otherwise impossible to commence a class action with a high number of consumers and there might be a potential for forum shopping.

Moreover, the venues are not widespread on the territory, but rather concentrated in few Tribunals designated on a macro-regional basis (Article 140-*bis*, para. 4, Consumers' Code). The rationale of such choice is likely to be found in the intention to concentrate the complex litigation in a small number of Tribunals in order to homogenize and monitor the decisions and maybe also not to make the commencement of a class action too easy and therefore possibly not enough seriously considered[21].

Once the class action has been filed, the Tribunal must preliminarily check if the claim may be admitted. Such control responds to a basic need for moralization: the selection of

[19] PICARDI, *Manuale del processo civile*, cit., p. 155 s.
[20] PICARDI, *Manuale del processo civile*, cit., p. 157.
[21] SANTAGADA, *Il processo di classe davanti ai tribunali macro regionali*, cit., p. 434 s.

admissible claims should neutralize the risk of abuse of the right of action, considering that each consumer may be a lead plaintiff and no control is exercised on his representativeness and moreover only one class action may be commenced with the same claim[22].

After the claim is admitted, it becomes possible to publicize it in order to get the opt-in declarations of the consumers who suffered the same damage. At this stage, who wants to benefit from the collective judicial remedy must declare his intention to take part in the action before the deadline, which is provided by the judge.

The judge's order admitting the action also determines some rules for the course of the process, in order to possibly minimize the formalities; provides the appropriate modality for the trial of facts; disciplines the other possible procedural issues, avoiding any formality which is not necessary to pursue the adversary principle.

Also in this case, as previously remarked for the summary judgment, the law leaves to the judge the regulation of the process on a case-by-case basis rather than pre-regulate it once for all. The discretionary power of the judge to direct the class action, drawn from the American techniques of complex litigation, should achieve a more efficient and flexible management of the single mass procedure, therefore avoiding useless formalities and rationalizing procedural resources and times[23].

The judgment closing the action is effective toward all the participants.

But there are exceptions to the rules of Article 140-*bis* Consumers' Code, as just outlined: first, it does not apply to administrative entities and to the entities running "public interest" businesses. Legislative decree no. 198 of December 20, 2009 provides a remedy, which is only improperly qualified as a "public" class action, entitling the plaintiffs not to the compensation of damages but only to the restoring of a correct development of the public functions[24].

[22] SANTAGADA, *Il processo di classe davanti ai tribunali macro regionali*, cit., p. 438 ss.
[23] PICARDI, *La giurisdizione all'alba del terzo millennio*, Milano, 2007, p. 174 ss.
[24] PICARDI, *Manuale del processo civile*, cit., p. 156.

5. The mediation of civil and commercial controversies

The purpose of granting actual access to justice, which represents the common basis for all the described statutory interventions, is also the key to the European reforms in this area. In the past decade, the European Union has enacted a number of regulations and directives on civil process, all aiming at harmonizing the Member States' laws with the goal of granting actual access to justice. We hereby consider only Directive no. 2008/52/EC of May 21, 2008, on certain aspects of mediation in civil and commercial matters[25].

The Directive provides for a uniform model of mediation, to be applied to all cross-border civil and commercial controversies. It is an ADR that, inspired by the American cultural experience of ADRs, is getting more common in Europe in order to reduce the number of cases before the courts, save State's financial resources devoted to the judiciary and meet the emerging request for justice, that would remain unsatisfied for the negative balance between costs and benefits arising from the process.

The expectations of the European legislature is that of incentivizing the recourse to mediation as a more appropriate tool for certain types of controversies, due to the possibility to provide a faster and more efficient solution of cross-border controversies, both civil and commercial, and to the further circumstance that the agreements reached at the outcome of the mediation have a higher probability to be voluntarily performed and keep a friendly and sustainable relationship between the parties.

The Directive, however, does not have a general scope, as it does not apply to the mediation attempts made by the judge in order to settle the judicial controversy brought before him. It only applies to those proceedings that take place out of the process, with the participation of a third party mediator, pursuing a composed solution of a controversy which is found by the parties themselves (so called, "autonomous" mediation).

[25] BIAVATI, *Il futuro del diritto processuale di origine europea*, in *Riv. trim. dir. e proc. civ.*, 2010, p. 859 ss.; ID., *Conciliazione strutturata e politiche della giustizia*, in *Riv. trim. dir. e proc. civ.*, 2005, p. 785 ss.

The uniform mediation model designed by the Directive provides for some minimum guarantees: the quality levels of mediators and of mediation services; the confidentiality obligations upon mediators and other people involved in the management of the proceeding; the granting of substantive effects relevant as to the statute of limitation/decadence to the mediation commencement brief; the recognition that the agreement arising from the mediation has the attitude to forced performance. The implementation of such guarantees should bring the proceedings to be short, efficient, fair and guaranteed[26].

The Italian Parliament, when implementing Article 12 of the Directive, providing for the obligation of the Member States to implement it before May 21, 2011, delegated the Government (Article 60 Law no. 69/2009) to enact "*one or more legislative decrees about mediation and conciliation in civil and commercial matters*". The Government issued Legislative Decree no. 28 of March 4, 2010, about mediation and conciliation of civil and commercial controversies[27].

The goal declared by the legislature is ambitious: "*guarantee … an actual reduction of the number of controversies … contribute to spread the culture of ADRs*", as well as "*enhance the self-regulatory experiences and … minimize the intervention of the State in regulating the actual exercise of the mediation activity*". To that purpose three mediation circuits are established – mandatory mediation, voluntary mediation, judge-delegated mediation – for both cross-border and domestic controversies related to disposable rights. Such proceedings must be held before mediation bodies registered in a special register. The brief demanding for mediation, like any judicial claim, has effect on the regime of statute of limitation and prevents the maturity of decadence (Article 5, para. 6).

In a number of matters (detailed in Article 5, para. 1), attempting a mediation is mandatory for proceeding with a judicial claim. The plaintiff is then burdened with the obligation to attempt mediation and his lawyer must inform him of such circumstance through

[26] GHIRGA, *Strumenti alternativi di risoluzione della lite: fuga dal processo o dal diritto? (Riflessioni sulla mediazione in occasione della pubblicazione della Direttiva 2008,/52/CE)*, in *Riv. dir. proc.*, 2009, p. 357 ss.
[27] LUISO, *La delega in materia di mediazione e conciliazione*, in *Riv. dir. proc.*, 2009, p. 1257 ss.; MONTELEONE, *La mediazione "forzata"*, in *Il giusto proc. civ.*, 2010, p. 21 ss.

a document in writing, the lack of which might void the contract between the lawyer and his client. Should the mediation not be attempted before the judicial claim is filed, the judge fixes a deadline for the parties to file a mediation proposal and a subsequent hearing before him after the period of mediation (4 months) has expired.

It must be moreover remarked that the Italian legislature is not really univocal. *Vis-à-vis* the introduction of mandatory mediation attempt in a number of controversies (as a prerequisite for filing a judicial claim), in labor controversies the mandatory mediation attempt – although previously imposed – has been cancelled by the recent Law no. 182 of November 4, 2010 and mediation is now merely voluntary for labor controversies.

In all the other controversies not expressly mentioned in the list of Article 5, para. 1, mediation remains voluntary and may be conducted before or during the process.

Mediation can be also delegated by the judge, consistently with Directive no. 52/2008, that provides (after the French model) that "*A court before which an action is brought may, when appropriate and having regard to all the circumstances of the case, invite the parties to use mediation in order to settle the dispute*" (Article 5). Such mediation joins the judicial mediation as set forth in Article 185 CPC. During the process, both in the first and the appellate degree and until the end of the trial of facts, the judge, considering the nature of the action, the moment of trial and the parties' behavior, may invite the parties to make recourse to mediation bodies, whatever the controversy.

The mediation proceeding is regulated by the mediation body which is chosen by the parties. The applicable regulation must provide for the confidentiality of the proceeding, the modalities for appointing the mediator that guarantee his impartiality and suitability for a correct and timely performance of the appointment, the absence of formalities of the proceeding.

If the outcome of the mediation proceeding is that the parties reach an agreement, the mediator writes the record of the proceeding with attached the text of the agreement and has it signed by the parties as well as himself. The record of the mediation must be approved by the

judge and entitles the parties to the forced performance of the rights borne by it as well as for having mortgage registered on its basis.

On the contrary, if no agreement comes out of the mediation or the parties, in any moment of the proceeding, jointly so request the mediator, the latter may articulate a proposal to solve the controversy. Its non acceptance may have effects on the regime of the order to pay legal expenses in the process[28].

Finally, it must be noted that the very short time elapsed since the described procedural reforms have come into force does not yet allow to form an opinion on their suitability to pursue their goals. We should still wait some more years before verifying their actual impact on the administration of justice in Italy.

[28] CANALE, *Il decreto legislativo in materia di mediazione*, in *Riv. dir. proc*., 2010, p. 616 ss.; DITTRICH, *Il procedimento di mediazione nel d. lgs. n. 28 del 4 marzo 2010*, in *Riv. dir. proc.*, 2010, p. 575 ss.; FABIANI-LEO, *Prime riflessioni sulla "mediazione finalizzata alla conciliazione delle controversie civili e commerciali" di cui al d. lgs. n. 28/2010*, in www.judicium.it; SASSANI-SANTAGADA (eds.), *Mediazione e conciliazione nel nuovo processo civile*, Roma, 2010; SCARSELLI, *La nuova mediazione e conciliazione: le cose che non vanno*, in www.judicium.it.

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Order for Payment Proceedings in bulgarian Civil Procedure Law

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Abstract: This paper wishes to speak about the general aspects of the proceedings the contain orders for payment in bulgarian Civil Procedure.

Keywords: Bulgarian Civil Procedure. Order of payment proceedings.

I. Order for payment proceedings are especial proceedings for defence-sanction in cases of unlawful development of the civil legal relationship, namely when the requested receivable foreseen in Art. 410 of the CCP (para. II) is not fulfilled, when the money receivable laid down in a document under Art. 417 of the CCP is not fulfilled either (*see* para. X). The aim of this type of proceedings is to create grounds for execution (Art. 404, item '1' of the CCP) when the receivable is not fulfilled although not being contested. The order for payment proceedings do not aim at ascertainment of the receivable but at establishing that it is not contested. In these proceedings the court does not verify the existence of the receivable.

Since the enforcement order is enforcement grounds, the receivable should be due and individualized (Ruling № 744 of 28 October 2010 on com. c. № 731/2010, II-Com. Ch. of the SSC; Ruling № 385 of 13 May 2010 on com. c. № 337/2010, I-Com. Ch. of the SSC; Ruling № 677 of 22 July 2010 on com. c. № 536/2010 I-Com. Ch. of the SSC; Ruling № 704 of 14 October 2010 on com. c. № 662/2010, II-Com. Ch. of the SSC).

The order for payment proceedings are regulated in Part Five: Enforcement Proceedings, Title One: General Dispositions, Chapter Thirty Seven: Order for Payment Proceedings. They are functionally related to the enforcement procedure, being proceedings for creating legal grounds for enforcement (Art. 404, item '1' of the CCP), for issuing a writ of execution and then to be followed by enforcement proceedings. They are functionally related to adversary procedure and aim at creating grounds for enforcement when the receivable is not contested, so that the long and expensive adversary procedure could be avoided. However, when the receivable is contested, the creditor is made to file a positive ascertainment claim under Art. 415 of the CCP.

The legislator termed the parties in the order for payment proceedings 'applicant' and 'debtor'.

The order for payment proceedings are facultative. When the debtor does not contest the receivable, the applicant is not obliged to use the order for payment proceedings. He/she can use the adversary procedure. In the adversary procedure when the receivable is not contest, depending on the defendant's behaviour the debtor can achieve a court agreement (Art. 415 of the CCP), a decision upon acknowledgement of the claim (Art. 237 of the CCP) or a decision by default (Art. 238 of the CCP).

Another characteristic feature of the order for payment proceedings is that when a contest is filed under Art. 414 of the CCP (*see* para. VI), the case does transform *ex officio* into adversary proceedings. Art. 415 of the CCP specifies a one month preclusive term for the creditor to file an ascertainment claim (*see* para. VII). It is a pity that the legislator did not adopt the model of transforming the order for payment proceedings into adversary ones, if the debtor does not file an objection against the enforcement order.

It is typical of the order for payment proceedings that they are strongly dependent on the written form. On the grounds of Art. 425(1) of the CCP Regulation No6/2008 of the Ministry of Justice has been adopted. It specifies the standard forms of an enforcement order, an application for issuing an enforcement order and the other papers in connection with the order

for payment proceeding (since 1 March 2008, SG No22 of 28 February 2008, am. SG 52 of 10 July 2010).

It is typical of the order for payment proceedings that security proceedings are not foreseen to develop within the former. Probably because the term set for court's pronouncing is short. However, this term is regarded by the courts as instructive and they do not meet it pronouncing within months instead within three days. The legislator should have taken into account the actual course of the cases and foreseen a possibility for security measures in these proceedings. It is also assumed that security measures are not foreseen due to their principle incompatibility with this type of proceedings. If the request is under Art. 410 of the CCP, then it is grounded only on unverified allegations, that have not been supported by written evidence. That will bring the court into a situation of requesting a guarantee as a condition for admitting a security measure. Moreover, the proceedings aim at acquiring more – an enforcement act for indubitable receivable. If the creditor is not sure in the certainty of his/her request, he/she should not opt for this procedure. He/she should request security of a future claim which he/she will file to have the dispute with the debtor settled. In the case of a request for an order for immediate enforcement under Art. 418 of the CCP, the receivable should be supported by written evidence. The creditor has the writ of execution issued in the very proceedings to which the debtor is not subpoenaed. Consequently, upon issuing the writ of execution, he/she can right away impose measures such as preparation for the enforcement in the course of the very proceedings, at the same time (even before that) when the debtor learns about the order.

The order for payment proceedings are regulated in the new CCP as a substituent of the out-of-court enforcement grounds (*see* para. X). The specific feature of the procedure law is that the enforcement order does not replace the writ of execution. It is judicial grounds for its issuing. The significant difference between the Bulgarian and other legal systems, the old Bulgarian Code of Civil Procedure, inclusive. In the Bulgarian systems the enforcement order is grounds for commencing the very enforcement proceedings, equally and even instead of a writ of execution.

The order for payment proceedings regulated in the new CCP are classified provisionally into two different order for payment proceedings (Art. 410 and Art. 418 of the CCP in connection with Art. 417 of the CCP). The following facts are the basis of the classification: a) Some of their prerequisites are different (compare Art. 410 and Art. 417 of the CCP); b) in the hypothesis of Art. 410 of the CCP the writ of execution is issued when the enforcement order takes effect, while in the hypothesis of Art. 418 of the CPP in connection with Art. 417 of the CCP it is issued simultaneously with the enforcement order. However, most rules are the same. The rules for considering the application, the nonappealability of the order, except of its part on the costs; the contest of the receivable under Art. 414 of the CCP; the necessity to file a claim under Art. 415 of the CCP, when an objection has been filed under Art. 410 of the CCP, etc. Only provisionally, the proceedings under Art. 410 of the CCP could be defined as general, classical, including general rules, while those under Art. 418 of the CCP in connection with Art. 417 of the CCP are defined as specific ones. There is no obstacle for the applicant under the conditions of eventuality to request in his/her application issuing of an enforcement order under Art. 410 of the CCP, if his/her request for immediate enforcement has not been upheld (Ruling No 352 of 4 June 2009 on com. c. No360/2009 II-Com. Ch. of the SCC). If a request for issuing an order for immediate enforcement under Art. 418 of the CCP, in connection with Art. 417 of the CCP, has been filed and the court finds the request groundless since the document presented does not belong to the category of those enumerated in Art. 417 of the CCP, it cannot issue an enforcement order under Art. 410 of the CCP. Such pronouncing is in conflict with the disposition principle and is inadmissible. The opposite is also true – it is inadmissible to issue an enforcement order under Art. 417 of the CCP, if the application for issuing of enforcement order under Art. 410 of the CCP has as an enclosure a document belonging to the grounds under Art. 417 of the CCP. The reason is that the request for issuing of enforcement order is under Art. 410 of the CCP, and not under Art. 417 of the CCP (Ruling No17 of 12 January 2010 on com. c. No734/2009 II-Com. Ch. of the SCC; Ruling No487 of 30 June 2010 on com. c. No171/2010 II-Com. Ch. of the SCC).

II. Receivables to which order for payment proceeding are applicable under Art. 410 of the CCP

Art. 410 of the CCP specifies that the applicant may request issuing of an enforcement order: for receivables of sums of money or of fungible chattels, where the claim is under the regional court jurisdiction (item '1'); for the delivery of a movable chattel which the debtor has received with an obligation to return the said chattel or which is encumbered by a pledge or has been transferred to the debtor with an obligation to surrender possession, where the action is under the regional court jurisdiction (item '2').

The applicant should individualize[1] precisely his/her receivable according to its grounds and amount (The practice of the SCC in this implication *see* Ruling No 431 of 9 December 2008 on com. c. No414/2008 II-Com. Ch. of the SCC; Ruling No 484 of 30 December 2008 on com. c. No293/2008 II-Com. Ch. of the SCC; Ruling No 30 of 16 January 2009 on com. c. No351/2008 I-Com. Ch. of the SCC; Ruling No485 of 30 December 2008 on com. c. No506/2008 II-Com. Ch. of the SCC; Ruling No346 of 30 November 2008 on com. c. No294/2008 II-Com. Ch. of the SCC). I share the practice concerning obligation for entire individualization of the receivable, but I do not share the standpoint that in the case it is not necessary to give instructions for amendment of the application due to the inapplicability of Art. 101 of the CCP. The receivable should be individualized precisely in the enforcement order. Otherwise the debtor will not be able to orientate what receivable is claimed against him/her, so that he/she could be able to decide whether to execute it voluntary or to contest it lodging an objection against the order under Art. 414 of the CCP. Besides, if he/she does not contest the receivable, the enforcement order is issued. As it is impossible to request voluntary execution of the receivable which is not individualized, it is less grounded to have enforced execution of the said receivable. Last but not least, although when the receivable is contested, the case is not transformed automatically or *ex officio* into adversary proceedings, if the applicant lodges a claim under Art. 422 of the CCP. The claim will be considered lodged with regard to the extinguishing limitations and the classification of the proceedings as pending, since the moment of filing with the court the

application for issuing an enforcement order. It cannot happen, if the receivable has not been individualized in the application.

The receivable should be executable since the order for payment proceedings are for creating grounds for execution. The lack of an explicit requirement for the receivable's executability in Art. 410(1) of the CCP is probably due to an involuntary legislative omission. When the receivable is not executable the creditor cannot require voluntary execution. He/she has lesser grounds to request enforced execution. It is inadmissible to issue an enforcement order for a non-executable receivable. If such an order is issued, the debtor can defend himself/herself by an objection under Art. 414 of the CCP.

Two categories of receivables are foreseen in Art. 401(1) of the CCP:

1. Money receivables

The legal grounds and the legal qualification of the receivable do not matter.[2] The subject matter of the order for payment proceedings under Art. 401(1) of the CCP can be either receivables originating from contract grounds or from unlawful damage, unjust enrichment, alimony, etc. Following the amendment of Art. 104, item '4' of the CCP, concerning the generic jurisdiction on commercial cases in the sense of Art. 365 of the CCP, a subject matter to the order for payment proceedings could also be money receivables originating from a trade deal, a privatization contract, a public procurement contract or a concession agreement, as well as debtor's receivables for which an insolvency procedure is opened, or are included in the insolvency mass. Following the amendment mentioned, the question whether the claim on such a receivable should be considered according to the general or to adversary procedure became irrelevant.

2. Receivable for delivery of fungible movable chattels[3]

It is not important whether these receivables are obligation, trade or legal pretences for chattels delivery.

3. Receivable for delivery of a specified individually movable chattel

According to Art. 410(1), item'2' of the CCP the applicant is entitled to request issuing of an enforcement order for the delivery of a movable chattel which the debtor has received with an obligation to return the said chattel or which is encumbered by a pledge or has been transferred to the debtor with an obligation to surrender possession, when the claim is under the regional court jurisdiction.

The regulation cited foresees three categories of receivables. Here the legal grounds for the receivables under item '1' is not irrelevant. In both cases the matter concerns receivables for delivery of a specified individually movable chattel.

a. receivables for transfer of a movable chattel which the debtor has obtained by a contract (rent, loan) with the obligation to return it;

b. receivables for transfer of a movable chattel which is encumbered by a pledge.

The matter is about a pledged movable chattel following the execution of the obligation secured by the pledge. The pledge contract is a real contract and pledging the chattel is an element of its conclusion (Art. 156 of the OCA). Therefore when the obligation is executed, extinguished, respectively, by withholding, transfer instead of a payment or by any other lawful mode, the pledgee should return the chattel.

c. Receivable for delivery of a specified individually movable chattel which has been transferred to the debtor with an obligation to surrender possession. Those are the cases when the delivery of the chattel was postponed and did not occur simultaneously with the surrender of possession.

The following exception has been established in § 51 of the TCP of the CCP. It was foreseen in Art. 46(2) of the PA that on the basis of an effective resolution of the General Meeting under Art. 45 of the PA, the manager or the chairman of the managing council could request issuance of an enforcement order for evicting an owner from the building according to Art. 410 (1) of the CCP.

4. A characteristic element uniting all hypothesises of Art. 410 of the CCP is the lack of a requirement for presenting evidence as well as for bringing such for the alleged receivable.

5. Another common characteristic element of all hypothesises of Art. 410 of the CCP is that the receivable should be lodged by a claim and that the claim should be under the jurisdiction of the regional court.

The cases which cost of claim does not exceed 25 000 BGN are under the jurisdiction of the regional courts (arg. Art. 104, item '4' of the CCP).[4]

5.1. Sometimes literature points that doubtlessly the claimed receivable should be liquid, since the order for payment proceedings do not allow procedural actions aimed at ascertaining its grounds and/or its amount, at determining a dispute in the sense, ether. The order for payment proceedings are not adversary proceedings and no legal dispute is considered in them. The order for payment proceedings aim at establishing that the receivable is not contested by the debtor and therefore to issue enforcement grounds so that the compulsory execution according to the CCP procedure could be used sooner. It is not by chance that in Art. 410 of the CCP the legislator has not specified that the receivable should be liquid. It is not only because of the great variety of opinions regarding the requirement for liquidity or ascertainment according to grounds and amount. In contrast to the hypothesis of Art. 417 of the CCP, the legislator does not require evidence for admitting the application for issuing an enforcement order and for its very issuing under Art. 410 of the CCP. Moreover, he does not even require bringing in evidence. The necessary and sufficient condition for issuing such an order is the receivables being fixed. The necessary and sufficient conditions for the enforcement order to take effect under Art. 410 of the CCP are: its transformation into grounds for execution and issuing a writ of execution on its grounds under Art. 410 of the CCP; and that the debtor does not lodge an objection under Art. 414 of the CCP. A necessary condition is the precise individualization and not its liquidity. Individualization and liquidity are not equivalent notions.

5.2. The necessary and sufficient condition for the receivable is its being a money receivable. It could be both in Bulgarian and in foreign currency. The utterly practical problem of calculating the state tax in BGN cannot be an obstacle for its admissibility as the normative ban for negotiating money loans in foreign currency has been lifted for years. Here I will simply

mention that when lodging the application, the calculation should take into account the rate exchange of the Bulgarian National Bank.

The legal public receivables which are also money receivables cannot be subject matter of the order for payment proceedings. (The legal definition of the notion public receivables is given in Art. 162(2) of the Tax-Insurance Procedure Code (TIPC)). The aim of the order for payment proceedings is to create juridical enforcement grounds for issuing a writ of execution for performing a compulsory execution according to the CCP procedure. There is no doubt in theory and practice about their purpose for satisfying civil receivables in the wide sense. There is no need and it is inadmissible to issue an enforcement order for a public receivable, when on the grounds of Art. 458 of the CCP in connection with Art. 190 of the SSC, the receivable is satisfied according to the executive procedure of the CCP which has started as satisfying of a private receivable. It is not necessary to have a writ of execution issued for the joinder mentioned. It is necessary and sufficient to provide the executive magistrate with the respective certificate prior to preparation of the allocation balance. Besides, if the debtor with his/her objection on the grounds of Art. 414 of the CCP has contested the receivable for which an enforcement order is requested, the applicant should on the grounds of Art. 414 of the CCP lodge a claim for his/her receivable within a one month preclusive term. However, the ascertainment of public receivables does not follow the adversary procedure under the CCP. The ascertainment of public receivables is performed following the procedure and by the body specified in the respective especial law. If the law does not foresee a procedure for ascertainment of a public receivable, it is ascertained on the grounds and amount by an act for a public receivable, issued according to the procedure for issuing an administrative act foreseen in APC. If the respective law does not specify the body that should issue the act, it is specified by the mayor, by the head of the respective administration, respectively (Art. 166(1) and (2) of the APC).

5.3. The provision in Art. 410(1), item'1' of the CCP is 'receivables for fungible chattels' without specifying whether the matter is about movable chattels. Most probably, it is because in the new CCP the word 'property' is used instead of 'immovable property' as it was assumed

in literature and practice. There is no doubt that the matter concerns receivables for delivery of movable chattels, being genetically defined, because only they could be fungible.

5.4.The legislator has foreseen many exceptions from that requirement in the TCP of the CCP. They include hypothesises in which out-of-court grounds were foreseen in especial laws. They have not been foreseen in Art. 417 of the CCP as grounds for issuing an order for immediate enforcement:

a)Art. 37 of the CCP was amended by §10 of the TCP of the CCP and it has been foreseen that in respect of their receivables arising from unrecovered remuneration and expenses, an attorney-at-law can request the issuance of an enforcement order under Article 410 (1) of the CCP regardless of the amount of the said receivables;

b)Some amendments of the Energy Act were made by §22 of the TCP of the CCP which stipulates:

aa. in Art. 107 of the EA: 'The public provider, the electricity system operator, the public suppliers, the suppliers of last resort, the transmission company and the distribution companies can request the issuance of an enforcement order under Article 410 (1) of the CCP for the receivables thereof for electricity provided or transmitted, as well as for the services provided thereby under this Act, regardless of the amount of the said receivables.'

bb. in Art. 154 of the EA: 'In respect of the liabilities of any customers, who are defaulting payers, and of the association referred to in Article 151 (1) herein to the heat transmission company, an enforcement order may be issued under Article 410 (1) of the CCP, regardless of the amount of the said liabilities. An equalizing bill for the respective year for which the liability applies must have been prepared in respect of the liabilities of any customer – a defaulting payer – according to a share distribution system.'

cc. in Art. 184 of the EA, the words 'may collect the receivables thereof for natural gas from defaulting payers according to of Art. 237 the CCP, item 'j' on the basis of the account statements' are replaced with 'can request the issuance of an enforcement order under Art.

410 (1) of the CCP for the receivables thereof for supply of natural gas regardless of the amount of the said receivables".

c) The Act of Notaries and Notarial Activity was amended by § 37 of the TCP of the CCP which stipulates:

aa. in Art. 61 of the ANNA: 'In respect of the sums due, the Notary Chamber of Bulgaria acting on a resolution of the General Meeting, can request issuance of an enforcement order under Art. 410(1) of the CCP, regardless of the amount of the said sums.'

bb. in Art. 89(3) the ANNA: 'In respect of any unpaid notarial fees, the notary can request issuance of an enforcement order under Art. 410(1) of the CCP, regardless of the amount of the said fees.'

d) Art. 54 of the Irrigation Associations Act (prom. No. 34/2001; amen. No. 108/2001, No. 30/2006) was amended by §50 of the TCP of the CCP as follows: 'In respect of the receivables thereof, the associations can request the issuance of an enforcement order under Art. 410(1) of the CCP regardless of the amount of the said receivables."

e) The PEMA was amended by §57 of the TCP of the CCP.

aa. Art. 54 of the PEMA was amended as follows: 'In respect of the due sums, under a resolution of the General Meeting, the Chamber can request the issuance of an enforcement order under Art. 410(1) of the CCP, regardless of the amount of the said sums.

bb. Art. 79(3) of the PEMA was amended as follows: 'In respect of any due fees and costs that have not been paid, the private executive magistrate can request the issuance of an enforcement order under Art. 410(1) of the CCP, regardless of the amount of the said fees and costs."

f) Art. 708 of the C. Code was amended by §57 of the TCP of the CCP. The provision is that on the grounds of the plan approved by the court, the creditor can request the issuance of an enforcement order under Art. 410(1) of the CCP, regardless of the the amount of the said transformed receivable. Fortunately, as a result of the positive efforts of law theory and

practice, the legislator was convinced to restore the former solution and to amend again Art. 708 of the C. Code by an AA of the C. Code (SG No101 of 28 December 2010). He stipulated that on the grounds of the plan approved by the court, the creditor can request the issuance of a writ of execution following the procedure of Art.405 of the CCP for execution of the transformed receivable regardless of its amount. The current legislative solution is in accordance with the recovery plan approved by a decision that has taken effect. Nowadays the recovery plan approved by a decision that has taken effect has the same importance as a sentencing decision with regard to the transformed receivables viewing the possibilities for issuing a writ of execution.

III. The application is lodged with the regional court where the permanent address or the seat of the debtor is. The generic jurisdiction is in connection with the requirement in Art. 410 of the CCP, that the claim should be under the jurisdiction of the regional court. The regional court where the permanent address or the seat of the debtor is has the venue competence (Art. 411(1) of the CCP). Since the application is considered in a closed session without subpoenaing the parties, the court has to observe both the generic and venue jurisdiction.

The application contains the request for issuing a writ of execution and should meet the requirements of Art. 127(1) and (3) and Art. 128(1) and (2) of the CCP. The application should be lodged in the standard form specified in Annex 1 to Ordinance No6/2008. Keeping the standard form is a condition for the validity of the request for issuing a writ of execution. When the applicant has not used a standard form or has used a wrong standard form, the court shall attach the relevant standard form to the written instruction for curing the non-conformity (Art. 425(2) of the CCP).

The question of court's powers when non-conformity of the application is in the lack of sufficient individualization of the receivable has been raised in practice. At first two Commercial Chamber panels of the SSC assumed that in a case of non-conformity of the application for issuing an enforcement order it should be left without progress. In 2010 the practice of the

Commercial Chamber panels of the SSC became uniform. The opinion adopted was the dominating one stating that in the order for payment proceedings it is inadmissible to give instructions for curing the non-conformity of the application for issuing an enforcement order when it lacks sufficient individualization of the receivable (Ruling No 431 of 9 December 2008 on com. c. No414/2008 II-Com. Ch. of the SCC; Ruling No484 of 30 December 2008 on com. c. No293/2008 I-Com. Ch. of the SCC; Ruling No485 of 30 December 2008 on com. c. No506/2008 II-Com. Ch. of the SCC; Ruling No346 of 30 November 2008 on com. c. No294/2008 II-Com. Ch. of the SCC). It is assumed that Art. 101 of the CCP is inapplicable to the order for payment proceedings. It has been pointed that the obligation of the court conducting order for payment proceedings is to observe only the non-conformity of the application for issuing an enforcement order foreseen in Art. 425(2) of the CCP. In the rest cases of non-conformity of the application for issuing an enforcement order caused by its failure to meet the requirements of Art. 127(1) and (3) and Art. 128(1) and (3) of the CCP, the court should give instructions for its curing. In general the considerations are about the lack of powers foreseen explicitly in Art. 410 and 418 of the CCP, as it has been foreseen about the statement of claim in Art. 129 of the CCP, and in Art. 426(3) of the CCP concerning the application for instituting enforcement proceedings. The emphasis is put upon the strictly formal character of the order for payment proceedings. It is manifested by the regulation of Art. 411(2) item '1' of the CCP introducing as an external feature the regularity of the application as an absolute prerequisite for issuing an enforcement order. (Ruling No 704 of 14 October 2010 on com. c. No662/2010). The practice of the Com. C. of the SSC can hardly be shared. Art. 101 specifying the *ex officio* obligation of the court to control the regularity of the procedural actions and give instructions and set a term for their remedy is in Part One: General Rules. Therefore it is applicable to all procedural actions of the parties and in all kinds of proceedings, regulated in the CCP, the order for payment proceedings, inclusive. Moreover, it seems that the SSC forgets about a merely practical reason for the necessity the first-instance courts to give instructions for curing the statement of claim, namely about the prepaid fee. The referral of the statement of claim does not lead to its reimbursed. The same reason is faced by the order for payment proceedings. The difference is

in the fees amount – it is 4% in the adversary proceedings while in the order for payment proceedings it is 2%. If that has no importance for the SCC, for the applicant it does.

IV. The court considers the application in a closed session without subpoenaing the parties. It should pronounce on the application for issueing an enforcement order within three days following its service (Art. 411(2) of the CCP). Unfortunately, the courts often fail to meet the deadline. The court issues an enforcement order, except when: (1) the request does not comply with the requirements covered under Article 410 of the CCP; (2) the request is in conflict with the law or with good morals; (3) the debtor does not have a permanent address or a registered office within the territory of the Republic of Bulgaria; (4) the debtor does not have a habitual residence or a place of business within the territory of the Republic of Bulgaria (Art. 411(2) of the CCP).

In the order for payment proceedings the court does not have the right to verify the existence of the receivable. When the application for issuing an enforcement order is not upheld, the court pronounces with a writ (Art.413(2) of the CCP). The writ should be motivated. There is a standard form approved by the Minister of Justice in Regulation No6/2008 establishing the standard forms of an enforcement order, an application for issuing an enforcement order and the other papers in connection with the order for payment proceeding. The writ disallowing the application entirely or partially is appealable by the applicant by a private appeal (Art. 413(2) in connection with Art. 279 and 274(1) of the CCP). The ruling of the intermediate appellative court that the private appeal against the writ for refusing issuance of an enforcement order is subject to cassation appeal by a private appeal before the SSC provided that the prerequisites in Art. 280(1) of the CCP (Art. 274(3), item '2' of the CCP) exist.

V. When the application is upheld, the court issues an enforcement order and the debtor is serviced with a copy of it (Art. 411(3) of the CCP).

The enforcement order is not motivated. It is issued in the standard form established in Regulation No6/2008, Annex No2 (for money payment), Annex No3 (for delivery of moveable chattels), respectively, and contains (Art. 412 of the CCP): the indication 'Enforcement Order' (item '1'); date and place of rendition (item '2'); a reference to the court and the name of the judge who rendered the order (item '3'); the forenames, patronyms and surnames, and addresses of the parties (item '4'); the case on which the order is issued (item '5'); the obligation wherewith the debtor must comply, and the costs which the debtor must pay (item '6'); an invitation to the debtor to comply within two weeks after service of the order (item '7'); an instruction that the debtor can lodge an objection within the term under item '7' (item '8'); an instruction that if the debtor fails to lodge objection to the issuer of the order or to comply, the enforcement order will take effect and coercive enforcement will be proceeded with (item '9'); the extent of appealability, before which court and within what time limit (item '10'); signature of the judge (item '11'). The contents under items '7', '8' and '9' is of crucial importance for the debtor's defence. He/she should be aware of the consequences of his/her non-compliance and of his/her failure to object the order. It is not foreseen to instruct the debtor on the preclusion connected with Art. 424(2) of the CCP, when he/she does not lodge an objection within the two week term foreseen in Art. 414 of the CCP. Due to the impossibility to lodge a negative ascertainment claim based on facts which have occurred by the expiry of the term under Art. 414 of the CCP (arg. Art. 424(2) of the CCP, *see* para. XXI), *de lege ferenda* it would be appropriate to foresee such an instruction.

The debtor is serviced with a duplicate of the very enforcement order immediately upon its issuing. He/she is serviced with a duplicate of the enforcement order because as we shall see further on the writ of execution is issued on its grounds and a note is put down on the original as well as on each document being grounds for execution. Therefore the original of the grounds for execution should be available in the proceedings for issuing a writ of execution. When the enforcement order is issued on the grounds of Art. 410 of the CCP, the debtor is serviced with its duplicate by the court official who delivers the court notices and papers under Art. 42 of the CCP. The duplicate of the order for immediate enforcement under Art. 418 of the CCP issued

on any of the grounds under Art. 417 of the CCP with a note for issuing a writ of execution is serviced by the executive magistrate (Art. 418(5) of the CCP).

VI. The debtor can object in writing the enforcement order or a part of it. The objection should be lodged within two weeks after service of the order, and the said term is preclusive and cannot be extended (Art. 414(2) of the CCP).

Justification of the objection is not required (Art. 414(2) of the CCP). Therefore it is irrelevant whether the debtor contests the obligation or its executability, or whether he/she resorts on his/her own objections that exclude a right, terminate a right and extinguish facts. It is not required to present facts supporting the objection. That is in accordance with the lack of a requirement in Art. 414(2) of the CCP to bring in and present facts in support of the request for issuing an enforcement order. Item '3' of Standard Form No7 gives instructions to the debtor that he/she can optionally give reasons for his/her contesting the receivable.

The objection is lodged in a standard form according to Annex No7. Art. 625 of the CCP does not specify this standard form as a condition for the validity of the objection. Art. 425 of the CCP does not specify the objection as a mandatory standardized application (only the petitions and the court acts are stated). Regarding the applicant the standardization aims at unburdening the court, which act is also standardized, and should be 'repeated', even though when a technical device is available, the court should directly 'reproduce' it in the enforcement order, if the application is upheld. The debtor's statement is not reproduced anywhere. The opposing party is not serviced with it. The aim of the 'standard form' of the objection in Regulation No6 is to facilitate realization of the debtor's right to objection, since this form is included as a mandatory enclosure to the order. The form contains the phrase 'I do not owe execution'. Thus the debtor is facilitated in his/her realization of the right to objection. It is enough that he/she fulfils the instructions in the standard form, puts his/her signature and sends it to the court that rendered the enforcement order. But debtor's using the standard form is not obligatory. So that the legal consequences from the objection could occur, in case it

was made on time, it would be enough to submit it in writing and express explicitly the will to contest the receivable.

The content of the petition is not regulated explicitly in the CCP. The lack of necessity to give grounds for the objection against the enforcement order established in Art. 414 of the CCP makes it significantly different from the objections of the defendant in adversary proceedings, where they should be proven with regard to the burden of proof. However, with this objection the defence intensity is great. For that reason the enforcement order under Art. 410 of the CCP does not take effect and the applicant should bring in an ascertainment claim under Art. 415 of the CCP. The debtor's failure to lodge an objection under Art. 414 of the CCP in the due term causes a heavy preclusion for him/her. He/she is unable to lodge a negative ascertainment claim based on facts which have occurred by the expiry of the said term, only if he/she did not know or could not have known about them. If the debtor does not object the enforcement order, the receivable is considered acknowledged.

Due to the reasons mentioned, the practice imposed the opinion that it is admissible to search the petition for objection in any written document submitted by the debtor within the term for submitting an objection (Ruling No 274 of 26 March 2010 on com.c. No159/2010, I - Com. Ch. of the SCC).

An objection may be lodged only against a part of the enforcement order when the receivable in the rest part is acknowledged. However, there should be an explicit acknowledgment of the receivable. It is also provided that when a part of the receivable is acknowledged, it should be specified explicitly (item '4' of Standard Form No 7).

VII. When the objection is lodged in the due term, the court instructs the applicant that he/she can lodge an ascertainment claim for his/her receivable within a one month term, paying the due state fee (Art. 415(1) of the CCP). Art. 415(2) of the CCP provides that when the applicant fails to present evidence that he/she has brought the action within the due term, the court invalidates the enforcement order in part or in whole, as well as the writ of execution

issued under Art. 418 of the CCP. Doubtless this text refers to an enforcement order issued under Art. 418 of the CCP, as well as to the one issued under Art. 410 of the CCP. It is true that the enforcement order issued under Art. 410 of the CCP has not taken effect, i.e. it has not caused its effect, hence there is no need to invalidate it. However, it is necessary to render an explicit act of its invalidation because although having not taken effect, the enforcement order exists in the legal world as an explicit court act. Therefore, if the claimant fails to lodge a positive ascertainment claim under Art. 415 of the CCP within the one month term, the court should invalidate by an explicit act the enforcement order issued under Art. 418 of the CCP, as well as the one issued under Art. 410 of the CCP. This act is a writ since it is analogous to the writ for a refusal to issue an enforcement order. The necessity to issue this act is also determined by the desire the intermediate appellate instance to control the invalidation of the enforcement order as a writ barring the defence. The creditor might have lodged the claim, but due to circumstances that do not depend on him/her, he/she has not informed the court about it (For instance, the claim was lodged by post on the last day of the term.) The regional court might have judged inappropriately the range of the debtor's objection and to have given instructions for lodging a claim. The creditor might have not agreed with the instructions but was not able to appeal directly, so he/she was waiting for the appealable terminating act to be rendered. (For instance, the enforcement order was issued against jointly responsible debtors, but only one of them submitted an objection under Art. 414 of the CCP and the court gave instructions for lodging the claim against all the debtors. Thus, when the claim was not lodged, the order was entirely invalidated.) Giving instructions to lodge the claim under Art. 415 of the CCP might be due to the inappropriately treating of a petition as an objection when it is not such, or to taking into account the consequences of an objection, when the order has been stabilized because of the expired term under Art. 414 of the CCP. If in this hypothesis we make the creditor bring the claim only because he/she has been instructed, then there will be costs on a court phase to be covered by a party which has not contested and has not intended to inflict.

VIII. The provision of Art. 416 of the CCP is that when an objection has not been lodged in due time or has been withdrawn, or the court decision for ascertainment of the receivable has taken effect, the enforcement order enters into effect. On the basis of the said order, the court issues a writ of execution and puts a note on the order.

The request for issuing an enforcement order under Art. 410 of the CCP is a request for issuing a writ of execution (Art. 410(2) of the CCP). But in the hypothesis of Art. 410 of the CCP the writ of execution is issued only after the enforcement order has taken effect. The enforcement arises after the order has taken effect. When a claim is lodged under Art. 415 of the CCP, the order takes effect much later, only when after a decision on an upheld ascertainment claim under Art. 415 of the CCP has taken effect. As seen from Art. 416, sentence II, of the CCP, due to the explicit will of the legislator the enforcement order remains the bearer of the enforcement effect. The decision on an upheld ascertainment claim that has taken effect has only a *res judicata* effect, and not an enforcement effect. However, since the decision on an upheld ascertainment claim that has taken effect is a procedural legal consequence for the arising of the enforcement effect of the enforcement order (being the bearer of the ascertainment act, too), it should be mentioned explicitly in the writ of execution, that it is being issued on the grounds both of the enforcement order and of the said decision. It is clear from Art. 416, sentence II, of the CCP, that the writ of execution should be issued by the court that has issued the enforcement order, the ascertainment decision of the intermediate appellate court that has taken effect, inclusive (Art. 269 of the CCP), or of the SCC (Art. 293(2) of the CCP, in connection with Arts. 293(3) and 295(2) of the CCP).

The very adversary proceedings under Art. 415 of the CCP follow the rules of the adversary procedure. The fact, that there is an enforcement order issued, although it has not taken effect, does not turn the procedure into a specific one. The requirements for lodging a claim under Arts. 127 and 128 of the CCP should be met.[1] The difference is that in this case an additional state fee should be paid. According to Art. 131(1) of the CCP the court should send the defendant a copy of the statement of claim. He/she has the right established by Art. 131(2) of the CCP to submit a reply to the statement of claim. It is so, because as already mentioned,

the enforcement order is issued without bringing evidence in the application, without the need of presenting written evidence, respectively. If the claim is a subject to consideration under the general adversary procedure, the rule of the general adversary procedure will apply. If the claim is a subject to consideration under a special adversary procedure (such as the proceeding for considering commercial disputes), it should be considered following that procedure.

When an ascertainment claim under Art. 415 of the CCP is upheld by a decision that has taken effect, the enforcement order and the decision that has taken effect are two acts providing defence-sanction in the civil procedure. The enforcement order is the bearer of the enforcement effect, while the decision that has taken effect by which the creditor's ascertainment claim is upheld is the bearer of *res judicata* effect. This is also a specific feature of the Bulgarian legislative solution on the correlation between the order for payment proceedings and the adversary proceedings. This correlation is notable in another aspect. On the grounds of Art. 404, item '1' of the CCP the sentencing decisions of the intermediate appellate courts that have not taken effect, are enforcement grounds. The intermediate appellate court decision upholding an ascertainment claim under Art. 415 of the CCP that has not taken effect does not have an enforcement effect (arg. Art. 416, sentence II, of the CCP).

Moreover, it is foreseen explicitly in Art. 416 of the CCP that a note for issuing a writ of execution is also put down on enforcement order. Regarded strictly, on one hand that means issuing a writ of execution is not put down on the ascertainment decision. On the other hand, the legislator finds, that a writ of execution cannot be issued only on grounds of the ascertainment decision, namely because it is not a bearer of the enforcement effect. Besides, the two proceedings progress in two independent cases, possibly in two independent courts (because of the different generic and venue jurisdiction). Putting a note on the enforcement order aims at preventing issuance of another original writ of execution on the same grounds.

Nothing is mentioned in the CCP about the hypothesis when the claim under Art. 415 of the CCP is disallowed by a decision that has taken effect. Under the argument of Art. 415(2) of the CCP the enforcement order should be invalidated by an explicit act of the court that has

issued it. The courts practice is in the same sense since the matter is about failed order for payment proceedings.

1. It is true that the prevailing courts practice is to require and apply the entire order for payment proceedings to the adversary proceedings, because this is the only way to judge precisely both the regularity and admissibility of the positive ascertainment claim, as well as the debtor's relevant objections lodged within the term under Art. 414(1) of the CCP, the relevance of the latter to the procedural possibilities opened to the defendant in the adversary proceedings (Art. 131 in connection with Art.133 of the CCP). For instance, it was assumed in Decision No 111 of 8 October 2010 on com. c. No1968/2009, I - Com. Ch. of the SCC that the explicitly lodged objection to extinguishing the receivable due to liquidity of the objection under Art. 414 of the CCP, should be taken into account by the court considering the adversary proceedings, even though a reply under Art.131 of the CCP has not been submitted.

IX. The hypothesis of Arts. 417 and 418 of the CCP is called special, although it is the more common in practice. It is called 'order for immediate enforcement'. In fact a writ of execution is issued simultaneously with this order without hesitating for its taking effect. Moreover, the legislator included the documents which under Art. 237 of the CCP, repealed, used to be out-of-court enforcement grounds in this particular hypothesis. Thus the regime of issuing a writ of execution preserved some of the elements of the former regime of issuing a writ of execution on out-of-court enforcement grounds. The difference in the case is that nowadays two acts of different regimes are issued simultaneously and overlapping, though one of them is the grounds for issuing the other, even before the grounds have taken effect. In Art. 404, item '1' of the CCP this order gives rise to an enforcement effect immediately upon its issuance.

The irrelevance of the amount of the receivable (Art. 417 of the CCP) is also typical for this hypothesis. Besides, the order for immediate enforcement could be issued only on the

grounds of a document admitted as grounds for its issuance (Art. 417 of the CCP). (Ruling No 672 of 24 November 2009 on com. c. No 677/2009, I - Com. Ch. of the SCC; Ruling No 22 of 14 January 2009 on com. c. No 263/2008, I - Com. Ch. of the SCC). Nowadays the grounds listed in Art. 417 of the CCP seem thorough. There is not a text as it used to be in Art. 237, item 'k' of the CCP, repealed, foreseeing that the enforcement could start on the grounds of other documents on which grounds the law allows issuing a writ of execution. However, as we shall see further on, many special laws refer to Art. 418 of the CCP, which is applicable to the hypotheses of Art. 417 of the CCP. Thus the legislator multiplied the grounds for issuance of an order for immediate enforcement.

The receivable should be executable in the hypothesis of Art. 417 of the CCP as well.

The order for payment proceedings are facultative in the hypothesis of Art. 417 of the CCP as well. The creditor who has any of the grounds under Art. 417 of the CCP, should not request issuance of an order for immediate enforcement and may prefer the adversary procedure.

X. The documents which are grounds for issuing an order for immediate enforcement are listed in Art. 417 of the CCP. They are almost a copy of those out-of-court enforcement grounds foreseen in the CCP, repealed.

Firstly referred is an act of an administrative authority according to which the admission of the enforcement is assigned to the civil courts.[1]

a)The text of Art. 417, item '1' of the CCP which is a copy of Art. 237, item 'd' of the CCP, repealed.

At the time of the CCP, repealed, in different periods of its validity, there used to be a lot of administrative acts which were enforcement of rulings. Until 1999, Art. 79(2) of the CCP, repealed, used to foresee a possibility to determine disputes between business subjects, under the head of one and the same institution. They used to be determined following an administrative procedure by an intraistitutional arbitrage. The legislative solution was repealed

when the new Constitution took effect as it was in conflict with it. Hence, nowadays Art. 418, item '1' of the CCP is also not related to administrative acts with which a legal dispute is determined.

Art. 417, item '1' of the CCP does not refer to public receivables in the sense of Art. 162(2) of the TIPC. The public receivables (Art. 162(2) of the TIPC) are ascertained in the respective ascertainment administrative acts (Art. 166(1) of the TIPC). Their enforcement is according to the procedure of TIPC (Art. 163(1) of the TIPC). When the public receivable on the grounds of Art. 358 of the CCP in connection with Art. 191 of the TIPC is not adjudged for satisfaction in the enforcement procedure under the CCP, there is no need of a writ of execution nor of an enforcement order either. The necessary and sufficient condition is to have the respective certificate from the National Revenue Agency. Art. 417, item '1' of the CCP does not refer to the administrative legal pretence rights. The administrative acts ascertaining administrative legal pretence rights are the enforcement grounds for following the procedure of the APA and not of the CCP. For this enforcement there is no need of issuing a writ of execution, nor an enforcement order either, even when that is of the competence of an executive magistrate. The enforcement grounds under APA are the following acts that have taken effect or are subject of preliminary execution: individual or joint administrative acts; decisions, rulings or orders of the administrative courts; agreements before the administrative authorities or before a court (Art. 268 of the APA).

Now the existence of receivables for compensations for saleable lots according to yard regulation plans is no more possible. By the TDA, the automatic expropriation effect of those plans (which they used to have under TURDA) was terminated according to § 6 of the TDA. The TDA does not allow expropriation of private property, but of sites which are public state or municipality property (Arts. 205 and 209 of the TDA). The regulation boundaries of the lots in the detailed regulation plan become boundaries of the properties (Art. 14(3) of the TDA). That means the former parcels cannot be 'retailored' by adding parts of them to neighbouring ones. However, there are acts under the TDA which ascertain money receivables – Arts. 196(6) of the TDA, Art. 210(6) of the TDA, Art. 225(5) of the TDA, etc. The texts concerning the execution of

those acts were not changed following the CCP's taking effect and still refer to Art. 237, item 'k' of the CCP, repealed. This involuntary legislative omission should be eliminated as soon as possible.

b) The adoption of Art. 418, item '1' of the CCP is connected with the repeal of Art. 6(12) of the Law of Compensation of Owners of Nationalized Properties (LCON. In fact in the last decades when the CCP, repealed, was valid most of the writs of execution on the grounds of an administrative act were issued under Art. 6(12) of the LCONP. Those are decisions under Art. 6 of the LCONP of the minister or of the institution's head, who exercises the rights of the state in trading companies whose assets include properties under the said law; of the district governors – in all the rest cases – which uphold the requests of the owners or legal successors of property owners nationalized under the laws and in the ways provided in Arts. 1 and 2 of the Restitution of Nationalized Real Estate Act (RNREA), which could not be restored really because the property has been become public or property of the state or of the municipality, acquired in good faith from third persons, or there have been constructions or other changes in accordance with the actual legislation, which do not allow the real restoration of the property. Those are also decisions for compensations of those properties in a way specified in Art. 2 of the LCONP and chosen by the owners with regard to the quotas and valuations indicated in the acts of the said authorities. The administrative act under Art. 6 of the LCONP has a constitutive effect, which is transformed into sole property or gives rise to rights to shares or to a share in trading company (Arts. 1 and 2 of the LCONP). When under Art. 2 of the LCONP there is no voluntary execution by the person who is affected by Art. 6 of the LCONP, then there could be enforcement. Since following the repeal of the Art. 6 of the 2000 LCONP (rep. SG No9/2000) he/she is not a subject in the administrative proceedings, neither in the court proceedings for appeal of the said act, nor is legitimate to appeal, it was assumed in ID No6 of 10 May 2006 that the dispute on the acquired rights can and should be determined by adversary proceedings. It was also assumed that since the person was not a party to administrative proceedings according Art. 2 of the LCONP and could not appeal the act, he/she is not bound to that act and

the matter of its lawfulness can be considered in adversary proceedings within the frames of the indirect legal control on a pre-jurisdiction level.

Nowadays, in accordance with this position, it is possible on the grounds of Art. 414 of the CCP to have issued an order for immediate enforcement and a writ of execution against a third person (being a debtor in the order for payment proceedings) in whose legal sphere the administrative act that has taken effect causes changes like those under Art. 6 of the LCONP. The said third person can lodge an objection under Art. 414 of the CCP. Then, the beneficiary of the constitutive effect of the administrative act being an applicant to the order for payment proceedings should lodge a claim under Art. 414 of the CCP. Viewing the considerations on the reasons for the current legislative solution, the latter should be valid regarding not only the administrative act but the court decision on the appeal against it, if the person under Art. 2 of the LCONP has not been constituted as a party to the case. Since LCONP dates of 1999, Art. 6(1) of the LCONP sets a preclusive term for lodging the requests under Art. 2 of the LCONP. In fact, that law has been already losing its field of application except for the pending cases.

c) The receivables specified in Art. 269(2) of the APA should be considered when discussing the range of Art. 417, item '1' of the CCP.

The provision of Art. 269(2) of the APA is that the private receivables of the State and the municipalities, the receivables for detriment resulting from unlawful administrative acts and from coercive enforcement and the other private monetary receivables arising from or certified by enforcement grounds under Art. 268 of the APA, as well as any receivables for costs incidental to enforcement, are enforced according to the procedure established by the CCP. The order for payment procedure is the procedure of the CCP. It is not a particular reference to Art. 418 of the CCP. And it is not by chance.

The enforcement grounds under Art. 268 of the APA are of another nature. Those are individual or general administrative acts (item '1'); decisions, rulings and orders of the administrative courts (item '2'); agreements reached before the administrative authorities or before the court (item '3') that have taken effect or are subjects to preliminary execution. Art. 417, item '1' of the CCP could be applicable to writs of execution under Art. 268 item '1' of the

APA. A writ of execution under Art. 404 item '1' of the CCP should be issued on the enforcement grounds of Art. 268 items '2' and '3'of the APA. There is no use to go through order for payment proceedings because the matter concerns court decisions and rulings, agreements reached before the administrative courts. Besides, if the administrative act has taken effect, the objection under Art. 414 of the CCP should be inadmissible but when the enforcement is on the grounds of Art. 6(1) of the LCONP against the person in whose legal sphere the change has occurred.

aa) Private receivables of the State and the municipalities arising from the enforcement grounds under Art. 268 of the APA.

One could think about the application of Art. 417, item '1' of the CCP when the writ of execution is under Art. 268 item '1' of the APA, i.e. an administrative act. However, the administrative act ascertaining a private receivable of the State and the municipality that has taken effect is foreseen as grounds for issuing an order for immediate enforcement under Art. 417, item '7' of the CCP.

A writ of execution under Art. 404 item '1' of the CCP should be issued on the enforcement grounds of Art. 268 items '2' and '3'of the APA. There is no use to go through order for payment proceedings because the matter concerns court decisions and rulings, agreements reached before the administrative courts, respectively.

bb) Receivables for detriment resulting from unlawful administrative acts are the receivables of different legal subjects, who have contested successfully the respective administrative act which was recognized as void or reversed as an unlawful one. In those cases when a compensation was also adjudged under Part III, Chapter XI of the APA simultaneously with the contestation of the act or in independent administrative proceedings (Art. 204(2) of the APA), it should be executed according to the procedure of CCP. Since the matter concerns decisions of the administrative courts, the writ of execution should be issued on the grounds of Art. 404 item '1' of the CCP and one should not go through order for payment proceedings. That deals with the competence in the adversary proceeding on claims for compensations for

detriment resulting from unlawful administrative acts. That is not a reason to treat the decisions of the administrative courts in a way different from treating the general ones.

cc) Receivables for detriment resulting from coercive enforcement. Those are receivables under Art. 299 of the APA, established in the procedure of APA, according to Art. 300 of the APA.

The decision of the administrative court on the claim under Art. 300 in connection with Art. 299 of the APA being a court decision is grounds for issuing a writ of execution under Art. 404 item '1' of the CCP, as are the decisions rendered in adversary proceedings by the general courts.

dd) Private monetary receivables arising from or certified by enforcement grounds under Art. 268 of the APA.

Such are the receivables under Art. 6 of the LCONP.

The general wording of Art. 417, item '1' of the CCP for using the administrative acts as grounds for issuing an order for immediate enforcement in the remaining cases is in conflict with the application of Art. 414 and 415 of the CCP since the matter concerns an administrative act that has taken effect. The general regime of the APA differs considerably from the legislative solution under Art. 6 of the LCONP. According to Art. 26(1) of the APA the known interested citizens and organizations but the applicant are informed about the commencement of the proceedings. According to Art. 153(1) of the APA parties to the case on contesting the administrative act are the contestant, the authority that issued the act as well as all interested persons. The court constitutes the parties *ex officio* (Art. 153(1) of the APA). The decision with which the contested act is declared null, is reversed or modified is effective *erga omnes*. (Art. 183 of the APA). It is true that according to Art. 124(2) of the APA anyone interested is entitled to lodge a claim, to ascertain the existence or absence of an administrative right or legal relationship, but only when he/she has no other means of defence. Moreover, on the grounds of Art. 128(1) of the APA that claim is under the jurisdiction of the administrative courts. Unlike the situation in Art. 128(2) of the APA the objection under Art. 414 of the CCP and the claim

under Art. 415 of the CCP have a subject of the order for payment proceedings as a subject of receivable.

The administrative acts that have taken effect were foreseen as enforcement grounds parallel with the court decisions in Art. 237, item 'a' of the CCP, repealed. They were qualified as out-of court grounds only by the formal characteristic of being acts which were not issued by the court. As far as the stability of the enforcement and the impossibility to contest the receivable under the procedure of Art. 250 of the CCP, repealed, are concerned, they were equalized to the court decisions which have taken effect. Therefore the wiser legislative solution would be to foresee those acts in Art. 401, item '1' of the CCP as grounds for issuing a writ of execution. Regarding the administrative acts for ascertaining private receivables that have taken effect, besides the presented considerations, I find the legislative solution not to be in accordance with Art. 14 of the CCP, wherein it is specified explicitly that all civil cases are under the jurisdiction of courts. The Article is a projection of Art. 119 of the Constitution according to which justice is administrated only by the courts. On the other hand, until the current CCP took effect, the enforcement grounds under Art. 268 of the APA were treated in literature and practice as direct enforcement grounds, i.e. there was no need to issue a writ of execution for the enforcement. The only exception used to be the receivable for the costs adjudged by a decision on the appeal against the administrative act, as well as the one for compensations adjudged by a decision that has taken effect.

My opinion based on the presented considerations is that the general regulation of Art. 417, item '1' of the CCP is not appropriate. Its putting ahead of all is even less appropriate. However, as the current Art. 417, item '1' of the CCP is preserved, one could expect especial laws which similarly to Art. 6 of the LCONP will foresee deviations from the cited above APA general rules for constituting interested parties and for inclusion of the administrative acts issued with regard to the said rules into the application field of the order for payment proceedings. This approach would be much closer to the approach in connection with the application field of Art. 410 of the CCP and with the plenty especial norms created in this connection by means of TCP (*see* para. II).

d) According to Art. 78 of the AVSA when a compensation has been adjudged, the enforcement of a sanction provision is admissible upon the request of the person having the right to compensation under Art. 418 of the CCP. Art. 78 of the AVSA is the general **reference** norm valid for all sanction provisions, for which the possibility to have compensations adjudged on their grounds has been foreseen. The sanction provisions for fines or money compensations in favour of the State are enforced according to the procedure for state receivables (Art. 79(2) of the AVSA). Prior to the issuance of a sanction provision the victim may file a claim to the relevant penalising authorities for compensation of damages inflicted to him/ her in the amount of up to 2,000 BGN, unless the relevant law or decree has provided an option for claiming damages in a large amount before the same penalising authority (Art. 45(1) of the AVSA). However, the fine by a sanction provision is public legal receivable in the sense of Art. 162(2) of the FPPA and its enforcement is performed following the procedure of the FPPA. According to Art. 79(2) of the AVSA when sanction provisions are adjudged in favour of state-owned enterprises, co-operatives, or other public organisations or individuals, they are executed following the procedure referred to in the CCP. It should be assumed in connection with Art. 79(2) of the AVSA that sanction provisions are grounds for issuing an enforcement order under Art. 418 of the CCP. The sanction provisions under the AVSA do not belong to the notion 'administrative acts' in the sense of Art. 269(2) of the APA. The sanction provisions are state administration acts but have a sanctioning nature. They do not overlap with the contents of the notion 'administrative acts' in the sense of Art. 21 of the APA. The collection of the adjudged compensations ascertained by sanction provisions following the procedure of Art. 418 of the CCP is performed on the grounds of the explicit reference to that procedure, envisaged in Arts. 78 and 79 of the AVSA, and not on the grounds of Art. 269(2) of the APA. The sanction provision issued by the municipality mayor on the grounds of Art. 20(5) of the FPPA (at the time of the CCP, repealed, that used be direct enforcement grounds) also belongs to the field of applying the norm of Art. 78 of the AVSA, with reference to Art. 418 of the CCP.

It seems with the amendment of Art. 78(1) of the AVSA the legislator had intended to open the possibility for adjudging compensation with a sanction provision, for issuing an

enforcement order on its grounds, respectively. But the legislator also provided the person against whom the sanction provision was issued with the chance to contest the receivable with an objection under Art. 414 of the CCP, that will cause the need of ascertaining the receivable by an adversary procedure under Art. 414 of the CCP. Thus the admittance of a faster enforcement of those private receivables, which have been ascertained in an administrative act by the possibility of utilizing the order for payment proceedings in its special type of an order for immediate enforcement was combined by the legislator with the possibility for the debtor to contest the receivable with an objection under Art. 414 of the CCP. However, that means the appealability of the compensation adjudged by a sanction provision foreseen in Art. 59(2) of the AVSA should have been cancelled.

e) It has been assumed that Art. 417, item '1' of the CCP is valid for acts of public authorities which are not government authorities (for instance the Barristers Council) which used to be out-of-court enforcement grounds. The Barristers Council (as well as the Notaries Chamber and the Chamber of Private Executive Magistrates) is a non-government organization and it does not issue administrative acts in the sense of Arts. 21 and 65 of the APA. The matter concerns receivables which are not public in the sense of Art. 162(2) of the SSC but they are not private being a means of disciplinary sanction – fine. Their enforced satisfaction is under the CCP procedure. Those acts were foreseen in the TCP of the CCP thus replacing the out-of-court enforcement grounds for that kind of receivables. Art. 145 of the AB was amended in §10 the TCP of the CCP, foreseeing the enforcement of the decision for a disciplinary sanction fine to be admitted by a request of the Barristers Council under Art. 418 of the CCP. Besides, when the due cost are not paid by the sanctioned barrister in a one month term following the decision's taking effect, the enforcement on the part of the costs is admitted by a request of the Barristers Council or the disciplinary court under Art. 418 of the CCP.

However, the legislator does not treat the same way the acts of the Notaries Chamber and those of the Chamber of Private Executive Magistrates when fining the private executive magistrates, although those authorities are analogous to the Barristers Council. Art. 61 of the ANNA was amended in §37 of the TCP of the CCP. It foresees a possibility for the Notaries

Chamber upon a resolution of its GM to request an enforcement order issuance for the due sums under Art. 401(1) of the CCP, regardless of their amount. Art. 54 of the PEMA was amended in §57 of the TCP of the CCP. It foresees a possibility for the Chamber of Private Executive Magistrates upon a resolution of its GM to request enforcement order issuance for the due sums under Art. 401(1) of the CCP, regardless of their amount.

2. A document or a statement from account books ascertaining the receivables of the state establishments, municipalities and banks.

These grounds for issuing an order for immediate enforcement are valid only for the subjects mentioned. A condition for using the account books as grounds for issuing an order for immediate enforcement is the regularity of their entries. The statements are valid for money receivables arising from a contract. Entries from the account books cannot be used for receivables for damages or for ungrounded enrichment.

In connection with above text the following amendments of the CCP were made with TCP into special laws:

a) Art.53(2) of LNBB foresees that NBB can request issuance of an order for immediate enforcement following the procedure of Art. 418 of the CCP on the grounds of statements from account books ascertaining arrears, including any interest due.

b) Art.111(2) of the Health Insurance Act foresees that RHIF can request issuance of an order for immediate enforcement under Art. 418 of the CCP on the grounds of statements from account books. Those are receivables for the resources paid by the NHIF on treatment of any diseases caused by deliberate injury to a person's own health, the health of other persons in a premeditated criminal offence, as well as for injury to the health of third parties committed in a state of alcoholic intoxication or use of narcotic or anaesthetic substances, which are restored to the National Health Insurance Fund by the injurer with due interest and with the expenses incurred on the recovery.

c) It was foreseen in Art. 60 of the of the CIA that when a loan or individual instalments thereof are not paid on the agreed payment dates as well as in the cases where the loan is

subject to accelerated payment due to default on one or more instalments on the loan, the bank can request the issuance of an order for immediate enforcement according to the procedure of Art. 418 of the CCP on the grounds of a statement from account books. The statement is from the account of the borrower.

d. It was foreseen in Art. 59(5) of the LBI that when the loan is not paid on the agreed payment date, the syndic can request the issuance of an order for immediate enforcement according to the procedure of Art. 418 of the CCP on the grounds of a statement from account books.

e. It was foreseen in Art. 260(4) of the Law on Defence and Armed Forces of the Republic of Bulgaria (LDAF) that the sum under Art. 260(1) and (3) of the LDAF is deducted totally from the compensation and the other receivables, which the indebted person has the right to receive, and if the owed sum cannot be collected this way and in the cases under Art. 260(2) of the LDAF, the receivable is collected as provided by the CCP on the grounds of a statement from account books. Having also in mind § 41 of the TCP with which amendments were made in analogous provisions of the LDAF, repealed, it should be assumed that it is possible to have issued an order for immediate enforcement on the grounds of those account books. The military servicemen, whose contracts for regular military service have been terminated on the grounds of Arts. 163, 165 and 166 earlier than the expiry of the term according to Art. 142(5), Art.143(1) and Art. 144(3), and those on an extended term under Art. 145(1), owe reimbursement of the expenses for support, training and qualification and/or re-qualification, proportionally to the term of the non fulfilment (Art. 260(1) of the LDFA). The students, discharged from education following a procedure, determined by the Rules of the higher military schools or those who left on their will during the education, reimburse the expenses for support and education for the period, when they were educated (Art. 260(2) of the LDFA). The cadets discharged from education in a procedure, determined by the Rules of the professional colleges or those who have left by their own will during the education, reimburse the expenses for support and education for the period, when they were educated (Art. 260(3) of the LDFA).

f. It was foreseen in Art. 67(4), sentence II, of the Law on Patents and Utility Model Registration that the Patent Office is entitled to request issuance of an order for immediate enforcement under Art. 481 of the CCP for the sums owed for preparing the necessary copies of documents on the grounds of the statement from the account books because payment failure is not a reason to terminate the application procedure.

g. It was foreseen in Art. 27(2) of the Farmers Support Act that the Agriculture State Fund is entitled to request issuance of an order for immediate enforcement under Art. 481 of the CCP on the grounds of the statement from the account books for its receivables from legal entities and individuals for unduly paid and overpaid sums for schemes and measures. The receivables are collected by NRA.

h. It was foreseen in § 11b of the Privatization and Post-privatization Control Act (PPCA) that the Agency for Post-Privatization Control and the authorities under Art. 4(2) of the PPCA are entitled to request issuance of an order for immediate enforcement under Art. 481 of the CCP on the grounds of the statement from the account books for due installments for covering the cost on privatization contracts.

i. It was foreseen in Art. 57(2) of the Roads Act (RA) that when the requirements under Art. 57(1) of the RA are not met, the consequences are remedied by the administration managing the road on the offender's account. For its receivables from the offender the administration can request issuance of an order for immediate enforcement pursuant to the provisions of Art. 418 of the CCP on the grounds of the statement from the account books.

In practice the order for payment procedure under Art. 417 item '2' of the CCP is used mostly by the banks. Overcome are the attempts of some banks to present a document entitled "Account Statement" containing description of the account with allegations typical of the statement of claim, instead of a proper statement of the borrower's account. Overcome was also the practice of some courts to require not an account statement but the tracking of the entire activity of the account. The account statement should contain the exact data about the particular client of the bank, the bank loan contract, the amount of money owed by the borrower, the principle, interests, executability (Ruling No 430 of 16 July 2009 on a com.c. No

346/2009, I-Com. Ch. of the SCC; Ruling No 134 of 29 January 2010 on a com.c. No 52/2010, I-Com. Ch. of the SCC; Ruling No 426 of 16 July 2009 on a com.c. No 322/2009, I-Com. Ch. of the SCC; Ruling No 430 of 16 July 2009 on a com.c. No 346/2009, I-Com. Ch. of the SCC; Ruling No 461 of 28 June 2010 on a com.c. No 272/2010, II-Com. Ch. of the SCC; Ruling No 746 of 3 November 2010 on a com.c. No 409/2009, Com. Ch. of the SCC). Due to the wording of Art. 417, item '2' of the CCP 'a document or a statement from account books' there is no obstacle to present the loan contract with the statement from account books (Ruling No 118 of 24 February 2009 on a com.c. No 25/2009, II-Com. Ch. of the SCC; Ruling No 264 of 7 May 2009 on a com.c. No 210/2009, I-Com. Ch. of the SCC). It is possible to have issued an order for immediate enforcement only on the grounds of a statement from account books, if the said statement certifies all allegations of the creditor (Ruling No 430 of 16 July 2009 on a com.c. No 346/2009, I-Com. Ch. of the SCC; Ruling No 134 of 29 January 2010 on a com.c. No 52/2010, I-Com. Ch. of the SCC; Ruling No 426 of 16 July 2009 on a com.c. No 322/2009, I-Com. Ch. of the SCC). However, it is not enough to present only the loan contract. Besides, the executability of the receivable should be also put down in the statement from account books. As seen from the phrase 'a document or a statement from account books', in the cases of pre-term executability of the loan the loan contract and a document certifying the circumstance - grounds for pre-term executability - should also be presented. (Ruling No 641 of 16 November 2009 on a com.c. No 656/2009, I-Com. Ch. of the SCC; Ruling No 331 of 28 November 2008 on a com.c. No 306/2008, I-Com. Ch. of the SCC; Ruling No 543 of 25 September 2009 on a com.c. No 465/2009, II-Com. Ch. of the SCC; Ruling No 231 of 23 March 2010 on a com.c. No 115/2010, II-Com. Ch. of the SCC).

3. A notarial act, an agreement or another contract bearing notarized signatures with regard to the obligations contained therein to pay sums of money or other fungible things, as well as obligations to deliver particular chattels.

The said documents cannot serve as grounds for issuing an order for immediate enforcement for other pretence rights, although certifying those rights.

During the verification under Art. 418(1) of the CCP the court cannot verify the genuineness of the deeds and testimonies that the documents under Art. 417 item '3' of the CCP contain. The verification is only on the formal regularity of the document. The court has to check whether the type of document meets the standards and norms for its issuance. In connection with the range of the verification under Art. 418(1) of the CCP in the order for payment proceedings in the hypothesis of Art. 417 item '3' of the CCP the court cannot verify the authenticity of notarially certified signatures put on the agreement protocol presented by the applicant, as well as whether there is a breach of the regulation under Art. 582 of the CCP. The verification should be performed within the frames of the adversary proceedings following the procedure of Art. 422 of the CCP for ascertaining the existence of the very receivable. The parties should exhaust all their arguments and objections concerning the disputed receivable, the document Art. 417 of the CCP, inclusive. (Ruling No 143 of 23 February 2010 on a com.c. No 912/2009, II-Com. Ch. of the SCC).

Since the court performs the verification examining the formal character of the document, the claimed receivable of the applicant should be supported by the contents of the document on which grounds he/she can request issuance of an order for immediate enforcement and a writ of execution. When the request for issuance of an order for immediate enforcement under Art. 417 item '3' of the CCP is on the grounds of a notarial act for a receivable for a forfeit for faulty failure to perform, the court does not ascertain the obligation of paying a money sum, as a due receivable in the sense of Art. 418(1) of the CCP. It is because the executability of the forfeit depends on debtor's failure to fulfil his/her obligation to build the sites within the agreed term. The judgement is whether there was a failure to fulfil. Those are facts beyond the grounds under Art. 417 item '3' of the CCP for issuing an order for immediate enforcement which are not attested by that document and cannot be discussed in the proceedings under Art. 418 of the CCP. The occurrence of the fact which determines the executability of the receivable for a forfeit in the notarial act, depends on the occurrence of another circumstance. According to Art. 418(3) of the CCP that occurrence of a circumstance should be attested by an official document or a document originating from the debtor. That

document should be presented together with the application for issuing an order for immediate enforcement (Ruling No 321 of 3 May 2010 on a com.c. No 286/2010, II-Com. Ch. of the SCC; Ruling No 508 of 6 July 2010 on a com.c. No 281/2010, II-Com. Ch. of the SCC).

4. A statement of the registered pledges registry on a recorded security interest and on commencement of foreclosure: in respect of the delivery of pledged chattels as grounds for issuing an order for immediate enforcement under Art. 417 item '4' of the CCP.

The text corresponds to Art. 35(1) of the RPA in its wording prior to passing the CCP, current (SG No.59/2007 in force since 1 March 2008) until the last amendment of Art. 35 of the RPA (SG No.101/2010).[1] It does not take into account the actual text of Art. 35(1) of the RPA following its amendment. Its provision is that when the pledgor does not cooperate duly for the execution upon the pledged property or its keeping, the pledgee on the grounds of a statement of the registered pledges registry and on commencement of the execution, can request form the executive magistrate delivery of the pledged property according to the procedure of Art. 521 of the CCP. Thus a statement of a registered security and on commencement of the execution was again established by the legislator as direct grounds for execution, as it used to be prior to passing the CCP, current. In its present wording Art. 35(1) of the RPA is a law newer than Art. 417 item '4' of the CCP. For that reason Art. 35(1) of the RPA should be applied and the said entry should be used as direct grounds for execution. That means Art. 417 item '4' of the CCP has lost its effect and on the grounds of the said entry an order for immediate enforcement and a writ of execution should not be issued. The possibility for the legislator to establish the respective grounds for execution has been explicitly stated in Art. 426(1) of the CCP.

The current legal meaning of the said entry as direct grounds for execution under Art. 35(1) of the RPA is corresponding better to Art. 36(2) of the RPA. With passing the CCP, current, yet it was foreseen that in the enforcement proceedings the pledgor may contest the receivable or the security right under the procedure of Art. 439 of the CCP, i.e. by a claim, and not by an objection under Art. 414 of the CCP. However, it should be kept in mind that neither the receivable nor the right of pledge are ascertained in the proceedings during which the court

trial is held, therefore they have not been ascertained by *res judicata* and Art. 439 of the CCP is not applicable.

The legislator should repeal Art. 417 item '4' of the CCP as soon as possible to avoid the contradictory court practice.

5. A statement of the registered pledges registry on an entry of a contract for a sale with retention of title until payment of the purchase price or a lease contract: in respect of the return of corporeal things sold or leased.

6. A contract of pledge or a mortgage deed under Arts. 160 and 173 (3) of the OCA.

According to Art. 160 of the OCA when a secured receivable is money or liquidated damages in cash have been agreed for it, if the pledge is created by a contract in writing or is provided by operation of law for securing receivables which arise from a contract in writing, on the grounds of the said contract the creditor may request issuance of an order for immediate enforcement under Art. 418 of the CCP. According to Art. 165 of the OCA a creditor who has a pledge on a receivable may request issuance of an order for immediate enforcement under Art. 418 of the CCP pursuant to the terms and procedures set forth in Article 160, and is satisfied preferentially in accordance with the procedure for reversal of execution on a receivable. According to Art. 173(3) of the OCA, if a claim is for a specific sum of money, or if liquidated damages in cash have been agreed for it, the creditor may request issuance of an order for immediate enforcement under Art. 418 of the CCP (Ruling No 490 of 2 July 2010 on com. c. No 298/2010 II – Com.Ch. of the SCC).

Art. 417 item '6' of the CCP is grounds for issuance of an order for immediate enforcement against the debtor who has pledged or mortgaged his/her chattel for securing his/her own obligation. Art. 417 item '6' of the CCP is also grounds for issuance of an order for immediate enforcement against a third person who has a pledge or mortgage for securing an obligation of somebody else. This is the text saving the creditor when the principal debtor is insolvent, because under the argument of Art. 638 of the CC neither an order for immediate enforcement nor can a writ of execution be issued against him/her. Under the argument of

Arts. 637 and 638 of the CC neither order for payment proceedings nor proceedings for issuance of a writ of execution are admissible against the debtor for whom insolvency proceedings are instituted. Under the argument of Arts. 637(3), item '3' of the CC an order for immediate enforcement and writ of execution under Art. 417 items '3' and '6' of the CCP in connection with Art. 418 of the CCP, can be issued against a third person who has a pledge or mortgage for securing the debtor's obligations both when the said debtor has insolvency proceedings instituted and when he/she has not such proceedings instituted. In practice some courts refuse to issue an order for immediate enforcement against a third person who has pledged or mortgage his/her property for securing an obligation of somebody else because the words 'it sentences' are both in the standard form of the order specified in the Annexes to Regulation No6 and in the traditional wording of the disposition. Due to the obstacle of this sentencing disposition set by the standard form and the tradition in sentencing the disposition of the writ of execution, the courts hesitate to make the easy legal step – to write down the ascertainment that the third person is responsible for the debt of the principal debtor by his/her property which was pledged or mortgaged. Fortunately, under the CCP, current, this lawful practice becomes more often (Ruling No 378 of 10 February 2010 on com. c. No 1481/2009 Com. Ch. of the Varna District Court; Ruling No 551 of 7 July 2010 on com. c. No 537/2010 I – Com.Ch. of the SCC). Art. 412 of the CCP does not foresee a sentencing disposition of the enforcement order. Regulation No 6 is a sub-law normative act. It is not necessary for the writ of execution to be with a sentencing disposition.[2]

7. An effective act for ascertainment of a State or municipal receivable, where its enforcement is performed according to the procedure established by the CCP.[3]

It was foreseen in Art. 14b(2) of the Law for Social Support that the compulsory execution of the order referred under Art. 14a(3) is admissible upon request of the Social Support Directorate pursuant to the provisions of Art. 418 of the CCP. In case of a bad faith the Director of the Social Support Directorate issues a motivated order for returning the received social aid together with the statutory interest. The legislator treats that state receivable as private on the level of ungrounded enrichment.

We do not face the hypothesis of Art. 417, item '7' of the CCP in the case under Art. 152 of the FC (am.- SG No.100/2010 in force 21.12.2010) the state pays c/o the municipality the support adjudged to an underage Bulgarian citizen on the account of the indecorous debtor. The amount of support is determined in a court decision but does not exceed the maximum set annually by the State Budget Act of the Republic of Bulgaria under the conditions foreseen in Art. 152 of the FC and in the Regulation for its application. It is subrogated into the rights of the satisfied creditor on the receivable for child support as well as into the rights under the writ of execution. Therefore the hypothesis does need neither an enforcement order nor a writ of execution. The State is regarded a joint claimant for a private state receivable for the support paid by the municipality with the interest on an enforcement case under Art. 152 of the FC (new - SG No.100/2010 in force since 21 December 2010).

8. Act of deficiency

Art. 27(4) of the Public Financial Inspection Act (PFIA) was amended by a TCP of the CCP foreseeing issuance of an order for immediate enforcement under Art. 418 of the CCP on the grounds of an act of deficiency. Meanwhile, Art. 51 of the RAPFIA was also amended, foreseeing that the inspected organization sends the act of deficiency to the respective court for issuance of an order for immediate enforcement under Art. 418 of the CCP. The amendment was also in connection with the lack of especial adversary proceedings for financial deficiencies what used to exist in the CCP, repealed.[4] The provision of Art. 22(2) of the PFIA is that factual findings in the act of deficiency are regarded true until proven false. In the hypothesis of Art. 417, item '8' despite of the binding evidence effect of the deficiency act, the debtor can by his/her objection under Art. 414 of the CCP object the enforcement order, to contest the receivable, inclusive, without having to ground his/her objection. This solution is not in accordance with the binding evidential effect of the deficiency act, established in the PFIA. The lodged objection causes the necessity the creditor to the act of deficiency (the damaged legal entity, inspected organization in the sense Art. 4 of the PFIA and Art. 5 of the RAPFIA) to lodge a positive ascertainment claim under Art. 415 of the CCP for ascertainment of the receivable subject of the deficiency act. There are not especial adversary proceedings for financial

deficiencies in the CCP, current. For that reason the procedure follows the rules of general adversary proceedings. However, the rule of Art. 22(2) of the PFIA establishing the compulsory evidential effect of the act of deficiency should be applied in the adversary proceedings under Art. 415 of the CCP. Moreover, lodging the objection under Art. 414 of the CCP it does not lead to suspending the enforcement. It can be suspended only under the conditions of Art. 420 of the CCP. It is foreseen in the text that the court should suspend the enforcement, if the debtor furnishes due security according to Art. 420(1) of the CCP. The court judges on suspending the enforcement on the grounds of convincing written evidence (Art. 420(1) of the CCP) and in connection with the binding evidential effect of the act of deficiency.

9. A promissory note, a bill of exchange or another negotiable security payable to order which is equivalent thereto, as well as a bond or coupons attached thereto.

In order to have an order for immediate enforcement on the grounds of those documents, they should be composed in the due legal form and have the requisites specified by the law (Arts. 455 and 533 of the C. Code; ID No. 1-2005-GMCC of the SCC). Those are enforcement grounds against the drawer even when the document for a protest made (Arts. 498 and 537 of the C. Code) is added, except in the case of Art. 500 of the C. Code.

The promissory note and the bill of exchange, though being the most used grounds for issuing an order for immediate enforcement, are at the end of the list (Art. 417, item '9' of the CCP) because the regime of their order for payment proceedings are more specific (*compare* Art. 420 of the CCP).

1. Regarding the cited Art. 417, item '4' of the CCP and Art. 35 of the RPA the legislator demonstrated remarkable inconsistency. With a TCP of the CCP (SG No.59/2007 in force since 1 March 2008) it was foreseen in Art. 35(1) of the RPA that when the pledgor does not cooperate duly for the execution upon the pledged property or its keeping, the pledgee on the grounds of a statement of the registered pledges registry and on commencement of the execution, can request issuing of an order for immediate enforcement under Art. 418 of the CCP. The delivery of the pledged property is performed according to the procedure of Art. 521 of the CCP. Under

the CCP, repealed, there used to be direct grounds for enforcement. There did not use to be a need of issuing a writ of execution.

2. Some courts by the analogy of the sentencing disposition of the enforcement order in the standard form and of the writ of execution render an enforcement order against a third person who has a pledge or a mortgage, although even the fifth year law students are aware that that person is not a debtor, regardless of being called mortgage or pledge debtor. The person is only responsible for the obligation of somebody else with his/her property in a way that enforcement could be performed on the said property in order to satisfy the debtor. Fortunately this practice is isolated.

3. For the first time this kind of act was established as enforcement grounds with the amendment of the 2002 CPP, repealed, in connection with Art. 87(2) of the CSRA. However, after all it was repealed by § 34 of the transitional and concluding provisions of the AA of the CTSIP (SG, No.12 of 13 February 2009, am. SG, No.32/2009, in force of 1 January 2010). The private receivables of the state are collected according to the procedure of CCP and not to that of the CTSIP. In this aspect the legislator has taken into account the Decision of the Constitutional Court No.2/2000 (SG No.29//2009) where the Constitutional Court proclaimed unlawful: a) Art. 14(2) of CTP (later replace by CTSIP) in its part foreseeing the collection of the private receivables of the state to be carried out following the procedure for the public ones, where it has been foreseen explicitly by a law; Art. 87(3) and (4) of the CSRA, according to which the private receivables of the state under Art. 87(2) of the CSRA are satisfied following the CTP. Later CTP was repealed and CTSIP was adopted taking into account the Decision of the Constitutional Court No.2/2000. According to Art. 87(1) of the CSRA the state receivables under the Code of the Settlement of Non-Performing Loans, Contracted by 31st December 1990, acquired following the procedure of § 46 of the Amendment Act of the Banking Act (SG, No. 54/1999), as well as the receivables of the closed down State Fund for Reconstruction and Development and State Fund for Energy Recourses are ascertained by an act for ascertainment of a private state receivable issued by the Executive Director of the Agency for State Receivables. The contradiction was avoided very elusively, foreseeing in Art. 87(2) of the CSRA

that when the debtor contests the receivable, he/she can file a claim before the competent court in a 14 day term following the service of the act for ascertainment of the private state receivable. The cases under this paragraph used to be considered under Chapter XX, item 'a' of the CCP, repealed. Art. 87(1) and (2) of the CSRA and Art. 237, item 'i' of the CCP, repealed, were not attacked before the Constitutional Court. The contradiction with the Constitution was avoided very elusively, foreseeing in Art. 87(2) of the CSRA a possibility for the debtor to lodge a negative ascertainment claim for contesting the receivable.

Art. 87(2) of the CSRA was amended by TCP of the CCP, current. It was foreseen the receivables under Art. 87(1) of the CSRA, but those under item '5', to be ascertained by an act for ascertainment of a private state receivable issued by the Executive Director of the Agency for State Receivables. On the grounds of an act for ascertainment of a private state receivable the agency can request issuance of an enforcement order according to the procedure of Art. 418 of the CCP. Art. 87(2) of the CSRA does not require the act to have taken effect. But it is foreseen in Art. 417 item '7' of the CCP that it is necessary to have an administrative act for ascertainment of a private state receivable that has taken effect. Besides, the possibility for the debtor, if he/she contests the receivable, to file a claim before the competent court within 14 days following the service of the act for ascertainment of a private state receivable foreseen in Art. 87(2) of the CSRA has been repealed. In fact, it was replaced by the possibility to contest the receivable by an objection under Art. 414 of the CCP. It is true that this possibility is rather eased because no grounding of the objection is required. On the other hand, the enforcement that has started on the grounds of the enforcement order and the writ of execution issued on its grounds is hard to cease only under the conditions of Art. 420 of the CCP. The CTSIP and Art. 87(2) of the CSRA, inclusive, have been repealed by § 34 of the TCP of the AA of the CTSIP (SG, No.12 of 13 February 2009, am. SG, No.32/2009, in force of 1 January 2010). Hence, the hypothesis because of which the grounds under Art. 417, item '7' of the CCP were created does not exist anymore.

4. The especial adversary proceedings for financial deficiencies in the CCP, repealed, used to commence when the act of deficiency was sent *ex officio* to the court by the controlling

authority with a cover letter without writing a statement of claim. The act of deficiency and the cover letter used to possess all necessary attributes of a statement of claim. This faster and simplified defence used to start regardless of the will of the damaged person. Under the CCP, current, the damaged legal entity (inspected organization in the sense Art. 4 of the PFIA and Art. 5 of the RAPFIA) is legitimized to file an application for issuance of an enforcement order, i.e. that depends on its will. However, the legal entity is an abstraction. It does not have will. That is the will of the person managing the legal entity. Often that is the person against whom the act of deficiency has been issued. That person has no interest in realizing his own responsibility for the property. However, in this conflict of interests the court is not entitled to appoint a special representative, because there is not a pending case. The same is the situation when the claim is lodged under Art. 415 of the CCP, if the debtor has lodged an objection under Art. 414 of the CCP, as well as when enforcement proceedings have been instituted. For those circumstances the order for payment proceedings in the hypothesis of Art. 414, item '8' of the CCP have almost no practical application. In this situation it will be appropriate, if the legislator reconsiders his concept viewing the specific damages of the public interests in the cases of an act of deficiency.

XI. The specifics of the order for payment proceedings on the grounds of the documents listed in Art. 417 of the CCP are that the creditor requests the court's issuing an enforcement order and a meanwhile issuing of a writ of execution. With the application he/she presents a document under Art. 417 of the CCP as grounds for the receivable.

The requirement for individualization of the receivable and its executability are also applicable in this type of proceedings. Unlike in the case under Art. 410 of the CCP it is not enough to allege the receivable. To have an enforcement order issued one should file a written standard application according to Annex No4 (Art. 5 of Regulation No6/2008) which contains the request for issuance of an enforcement order and issuance of a writ of execution, upon presenting a document under Art. 417 of the CCP. Filing the application in the standard form is a condition for its validity. When the applicant has not used a standard form or has used a

wrong one, the court gives him/her instructions for curing the irregularity enclosing to the written instruction the relevant standard form (Art. 425(2) of the CCP). If the applicant does not cure the irregularities within the set term, the application should be disallowed. The writ disallowing the application is appealable by the applicant by a private appeal (Art. 279 of the CCP in connection with 274(1) item '1' of the CCP). The ruling of the intermediate appellative court with which the private appeal is not upheld is subject to cassation appeal by a private appeal before the SAC provided that the prerequisites in Art. 280 of the CCP (Art. 274(3), item '2' of the CCP in connection with Art. 279 of the CCP) exist.

The application for issuance of an order for immediate enforcement is considered in a closed court session without subpoenaing the parties. In this case the rules of Art. 411 of the CCP apply.

XII. The writ disallowing entirely or partially the application for issuance of an enforcement order is appealable by the applicant by a private appeal which copy is not presented for servicing the opposing party with it (Art. 413(2) of the CCP). The writ disallowing entirely or partially the application for issuance of a writ of execution is appealable by the applicant by a private appeal within a one week term. A copy of the appeal is not presented for servicing the opposing party with it (Art. 418(4) of the CCP). As the enforcement order and writ of execution overlap and proceed simultaneously, the same way overlap the two refusals to issue the two functionally interrelated acts. Therefore the appeals against the writ disallowing the application for issuance of an enforcement order and that disallowing the application for issuance a writ of execution proceed simultaneously. It is assumed in practice in connection with Art. 278 of the CCP that determining the dispute on the merits in the order for payment proceedings is exhausted by verifying the existence of the grounds for issuing enforcement order. If the grounds exist, then the court renders a ruling for issuance of the enforcement order as well as of the writ of execution. In other words, it is assumed that if the intermediate appellative court, the cassation court, respectively, upholds the appeal, it does not issue the very order for immediate enforcement and the writ of execution on its grounds. When the

intermediate appellative court or the cassation court find that the application for issuance of the enforcement order has been disallowed wrongfully, they pronounce on the merits ruling *the issuance* of an order for immediate enforcement on the respective grounds under Art. 417(1) of the CCP, individualized according to the application and with the issuance of writ of execution. The case is returned to the first instance court *only for the preparation* of the enforcement order and the writ of execution. (For instance, Ruling No 327 of 4 May 2010 on com. c. No 881/2009 II – Com.Ch. of the SCC; Ruling No 461 of 28 June 2010 on com. c. No 272/2010 II – Com.Ch. of the SCC; Ruling No 130 of 27 January 2010 on com. c. No 415/2009 I – Com.Ch. of the SCC; Ruling No 641 of 16 November 2009 on com. c. No 656/2010 I – Com.Ch. of the SCC; Ruling No 134 of 18 March 2009 on a com.c. No 120/2009, I-Com. Ch. of the SCC; Ruling No 134 of 29 January 2010 on a com.c. No 52/2010, I-Com. Ch. of the SCC). This practice finds its excuse in the technical complications that might occur in the order for payment proceedings in connection with the application of Arts. 420, 415, etc. Of the CCP, if the intermediate appellative court, the cassation court, respectively, issue the enforcement order and the writ of execution.

It was adopted by ID No. 1-2001-GMCC of the SCC that the ruling of the intermediate appellative court for disallowing the appeal against the refusal of the court to issue an enforcement order is not a subject to cassation appeal. This ID is not applicable with regard to the ruling which allows the appeal against the writ for refusal of the court to issue an enforcement order. That is a matter of independent proceedings that did not use to exist in the CCP, repealed. The said ID is particular for issuance of enforcement grounds and aims at avoiding the adversary proceedings. Therefore the hypothesis belongs to the application field of Art. 274(3), item '2' of the CCP (Ruling No 274 of 29 May 2009 on c. c. No 2/2009 III – C.Ch. of the SCC; Ruling No 641 of 16 November 2009 on com. c. No 656/2010 I – Com.Ch. of the SCC; Ruling No 134 of 18 March 2009 on a com.c. No 120/2009, I-Com. Ch. of the SCC; Ruling No 134 of 29 January 2010 on a com.c. No 52/2010, I-Com. Ch. of the SCC). Due to the above relation between the order for immediate enforcement and the writ for immediate enforcement, connected with the issuance of a writ of execution, the appeal against the refusal of the court

to issue an order for immediate enforcement is also an appeal against the writ for immediate enforcement, connected with the issuance of a writ of execution. During the last year the practice of the Commercial College of the SCC was unified and *is no more* controversial regarding the procedural means of defence in the order for payment proceedings concerning the field of rulings of the intermediate appellative courts that are subject to appeal before the SCC. The ruling will be subject to a cassation appeal (Art. 274(3), item '2' of the CCP) only when the intermediate appellative court has confirmed the writ of the enforcement court for an entire or partial refusal of the court to issue an order under Arts. 410 and 417 of the CCP. In case of a reversal of the writ for immediate enforcement, the intermediate appellative court will doubtlessly invalidate the writ of execution already issued. It has been assumed in the practice of the Commercial College of the SCC that this ruling of the intermediate appellative court is not subject to appeal before the SCC (Ruling No 422 of 18 June 2010 on a com.c. No 406/2010, II-Com. Ch. of the SCC; Ruling No 721 of 22 October 2010 on a com.c. No 689/2010, II-Com. Ch. of the SCC; Ruling No 872 of 9 December 2010 on a com.c. No 944/2010, II-Com. Ch. of the SCC; Ruling No 18 of 10 January 2011 on a com.c. No 130/2010, II-Com. Ch. of the SCC; Ruling No 872 of 9 December 2010 on a com.c. No 944/2010, II-Com. Ch. of the SCC; Ruling No 887 of 14 December 2010 on a com.c. No 910/2010, II-Com. Ch. of the SCC; Ruling No 17 of 12 January 2011 on a com.c. No 695/2010, I-Com. Ch. of the SCC; Ruling No 21 of 12 January 2011 on a com.c. No 684/2010, I-Com. Ch. of the SCC). The writ of the enforcement court with which the application for issuance of an order for immediate enforcement is upheld is a subject to independent intermediate appeal according to the procedure foreseen in Art. 419 of the CCP. But the ruling of the intermediate appellative court is not subject to appeal before the SCC (Ruling No 743 of 13 October 2010 on a com.c. No 617/2010, I-Com. Ch. of the SCC).

In my opinion, the legislator's concept and will are demonstrated explicitly and definitely in Art. 274(3), item '2' of the CCP. The proceedings for issuance of a writ of execution are independent proceedings, although being functionally related to the enforcement ones. The latter proceedings comprise the specific for the Bulgarian enforcement proceedings absolute procedural prerequisite - the writ of execution. The text of Art. 274(3), item '2' of the

CCP was adopted in order to overcome the practice of ID No. 1-2001-GMCC of the SCC in this aspect. That is why this ID should be considered obsolete under the CCP, current, with regard to the ruling of the intermediate appellative court with which the appeal against the writ for issuance of a writ of execution is disallowed. The practice is controversial but during the last year the practice opposite to my opinion became dominant in the Commercial College of the SCC.

XIII. It is characteristic of the proceedings under Art. 418 of the CCP that the writ of execution is issued *simultaneously* with the enforcement order, which as seen from Art. 404, item '1' is its enforcement grounds, although it has not taken effect yet. That is why the enforcement order under Art. 418 in of the CCP, in connection with Art. 417 of the CCP is called 'order for immediate enforcement'. That means the writ of execution is issued immediately without waiting for its taking effect. The specific in the case is the overlapping of two acts. The order for immediate enforcement is the grounds for issuing a writ of execution immediately upon its issuance prior to its taking effect. Moreover when issuing a writ of execution the court puts down a due note only on the enforcement order as well as on the document presented under Art. 417 of the CCP (Art. 418, sentence I of the CCP).

The provision of Art. 418(2) of the CCP is that the writ of execution is issued after the court has verified the *prima facie* conformity of the document and has ascertained the enforcement receivable against the debtor.

Viewing the outlined specific relation between the order for immediate enforcement and the writ for issuing a writ of execution, I find that the court should perform the verification under Art. 418(2) of the CCP yet while deciding whether to issue an order for immediate enforcement, because the prerequisites specified in Art. 418(2) of the CCP are grounds for issuing both the writ of execution and the order for immediate enforcement under Art. 418 of the CCP. Art. 418(2) of the CCP is a reproduction of Art. 243(1), item '1' of the CCP, repealed. That is why the achievements of the procedural theory and practice under Art. 243(1), item '1' of the CCP, repealed, can be used when applying Art. 418(2) of the CCP.

When a request for issuing an enforcement order under Art. 418 of the CCP, in connection with Art. 417 of the CCP, is made and the court finds that there are no grounds for issuing an order under Art. 417 of the CCP, it cannot issue an enforcement order under Art. 410 of the CCP, because the applicant does not require issuing whatever order. His/her request is for an order under Art. 418 in of the CCP. Such a pronouncing is in conflict with the dispositive principle, hence it is inadmissible. Theoretically, since the matter is about procedural actions, there is no obstacle the applicant himself/herself to merge the two requests under the conditions of eventuality. However, that is assumed in practice as inadmissible. The considerations are the following: the standard forms for the applications under Arts. 418 and 410 of the CCP are different and it is technically impossible to make an eventual request for an order under 410 of the CCP using the standard application form under Art. 418 of the CCP; two fees should be paid, if making the two requests; while appealing the writ for disallowing of the principal application, the order under Art. 410 of the CCP, issued upon eventual request, will take effect. In my opinion, only the latter consideration is serious. Under the argument of Art. 415 of the CCP, Art. 72(2) of the CCP should be applied regarding the fees. The difference in the applications under Art. 418 of the CCP is that by the second one immediate enforcement is requested. This difference could not be an obstacle for the admissibility of eventual merging the two applications.

The court should verify whether the document attached to the application belongs in nature to those foreseen in Art. 417 of the CCP as well as whether it meets as such the legal requirements for a form and contents (ID No. 1-2005-GMCC of the SCC for a promissory note, which preserved its actuality under the CCP, current, since the promissory note which under the CCP, repealed, used to be out-of-court enforcement grounds, now is grounds for issuing an order for immediate enforcement under Art. 417 of the CCP (Art. 417, item '9' of the CCP; Ruling No 672 of 24 November 2009 on com. c. No 677/2009, I - Com. Ch. of the SCC; Ruling No 22 of 14 January 2009 on com. c. No 263/2008, I - Com. Ch. of the SCC; Ruling No 264 of 7 May 2009 on com. c. No 210/2009, I - Com. Ch. of the SCC)).

Under the argument of Art. 418(2) of the CCP it is necessary to present the original of the document under Art. 417 of the CCP for issuing the order for immediate enforcement (Ruling No 550 of 28 September 2009 on com. c. No 447/2009, II - Com. Ch. of the SCC). The document should directly attest the receivables alleged (Ruling No 423 of 25 June 2009 on com. c. No 437/2009, II - Com. Ch. of the SCC). All invisible grounds for invalidity of the document are not verified in the order for payment proceedings (Ruling No 370 of 11 June 2009 on com. c. No 398/2009, II - Com. Ch. of the SCC). The verification of the document's *prima facie* conformity and its ascertainment of the due enforcement receivables against the debtor does not include assessment of its authenticity, of the validity of the actions performed by other authorities or persons in connection with this document either. The assessment could be performed only in the adversary proceedings under Art. 422 of the CCP (Ruling No 143 of 23 February 2010 on com. c. No 912/2009, II - Com. Ch. of the SCC).

In the order for payment proceedings the verification under Art. 422(2), item '2' of the CCP should be also performed. The verification concerns claims grounded on rights and obligations which are in conflict with the legal order and the public interest, as contained in Art. 117 of the PILC and in Art. 34 of the Council *Regulation (EC)* No *44/2001*.

Having performed the verification of the formal character of the document, the court verifies whether the document's contents attest a pretence right suitable for execution. If the contents reveal that such a right is not attested, the court should refuse issuing both an enforcement order and a writ of execution. In the order for payment proceedings the court is not entitled to verify whether the receivable exists and is executable. The document under Art. 417 of the CCP has evidential effect for the proceedings under Art. 418 of the CCP regarding the executable right it certifies. Data not comprised by the document under Art. 417 of the CCP can be used only under the conditions of Art. 418(3) of the CCP and only with regard to the executability of the receivable. Otherwise the data about the executability should be in the very document, for instance the set term of execution (Ruling No 48 of 14 January 2010 on com. c. No 672/2009, I - Com. Ch. of the SCC).

When according to the document presented the executability of the receivable is dependent on the performance of a counter obligation or on the occurrence of another fact, the performance of the obligation or the occurrence of the fact has to be ascertained by an official document or the debtor's outgoing document (Art. 418(3) of the CCP). This is a hypothesis wherein the creditor should present additional evidence ascertaining the executability of the receivable but the document under Art. 417, item '3' of the CCP (Ruling No 274 of 29 May 2009 on com. c. No 2/2009, III - Com. Ch. of the SCC).

XIV. When the application for issuance of an enforcement order under Art. 418 of the CCP is upheld, the court issues an enforcement order under Art. 417 of the CCP in a standard form according to Annex No5 (for money receivable), Annex No6 (for delivery of a chattel) of Regulation No6/2008 in connection with Art. 425 of the CCP. There is not an explicit text about the contents of the order for immediate enforcement in the CCP in its part on the order for payment proceedings under Art. 418 of the CCP. In this aspect Art. 412 of the CCP has been taken into account in the above Annexes as well as the difference between enforcement order under Art. 410 of the CCP and that under Art. 418 of the CCP, in connection with Art. 417 of the CCP. The difference is in the contents under Art. 412, item '9' of the CCP because, as I have already emphasized, in the order for payment proceedings under Art. 418 of the CCP, it is not necessary the enforcement order to have taken effect, in order to issue a writ of execution. For that reason it is specified explicitly in item '3' of the standard form that the enforcement order is subject to immediate enforcement and that a writ of execution has been issued on its grounds. Moreover, it specified explicitly in the standard form that if an objection has been filed within a two week term, the creditor can lodge a claim for the receivable against the debtor (item '2' of the standard form in connection with item '1' of the standard form). Another dissimilarity with the enforcement order under Art. 410 of the CCP has also been taken into account. It is giving explicit instructions to the debtor that the enforcement is suspended, if he/she furnishes a due security before the court following the procedure of Arts. 180 and 181 of the OCA. It has also been taken into account that the court can suspend the enforcement, if

in the set term for lodging an objection, the debtor presents convincing written evidence that he/she has no obligation to perform (item '5' of the standard form). The document presented by the creditor on which grounds the enforcement order has been issued should be specified explicitly, as well as the verification circle performed by the court – whether it conforms *prima facie* and ascertains the adjudged receivable (item '6' of the standard form). A copy of the document is enclosed to the enforcement order (item '6' of the standard form).

According to Art. 418(5) of the CCP the enforcement order issued under Art. 418 of the CCP with the note of the issued writ of execution is serviced by the executive magistrate.[1] In fact, the executive magistrate services a duplicate of the enforcement order issued with the said note, not its original. However, the Regulation shows that when an enforcement order is issued under Art. 418 of the CCP, the debtor learns about it only when an enforcement proceedings have been instituted against him/her. The legislator adopted such an approach considering that the ascertainment of the documents listed in Art. 417 of the CCP proves their authenticity to a great extent.

1. In the general hypothesis the enforcement order issued under Art. 410 of the CCP is serviced by the court and not by the executive magistrate because it is advanced to enforcement not only on the grounds of the order. In the hypothesis under Art. 417 of the CCP there is no need to present evidence of servicing the debtor with the order before the court, although the order has not taken effect yet. On its grounds the court has already issued the writ of execution. It is important whether the order has been duly serviced only viewing the defence of the debtor under Art. 410 of the CCP.

XV. The enforcement order under Art. 418 of the CCP is not subject to appeal, but in the part regarding the costs. (Art. 413(1) of the CCP). The debtor's defence is by the objection under Art. 414 of the CCP, and later by the objection under Art. 423 of the CCP.

However, the writ with which the application for immediate enforcement is upheld can be appealed by a private appeal in a two weeks term following the servicing of the enforcement order Art. 419(1) of the CCP.

It is assumed in the practice under the argument of Arts. 419(1) and 418(1) of the CCP that three acts are issued in the enforcement order proceedings which uphold the appeal under Art. 418 of the CCP: an enforcement order; a writ for admitting immediate enforcement; a writ for issuance of a writ of execution. In the case of the order for immediate enforcement all the three acts are issued or refused issuance. The writ for immediate enforcement is regarded as an analogue of the admission of preliminary enforcement of a first-instance court decision that has not taken effect in an adversary procedure (Art. 242 of the CCP). Regarded strictly, this practice corresponds to Arts. 419(2) and 418(1) of the CCP. If the legislator has had such a will, in my opinion, he has allowed unduly procedural profligacy of piling three acts. In my opinion, a writ for admission of immediate enforcement is equivalent to the writ for issuance of a writ of execution simultaneously with the order under Art. 418 of the CCP. The hypothesis of Art. 418 of the CCP is analogous not to Art. 242 of the CCP, but to the foreseen executablity of the sentencing decision of the intermediate appellative court (Art. 404, item '1' of the CCP) that has not taken effect, where the enforcement effect occurs with rendering a decision, without the explicit act for admission of preliminary enforcement, as it is in the hypothesis of Art. 242 of the CCP for a sentencing decision of the first-instance court that has not taken effect.

The statement of private appeal against the writ for immediate enforcement is lodged together with the objection against the enforcement order and may be grounded only on facts taken from the acts under Art. 417 (Art. 419(2)) of the CCP. As it is in the proceedings under Art. 418 of the CCP, the court verifies only the prerequisites under Art. 418 of the CCP, the complains in the statement of appeal against the writ which the application for immediate enforcement is upheld, can be grounded only on allegations of wrongfulness of the writ regarding the *prima facie* conformity of the document under Art. 418 of the CCP and its ascertainment of the due executable receivable. The latter should be duly individualized and executable. In the statement of appeal the debtor can also refer to violations under Art. 411 of

the CCP. The debtor cannot object that he/she has paid, compensated, that the deed from which the executable right originates is faulty because of faults in the will or when it was concluded he/she was not duly represented. If the statement of appeal contains such allegations, they should be admitted as an objection under Art. 414 of the CCP.

The matter is about two means of defence against independent functionally related acts – where the first is the grounds for issuing the second. The means of defence against the enforcement order under Art. 418 of the CPP is the objection under Art. 414 of the CCP lodged at the court that has issued the order. Its consequence is connected with the necessity of debtor's filing a positive ascertainment claim within the preclusive term under Art. 415 of the CCP. That has not a consequence for suspending the enforcement. The creditor's failure to meet the deadline under Art. 415 of the CCP is grounds for invalidation of the enforcement order and of the writ of execution issued on its grounds. The statement of private appeal is against the writ for immediate enforcement and is lodged with the district court (Art. 279 of the CCP in connection with Art. 274(1), item '2' of the CCP). The text of the law reveals that the debtor must use both means of defence simultaneously and that he/she cannot appeal the writ for immediate enforcement without lodging an objection against the enforcement order meanwhile. The legislator has found it irrelevant to appeal the writ for immediate enforcement, if its existence or executability is not contested, as well as that such a procedural behaviour of the debtor would be in conflict with the requirement for conducting the proceedings in good faith (Art. 3 of the CCP). In order to exclude any possibilities for bad faith, the legislator has also foreseen practically in Art. 419(2) of the CCP, that filing the objection under Art. 414 of the CCP is a procedural prerequisite for admissibility of the statement of appeal under Art. 419(2) of the CCP. That is why it is a right court practice to assume that the statement which means contesting the receivable, although contained in the appeal under Art. 419(2) of the CCP, should be considered as an objection under Art. 414 of the CCP.

The writ of the court conducting the order for payment proceedings with which the appeal for immediate enforcement is upheld, is subject to appeal before the intermediate appellative court according to the procedure foreseen in Art. 419 of the CCP (Ruling No 743 of

13 October 2010 on a com.c. No 617/2010, I-Com. Ch. of the SCC). It is assumed in the consistent practice of the Commercial College of the SCC that the ruling of the intermediate appellative court with which the appeal under Art. 419(1) of the CCP is disallowed is not subject to appeal before the SCC. The arguments are the following: According to the SCC the intermediate appellate decision does not determine a dispute on the merits in independent proceedings in the sense of Art. 274(2), item'2' of the CCP. That decision does not bar the further progress of the case in the sense of Art. 274(3), item'1' of the CCP. The debtor has the only possibility to defend himself/herself in the adversary proceedings under Art. 422 of the CCP, evoked by his/her filing an objection under Art. 414 of the CCP and by his/her request for suspension of the enforcement proceedings under Art. 420 of the CCP. After a successful defence in the adversary proceedings he/she can achieve disallowance of the claim with a decision that has taken effect, which is grounds for invalidation of the enforcement order and of the writ of execution. By the suspension under Art. 420 of the CCP he/she can avoid the enforcement. It is also assumed that only the writ, the ruling, respectively, of the intermediate appellate court with which the appeal is not admitted is subject to appeal before the SCC. The appeal is on the grounds of Art. 274(1), item'1' of the CCP. Where the writ for immediate enforcement is reversed, the intermediate appellate court will also invalidate the writ of execution already issued. In the last year it has been assumed in the consistent practice of the Commercial College of the SCC that this ruling of the intermediate appellative court is not subject to appeal before the SCC. (Ruling No 422 of 18 June 2010 on a com.c. No 406/2010, II-Com. Ch. of the SCC; Ruling No 721 of 22 October 2010 on a com.c. No 689/2010, II-Com. Ch. of the SCC; Ruling No 872 of 9 December 2010 on a com.c. No 944/2010, II-Com. Ch. of the SCC; Ruling No 18 of 10 January 2011 on a com.c. No 130/2010, II-Com. Ch. of the SCC; Ruling No 872 of 9 December 2010 on a com.c. No 944/2010, II-Com. Ch. of the SCC; Ruling No 887 of 14 December 2010 on a com.c. No 910/2010, II-Com. Ch. of the SCC; Ruling No 17 of 12 January 2011 on a com.c. No 695/2010, I-Com. Ch. of the SCC; Ruling No 21 of 12 January 2011 on a com.c. No 684/2010, I-Com. Ch. of the SCC). The main point here is that this ruling does not provide a decision on the merits in independent proceedings in the sense of Art. 274(3), item'2' of the CCP, since in the case the claimant will defend himself/herself by the claim under Art.

415 of the CCP. Moreover, for the reason that filing an objection under Art. 419(1) of the CCP the debtor has set a claim obligatory.

In my opinion, in the objection under Art. 419(1) of the CCP the defence is sought in independent order for payment proceedings. That is why there are independent proceedings in the sense of Art. 274(3), item'2' of the CCP in the hypothesis discussed. Their functional relation to enforcement and adversary proceedings does not rescind this characteristic feature of theirs. The proceedings under Art. 418 of the CCP are conducted especially to have a writ of execution as a result of enforcement grounds created in these particular proceedings (*see* Art. 410(2) of the CCP).

The objection under Art. 414 of the CCP does not suspend the enforcement but in the cases of Art. 417, item '9' of the CCP (arg. Art. 420 of the CCP). The appeal of the writ of immediate enforcement does not suspend the enforcement (Art. 419(3) of the CCP). The matter concerns whether the court with which the appeal was filed can suspend the court practice enforcement on the grounds of Art. 438 of the CCP. When answering the question one should have in mind Art. 420 of the CCP which is an especial article regarding Art. 438 of the CCP and sets other prerequisites for suspending the enforcement. It is suspended obligatory, only if the debtor furnishes duly the security under Arts. 180 and 181 of the OCA, which means practically to furnish a pledge against the sum claimed against him/her. When convincing evidence is presented, the court is not obliged but it can suspend the enforcement. The especial rule of Art. 420 of the CCP is connected with a special competence – the court that issued the order. When solving the set problem one should take into account the fact that the contestation under Art. 414 of the CCP (Art. 419(2) of the CCP) must be made when an objection under Art. 419 of the CCP has been filed. If a parallel application of Arts. 438 and 420 of the CCP is admitted, then a double competence will be admitted. Hence, one of the courts might refuse suspending, while the other might render the enforcement, etc. Besides, as seen from Art. 419(2) of the CCP, when appealing under Art. 419(1) of the CCP the debtor can present convincing written evidence supporting the contestation of the receivable (Art. 420(2) of the CCP), because his/her statement of appeal can be grounded only on complains limited

within the range of the verification under Art. 418(2) of the CCP mentioned above. On the basis of the said already, I find that the intermediate appellative court which considers the appeal under Art. 419 of the CCP cannot suspend the enforcement according to the procedure of Art. 438 of the CCP. That should be done by the court dealing with the order of payment proceedings when the prerequisites of Art. 420(1) and (2) of the CCP exist (*see also* Ruling No 700 of 19 December 2009 on a com.c. No 713/2009, II-Com. Ch. of the SCC).

XVI. In the cases under Art. 419 of the CCP the debtor is serviced with the order after the order for payment proceedings have been instituted against him/her. He/she is serviced with the order by the executive magistrate. Art. 420 of the CCP foresees especial grounds for suspending the order for payment proceedings, when they are on a writ of execution issued on the grounds of an enforcement order under Art. 418 of the CCP. The grounds for suspending are not enumerated limitatively in Art. 432 of the CCP. There is a possibility foreseen explicitly in Art. 432, item '5' of the CCP that other cases different from those in Art. 432 of the CCP can be foreseen in the law (Ruling No 454 of 29 December 2008 on a c.c. No 2260/2008, III-C. Ch. of the SCC; Ruling No 38 of 14 January 2010 on a com.c. No 543/2009, IV-Com. Ch. of the SCC).

The objection against the enforcement order does not suspend the enforcement in the cases of Art. 417, items '1' to '8' of the CCP, but:

1. When the debtor has furnished duly the security for the debtor following the procedure of Arts. 180 and 181 of the OCA.

The debtor will use the defence under Art. 417(1) of the CCP, in connection with Arts. 180 and 181 of the OCA, when he/she does not possess convincing written evidence. Thus he/she can evoke suspending the enforcement by furnishing a duly security, so that the claimant is satisfied. The security has another function despite of furnishing satisfaction of the claimant. That is an indication of the objection's seriousness and of the destabilization the evidential effect of the document under Art. 417 of the CCP used as grounds.

According to Art. 420(1) of the CCP the security is furnished following the procedure of Arts. 180 and 181 of the OCA. It should be due, i.e. it should cover the entire receivable plus the interests, and create a doubtless right of preferable satisfaction for the claimant. When the receivable is furnished by one of several debtors, the enforcement is suspended only against him/her (Art. 421(1) of the CCP). When the security does not cover fully the receivable, the suspending is limited to the amount of the security (Art. 421(2) of the CCP). When a receivable secured by a pledge or mortgage is contested, a security should be also furnished under Art. 420 of the CCP in order to suspend the enforcement (Ruling No 453 of 25 June 2010 on com. c. No 478/2010, II - Com. Ch. of the SCC). Otherwise the enforcement suspending would be only on the grounds of a mere contest. The pledge under Arts. 180 and 181 of the OCA makes the creditor privileged regarding the pledged sum which he/she could receive. The pledge is a certain indication that the contest of the receivable is serious. Besides, the security is such, so that it guarantees the rights of the creditor. Therefore it is worth sharing the court practice wherein it is assumed that suspending the enforcement proceedings on the grounds of a security under Arts. 180 and 181 of the OCA furnished duly in favour of the claimant is not bound to a term (Ruling No 454 of 29 December 2008 on a c.c. No 2260/2008, III-C. Ch. of the SCC). However, in those cases the objection under Art. 414 of the CCP should be lodged in the foreseen term. The debtor is the defendant in the adversary proceedings on the positive ascertainment claim of the creditor under Art. 415 of the CCP. Therefore in case of a duly furnished security the court conducting the order of payment proceedings can render suspending of the enforcement proceedings on the grounds of Art. 420(1) of the CCP, in connection with Arts. 180 and 181 of the OCA, while the adversary proceedings under Art. 415 of the CCP are pending.

The text of Art. 420(1) of the CCP in connection with the security under Art. 180 of the OCA is analogous to Art. 250 of the CCP, repealed. It used to foresee a possibility for suspending the enforcement proceedings when the writ of execution was issued on out-of-court grounds. Then the objection had to be supported by convincing written evidence, proving that the

adjudged amount is not due, or within the same term a due security had to be furnished to the creditor in accordance with the procedure under Arts. 180 and 181 of the OCA.

Now the legislator has clearly and explicitly demonstrated his will that suspension of the enforcement proceedings is obligatory in the case of a furnished due security under Arts. 180 and 181 of the OCA. The matter concerns an imperatively set condition for suspending. When it exists the court must suspend the enforcement. The court has to judge on the appropriateness of the security under Arts. 180 and 181 of the OCA.

I do not share the concept supported in some court decisions (Ruling No 454 of 29 December 2008 on a c.c. No 2260/2008, III-C. Ch. of the SCC) that in the case of Art. 420(1) of the CCP in connection Art. 417, items '1'-'8' of the CPP, the furnished due security according to the procedure under Arts. 180 and 181 of the OCA deals with suspending a right. I do not embrace the idea of suspending the enforcement proceedings by law. The enforcement procedure as a kind of civil procedure is a chain of procedural actions. Neither its terminating nor its suspending can occur automatically by law, with the occurrence of the respective fact. A particular act is necessary for its suspending. In the case of Art. 420(1) of the CCP, in connection Art. 417, items '1'-'8' of the CPP, the suspending should be rendered by the court that has issued the order for immediate enforcement because: a) the order for payment proceedings are before that court; b) the objection under Art. 414 of the CCP is lodged with that court; c) the legislator has qualified the security as a security before a court. The fact that the court is not entitled to make a judgement, as it is under Art. 420(2) of the CCP, does not mean that suspending comes as a rule. That means in the case of Art. 420(1) of the CCP, in connection with Arts. 180 and 181 of the OCA, the legislator has established imperatively grounds for suspending the enforcement proceedings which the court must suspend, if the debtor has furnished a due security under Arts. 180 and 181 of the OCA.

2. When a request for suspending the enforcement supported by convincing written evidence is filed within the term for objection, the court that has rendered an order for immediate enforcement can suspend it (Art. 420 of the CCP).

An objection under Art. 414 of the CCP should be also lodged. The request for suspending the enforcement should be grounded on objections supported by convincing written evidence that the enforcement right does not exist. As the execution has started by a writ of execution on the grounds of an order for immediate enforcement that has not taken effect, the enforcement right is not established by *res judicata* effect. That is why the debtor can contest the enforcement right by any objections that he/she could oppose to a sentencing claim of the claimant which has turned pointless due to out-of-court grounds. The evidential effect of the document on which grounds the order for immediate enforcement has been issued can be destabilized only by convincing written evidence which can justify the suspending. The court judges whether the presented evidence is convincing, so that it proves the nonexistence of the receivable. The court is not obliged to suspend the enforcement. The practice raises the question whether it is possible to instruct the debtor to furnish a due security, if the court does not find the evidence convincing enough as it used to be under Art. 250 of the CCP, repealed. Nowadays the instruction on this possibility is in item '5' of Standard Form No 5 for an order for immediate enforcement and in Standard Form No 6.

The court that has issued the order for immediate enforcement is competent to render suspending of the enforcement under Art. 420(2) of the CCP. Within the term for objection the debtor should file with that court an application for suspending the enforcement. The legislator has demonstrated his explicit will on the matter the in Art. 420(2) of the CCP. The term is preclusive. It cannot be extended. However, after the deadline the debtor can request the court to suspend the enforcement under Art. 420(1) of the CCP by furnishing a due security under Arts. 180 and 181 of the OCA.

3. As seen from the wording of Art. 420(1) of the CCP there is an exception from the rules for suspending the enforcement under Art. 420 of the CCP. It deals with the hypothesis of Art. 417, item '9' of the CCP when the order for immediate enforcement is on the grounds of a promissory note. Then an objection filed under Art. 414 of the CCP is enough.

In such cases Prof. Stalev assumed that the matter concerns suspending, termination, respectively, of the enforcement proceedings by virtue of law. He assumed also that in those

cases the act for suspending the proceedings only ascertains and announces the suspending which occurred by virtue of law. Under the CCP, repealed, there used to be explicitly provided acts for termination, suspending, respectively, of the enforcement proceedings. On the grounds of that statement some regional and intermediate appellative courts find it unnecessary, even inadmissible, to issue an explicit act. This practice omits something, which Prof. Stalev used to point at in connection with the suspending, termination, respectively, of the enforcement proceedings by virtue of law. Namely, that the act only ascertains the suspending, termination, respectively, of the enforcement proceedings, but the court should pronounce with an explicit ruling and announce the suspending occurring by virtue of law (Ruling No 188 of 5 March 2010 on a com.c. No 50/2010, II-Com. Ch. of the SCC; Ruling No 27 of 18 January 2010 on a com.c. No 486/2009, II-Com. Ch. of the SCC; Ruling No 454 of 29 December 2008 on a c.c. No 2260/2008, III-C. Ch. of the SCC; Ruling No 518 of 14 September 2009 on a com.c. No 107/2009, II-Com. Ch. of the SCC; Ruling No 415 of 15 July 2009 on a com.c. No 357/2009, I-Com. Ch. of the SCC; Ruling No 72 of 1 February 2010 on a com.c. No 797/2009, II-Com. Ch. of the SCC). The hypothesis is supported by the following: The suspending of the enforcement proceedings in the hypothesis of Art. 420(1) of the CCP in connection with Art. 417, item '9' of the CCP is by virtue of law and arises with the fact of filing an objection under Art. 414 of the CCP. Regardless of the fact that the suspending of the enforcement proceedings occurs by virtue of law with filing an objection within the due term, the debtor cannot prove that before the executive magistrate without an act of the court. Therefore there should be a ruling with which the suspending of the enforcement proceedings is pronounced, where the judgement is exhausted solely by the ascertainment of the objection filed within the due term. Without such an act the executive magistrate should obey the writ of execution issued by the court. In order to suspend the enforcement effect of the writ of execution issued by the court, the debtor cannot prove the realization of the respective grounds. He/she should present the act of the court which pronounces the suspending. There is not a term to request such a ruling. It can be requested and granted at any time. Some of the rulings quoted show that the obligation of the court to render an explicit ruling is grounded on considerations for fairness and procedural economy. It is reasonable in those cases with the possibility to issue a legal act to make it clear and specify

explicitly that enforcement is impossible on the grounds of the enforcement order, instead of instituting erroneously enforcement proceedings and reversal of the actions of the executive magistrate because the grounds for suspending the enforcement proceedings exist (Ruling No 415 of 15 July 2009 on a com.c. No 357/2009, I-Com. Ch. of the SCC).

In my opinion, in the hypothesis of Art. 420(1) of the CCP in connection with Art. 417, item '9' of the CCP the court should doubtlessly render an explicit ruling for suspending the enforcement proceedings. It is so not because a suspending by virtue of law exists, and not because to ascertain the occurrence of a suspending by virtue of law, but because there is a formulated imperative rule in the writ of Art. 420(1) of the CCP. In the hypothesis of Art. 417, item '9' of the CCP the enforcement proceedings should be suspended, if an objection under Art. 414 of the CCP has been filed. I do not share the thesis of suspending, terminating, respectively, by virtue of law, in the sense of automatic occurrence of a consequence by virtue of law, if the legally relevant fact has occurred. The enforcement procedure being a part of the civil procedure is a chain of procedural actions. It can be neither suspended nor terminated automatically by virtue of law, with the occurrence of the respective fact. This suspending should be rendered by an explicit act. In the case of Art. 420(1) of the CCP, in connection with Art. 417, item '9' of the CCP, the particular court that has rendered the order for immediate enforcement should render the suspending because the objection under Art. 414 of the CCP has been filed with it. The fact that the court is not entitled to make judgements, as it is under Art. 420(2) of the CCP, that does not mean the suspending occurs by rule. Because the objection is filed with the court that has issued the enforcement order, it is the authority entitled to issue an explicit act for suspending the enforcement. The court should do this right away, if there is an objection filed under Art. 420(2) of the CCP in the hypothesis of Art. 417, item '9' of the CCP. These powers of the court do not rescind the right of the debtor who has filed an objection under Art. 414 of the CCP with a request for suspending the enforcement.

XVII. Appeal. According to Art. 420(3) of the CCP the ruling on the request for suspending the enforcement is appealable by a private appeal.

There is a debate in court practice whether the ruling of the intermediate appellative court against the ruling of the regional court under Art. 420 of the CCP is subject to cassation appeal. Most of the panels at the SCC do not consider this ruling to be subject to cassation appeal (Ruling No 552 of 12 July 2010 on a com.c. No 599/2009, II-Com. Ch. of the SCC; Ruling No 614 of 9 November 2009 on a com.c. No 589/2009, I-Com. Ch. of the SCC; Ruling No 372 of 27 May 2010 on a com.c. No 378/2010, II-Com. Ch. of the SCC; Ruling No 509 of 9 October 2009 on a com.c. No 448/2009, I-Com. Ch. of the SCC; Ruling No 652 of 18 November 2009 on a com.c. No 543/2009, I-Com. Ch. of the SCC; Ruling No 395 of 18 May 2010 on a com.c. No 295/2010, I-Com. Ch. of the SCC; Ruling No 394 of 18 May 2010 on a com.c. No 363/2010, I-Com. Ch. of the SCC; Ruling No 478 of 17 June 2010 on a com.c. No 442/2010, I-Com. Ch. of the SCC; Ruling No 747 of 23 December 2009 on a com.c. No 635/2009, I-Com. Ch. of the SCC; Ruling No 515 of 24 June 2010 on a com.c. No 418/2010, I-Com. Ch. of the SCC; Ruling No 71 of 19 January 2010 on a com.c. No 767/2009, I-Com. Ch. of the SCC; Ruling No 464 of 16 June 2010 on a com.c. No 374/2010, I-Com. Ch. of the SCC; Ruling No 340 of 26 April 2010 on a com.c. No 261/2010, I-Com. Ch. of the SCC; Ruling No 163 of 9 February 2010 on a com.c. No 9/2010, I-Com. Ch. of the SCC; Ruling No 654 of 19 November 2009 on a com.c. No 700/2009, I-Com. Ch. of the SCC; Ruling No 306 of 27 April 2010 on a com.c. No 257/2010, II-Com. Ch. of the SCC; Ruling No 498 of 5 July 2010 on a com.c. No 288/2010, II-Com. Ch. of the SCC). Since 2010 this assumption has been featured as established in the Commercial College of the SCC. In general the considerations are the following: A substantive law dispute is not determined by the ruling under Art. 420 of the CCP. The ruling has not a barring effect upon the progress of the proceedings in order to be admissible for cassation appeal on the grounds of Art. 274(3), item '1' of the CCP. Pronouncing on the debtor's request for suspending the enforcement, the court renders a court act with a temporary effect that is bound to the further defence of the parties on the realization of the receivable subject of the enforcement order issued under Art. 410 of the CCP, under Art. 417 of the CCP, respectively, in the course of the order for payment proceedings. Due to the fact that the ruling under Art. 420(2) of the CCP is relative to the executability of the receivable and does not determine a substantive law dispute on its existence, the appeallability of the said ruling cannot be derived from the regulation of Art.

274(3), item '1' of the CCP. The inadmissibility of the cassation appeal against the ruling under Art. 420 of the CCP is justified by the solution given in item '6' of ID No. 1-2001-GMCC of the SCC in connection with the appeallability of the rulings under Art. 250 of the CCP, repealed. It is assumed that this solution is still valid under the CCP, current, because the legal regulation for suspending the enforcement according to the procedure of Art. 420 of the CCP is analogous to the one under Art. 250 of the CCP, repealed, while according to item '6' of ID No. 1-2001-GMCC of the SCC, instance control on the lawfulness of the ruling for suspending the enforcement is exhausted by the pronouncing of the intermediate appellative court.

This practice is in conflict with Art. 274(3), item '2' of the CCP, current. It is determined by the effort to preserve the effect of the ID on the cassation appeal rendered at the time of the CCP, repealed, despite of the existence of a new CCP and explicit and definitive solutions in it. Under the CCP, current, item '6' of ID No. 1-2001-GMCC of the SCC is ineffective. The legislator's will is demonstrated explicitly, clearly and definitely in Art. 274(3), item '2' of the CCP and aims particularly at inflicting a new court practice on the subject. Each act rendered in certain proceedings for defending a certain legal interest is subject to cassation appeal. The functional relation with the other proceedings does not alter their character. The adversary proceedings are also related functionally to the executive proceedings but that does lead to losing their character of independent proceedings. The sentencing claims are the most often ones. They aim not only at determining the legal dispute, but also at achieving a sentencing decision, in order to obtain defence in the executive proceedings. The proceedings under Art. 420 of the CCP for suspending the execution develop in a functional relation with the order for payment proceedings and the enforcement ones. The aim is to suspend the executive proceedings, so that the enforcement would not result into unjust enrichment because the order for immediate enforcement does not ascertain the claimed receivable, as well as because the debtor has contested it. These proceedings aim at the defence of a particular legal interest, namely to prevent unlawful substantive law enforcement, despite of the non-existence of a receivable. This interest is of a significant importance because the executive magistrate, if obeying the writ of execution, is entitled to sell a property and satisfy a non-existent receivable.

There is another reason for the inapplicability of item '6' of ID No. 1-2001-GMCC of the SCC in the hypothesis of Art. 420 of the CCP. It is true that the defence under Art. 420 of the CCP is analogous to the one under Art. 250 of the CCP, repealed. But it is not identical to it. At the time of the CCP, repealed, if the request for suspending the executive proceedings was disallowed, the debtor could file a claim under Art. 254 of the CCP, repealed. Being a claimant in the adversary procedure he/she could request security for his/her negative ascertainment claim by suspending the enforcement of the receivable he/she had contested. Nowadays the debtor has not a possibility to file a negative ascertainment claim. He/she is a debtor in the proceedings on the positive ascertainment claim under Art. 415 of the CCP, hence, he/she cannot request a security. Therefore he/she can undergo enforcement, although the claim under Art. 415 of the CCP might be disallowed by a decision that has taken effect. Therefore it is worth sharing the practice of SCC panels which assumes that the ruling under Art. 420 of the CCP is subject to cassation appeal on the grounds of Art. 274(3), item '2' of the CCP, provided the grounds for admitting a cassation appeal under Art. 280 of the CCP exist (Ruling No 453 of 25 June 2010 on com. c. No 478/2010, II - Com. Ch. of the SCC; Ruling No 329 of 28 May 2009 on com. c. No 334/2009, II - Com. Ch. of the SCC; Ruling № 292 of 13 May 2010 on com. c. № 67/2010, IV-Com. Ch. of the SSC; Ruling № 236 of 11 May 2010 on com. c. № 238/2010, III-Com. Ch. of the SSC; Ruling No 467 of 30 June 2010 on com. c. No 834/2010 II-Com. Ch. of the SCC; Ruling No 518 of 14 September 2009 on a com.c. No 107/2009, II-Com. Ch. of the SCC; Ruling No 188 of 5 March 2010 on a com.c. No 50/2010, II-Com. Ch. of the SCC; Ruling No 27 of 18 January 2010 on a com.c. No 486/2009, II-Com. Ch. of the SCC; Ruling No 454 of 29 December 2008 on a c.c. No 2260/2008, III-C. Ch. of the SCC; Ruling No 415 of 15 June 2009 on com. c. No 375/2009, I - Com. Ch. of the SCC).

If the debtor fails to submit a reply to the statement of claim within the due term and does not object the facts presented in it, in the proceedings on the claim under Art. 422 of the CCP, in connection with Art. 415 of the CCP, he/she suffers the consequences under Art. 133 of the CCP, in connection with Art. 146(3) of the CCP (Decision No 45 of 8 July 2009 on app.c.c. 42/2009 of the Gabrovo DC).

The procedure for considering the dispute is determined according to the creditor's receivable. It is possible the especial character of the receivable to determine the application of the special rules for commercial disputes or those for fast court proceedings.

It used to be assumed regarding Art. 415(2) of the CCP that for preserving the effect of the enforcement order it was enough only to file a statement of claim for ascertaining the receivable within the due term under Art. 415(1) of the CCP (Ruling No 247 of 18 May 2009 on a com.c. No 166/2009, IV-Com. Ch. of the SCC; Ruling No 691 of 13 November 2009 on a com.c. No 636/2009, II-Com. Ch. of the SCC). However, the established practice nowadays is that under Art. 415 of the CCP the applicant should not only have filed the claim, but he/she should have also presented evidence on the pretence (Ruling No 124 of 27 January 2010 on a com.c. No 20/2010, I-Com. Ch. of the SCC; Ruling No 360 of 19 May 2010 on a com.c. No 282/2010, II-Com. Ch. of the SCC; Ruling No 490 of 21 June 2010 on a com.c. No 254/2010, I-Com. Ch. of the SCC; Ruling No 456 of 25 June 2010 on a com.c. No 311/2010, II-Com. Ch. of the SCC; Ruling No 494 of 2 July 2010 on a com.c. No 403/2010, II-Com. Ch. of the SCC; Ruling No 687 of 11 November 2010 on a com.c. No 623/2010, II-Com. Ch. of the SCC; Ruling No 724 of 25 October 2010 on a com.c. No 640/2010, II-Com. Ch. of the SCC). Proving the fact that a positive ascertainment claim has been filed and meeting the deadline is a burden for the applicant. In the sense of Art. 415(2) of the CCP the applicant should not only inform the respective court conducting the order for payment proceedings that the ascertainment claim has been legally lodged, but he/she should also present a copy of the statement of claim with the data about its filing with the office or to present a certificate issued by the court whereat the adversary proceedings under Art. 415 of the CCP have been instituted. Lodging the claim with the preclusive term foreseen by the legislator is not enough to admit that the requirements under Art. 415(2) of the CCP have been met. The court is not obliged to verify *ex officio* whether the claim under Art. 414 of the CCP has been lodged. When the term under Art. 415 of the CCP expires and no evidence is presented before the court, the court conducting the order for payment proceedings should invalidate the enforcement order. If after the expiry of the term under Art. 415 of the CCP, the applicant presents evidence that he/she has lodged the claim,

the enforcement order should be invalidated, although the claim under Art. 415 of the CCP has been lodged within the term under Art. 415(1) of the CCP. The reason is in the impossibility54 to renew his/her right for preserving the effect of the enforcement order which has been already precluded. However, in my opinion, the debtor should acknowledge the legal interest of amending the claim under the conditions of Art. 212 of the CCP from ascertainment into a sentencing claim. It is due to the understanding of the SSC on the invalidation of the enforcement order also in the case when the claim is lodged within the term under Art. 415(1) of the CCP but the evidence for doing so has been presented before the court conducting the order for payment proceedings after the expiry of the said term. Moreover, in such a situation it should be also assumed that the consequences of Art. 422(1) of the CCP will be preserved, i.e. the sentencing claim should be also considered as lodged since the moment the application for issuing a writ of execution is filed. Otherwise it will be an extremely severe and unjustified sanction for the creditor who failed to submit on time the evidence on having lodged his/her claim within the due term. The rule of Art. 422(1) of the CCP is of great importance for suspending and terminating the acquittal limitation.

If the claim has not been lodged, the court applies the consequences of Art. 422(1) of the CCP, regardless of the proceedings stage (Ruling No 200 of 12 April 2010 on a com.c. No 148/2010, III-Com. Ch. of the SCC). The same is valid when the evidence for lodging the claim has not been presented before the court dealing with the order for payment proceedings within the term under Art. 415(1) of the CCP (*see* the court practice quoted above).

1. The claim under Art. 415 of the CCP in connection with Art. 422(1) of the CCP is a positive ascertainment claim. It is obvious from the title of Art. 422 of the CCP 'Claim for Ascertainment of the Recievable'. The aim is to ascertain by *res judicata* effect against the opposing party the existence of the receivable subject of the enforcement order issued. In the hypotheses of Art. 417 of the CCP the ascertainment character of the claim is determined by the fact that applicant in the order for payment proceedings, the claimant under Art. 422 of the CCP, respectively, has a writ of execution for his/her receivable issued against the debtor. It depends on the outcome of the adversary proceedings whether the writ of execution will be

suspended or the claimant will collect his/her money under the said writ. The sentencing claim is inadmissible because then the claimant will have simultaneously two writs of execution for one and the same receivable which is admissible. In the hypothesis of Art. 410 of the CCP the legislator's concept on the ascertainment character of the claim under Art. 415 of the CCP in connection with Art. 422(1) of the CCP is clearly demonstrated by Art. 410 of the CCP (am. SG No.46/2009), wherein it is provided that when the decision on ascertainment of the receivable takes effect, the enforcement order takes effect as well. On its grounds the court issues the writ of execution and makes a note on it, i.e. the enforcement order is the source of enforcement effect. In those cases the very law determines the character of the adversary defence (on the ascertainment character of the claim under Art. 415(1) of the CCP in connection with Art. 422(1) of the CCP *see* Decision No 102 of 9 July 2010 on com. c. No 767/2010, I – Com.Ch. of the SCC; Ruling No 377 of 15 June 2009 on com. c. No 191/2009, II - Com. Ch. of the SCC; Ruling No 324 of 8 June 2009 on com. c. No 160/2009, I - Com. Ch. of the SCC; Ruling No 340 of 2 June 2009 on com. c. No 276/2009, II - Com. Ch. of the SCC; Ruling No 200 of 12 April 2010 on a com.c. No 148/2010, III-Com. Ch. of the SCC; Ruling No 152 of 3 February 2010 on a com.c. No 2/2010, I-Com. Ch. of the SCC; Ruling No 143 of 5 May 2009, II-Com. Ch. of the SCC).

The regulation of Art. 422(1) of the CCP is a special procedural norm related to the order for payment proceedings, which provides the creditor with the right to lodge an ascertainment claim on the existence of the receivable. The creditor should not give grounds for the legal interest since this claim is a means of defence for a receivable recognized in the order for payment proceedings and its prerequisites for its lodging are established by a norm. It is pointless to prove the interest of the ascertainment claim when the matter goes about the ascertainment claims foreseen by the law. The legal interest arises from the objection under Art. 414 of the CCP and there is no need to prove separately the legal interest. The regulation of Art. 422(1) of the CCP is general. It concerns both types of order for payment proceedings (*see* on the legal interest in lodging the claim under Art. 415(1) of the CCP in connection with Art. 422 of the CCP (Ruling No 271 of 7 May 2009 on a com.c. No 308/2009, II-Com. Ch. of the SCC; Ruling No 290 of 1 April 2010 on a com.c. No 244/2010, I-Com. Ch. of the SCC; Ruling No 258 of

18 March 2010 on a com.c. No 68/2010, I-Com. Ch. of the SCC; Ruling No 377 of 15 June 2009 on com. c. No 191/2009, II - Com. Ch. of the SCC; Ruling No 383 of 15 June 2009 on com. c. No 150/2009, II - Com. Ch. of the SCC ; Ruling No 359 of 17 June 2009 on com. c. No 228/2009, I - Com. Ch. of the SCC).

2. The claim for ascertainment of the receivable is considered lodged since the moment of filing the application for issuance of enforcement order within the term under Art. 415(1) of the CCP (Art. 422(1) of the CCP).[1] The limitation is also considered suspended since the moment of filing the application for issuance of enforcement order (arg. Art. 116, item 'b' of the OCA in connection with Art. 422(1) of the CCP; Ruling No 390 of 22 June 2010 on com. c. No 70/2010, II - Com. Ch. of the SCC), as well the suspension of the limitation with pending proceedings (arg. Art. 116, item 'b' of the OCA in connection with Art. 422(1) of the CCP).

3. If the claim is disallowed by a decision that has taken effect, the execution is terminated (Art. 422(3) of the CCP). Under the argument of Arts. 415(2) and 416 of the CCP the enforcement order should be invalidated, in the hypothesises of both Art. 410 of the CCP and of Art. 417 of the CCP. Since there is a writ of execution issued in the second hypothesis, under the argument of Art. 415(2) of the CCP the writ of execution should be also invalidated. Moreover, the court that has rendered the decision should issue a writ of execution for the debtor against the claimant for return of the sums of money and chattels, received on the grounds of the preliminary execution of the reversed decision (Art. 423(3) of the CCP in connection with Art. 245(3), sentence II of the CCP; Ruling No 359 of 17 June 2009 on com. c. No 228/2009, I - Com. Ch. of the SCC; Ruling No 450 of 24 July 2009 on com. c. No 203/2009, I - Com. Ch. of the SCC). The counter writ of execution should be issued by the court that rendered the decision which has taken effect. The grounds for its issuance are the decision for disallowance of the claim that has taken effect and a certificate of the executive magistrate that the sum was paid, the chattels were delivered to the claimant, respectively.

1. It is provided in Art. 422(2) of the CCP that lodging a claim under Art. 422(1) of the CCP does not suspend immediately the enforcement, but in the ceases under Art. 420 of the

CCP. However, the claim under Art. 422(1) of the CCP is a positive ascertainment claim of the creditor for ascertainment of his/her receivable. The creditor has no interest in suspending the enforcement. So, the matter is not about suspending the enforcement. The case under Art. 420 of the CCP is of a debtor's request for suspending the enforcement in connection with the objection under Art. 420 of the CCP. It is a separate request addressed to the court which pronounces on it with an independent act that does not result from the lodged claim under Art. 422(1) of the CCP, in connection with Art. 415 of the CCP. In that case the defence is realized by the means not of a claim but of an objection under Art. 414 of the CCP and by a request for suspending the enforcement proceedings under Art. 420 of the CCP. Nowadays there is not a regulation for a claim of the debtor analogous to Art. 254 of the CCP, repealed, if his/her objection is not upheld, or he/she failed to lodge an objection. Presently the debtor's defence by a claim is in Art. 424 of the CCP but it is not in connection with the creditor's claim under Art. 422(1) of the CCP, in connection with Art. 415 of the CCP.

XVIII. As said already (*see* para. V) the enforcement order is not a subject to appeal (Art. 413(1) of the CCP). That is valid for both types of order for payment proceedings. That is also valid in the cases when the court has committed significant procedural breaches when rendering the enforcement order.

Instead the legislator has allowed defence before the intermediate appellative court by a written objection in the hypotheses thoroughly listed in Art. 423 of the CCP (Amended - SG no.50/2008, in effect since 1 March 2008). Prior to the amendment this defence was called 'reversal before the intermediate appellative court'.). The matter is about circumstances that prevented debtor's filing an objection under Art. 414 of the CCP. The text is very similar to Art. 20 of Regulation (EC) 1896/2006 (which in Bulgarian is called 'Review in Exceptional Cases') and is most probably borrowed from the said Regulation. The matter is about exceptional proceedings which are very close both to Art. 20 of Regulation (EC) 1896/2006 and to the reversal under Art. 303(1), item '5' of the CCP (Ruling No 313 of 3 June 2009 on com. c. No

313/2009, I - Com. Ch. of the SCC; Ruling No 596 of 5 November 2009 on com. c. No 645/2009, I - Com. Ch. of the SCC; Ruling No 119 of 17 September 2010 on com. c. No 102/2010, I - Com. Ch. of the SCC). The proceedings before the intermediate appellate court are analogous to those on the reversal of court decisions that have taken effect. Their aim is to replace the reversal and even used to be called 'reversal before the intermediate appellative court' prior to the 2008 amendment of Art. 423 of the CCP (SG no.50 of 30 May 2008). By the date the CCP, current, took effect on 1 March 2008 the legislator assigned an opposite effect to that amendment. The intermediate appellative court which under the rules of the functional competence is the district court, does not act to the rules of the intermediate appellative proceedings. The court verifies only the existence of the grounds foreseen in Art. 423(1) of the CCP.

According to Art. 423(1) of the CCP the debtor who was deprived of contesting the receivable is entitled an objection to the intermediate appellative court, when:

1. He/she has not been duly serviced with the enforcement order (item '1'). The matter concerns a significant procedural breach committed by the court in the cases under Art. 410 of the CCP, and such committed by the executive magistrate in the cases under Art. 418 of the CCP. The procedure for servicing the enforcement order is according to the general rules for servicing papers and summonses (Part One, Chapter Six of the CCP). The grounds are analogous to the hypothesis under Art. 303(1), item '5', sentence I, of the CCP.

2. The debtor has not been serviced with the enforcement order in person and on the day of the servicing the said debtor did not have a habitual residence within the territory of the Republic of Bulgaria (item '2'). The text is borrowed from Art. 20 of Regulation (EC) 1896/2006 and up to now has not been known in Bulgarian Procedural Law. The prerequisites under Art. 423(1), item '2' of the CCP are comulatively presented. The matter in the case does not deal with a procedural breach committed by the court. The enforcement order has been duly serviced but not to the debtor in person. According to the rules of servicing papers they may be serviced in person. Servicing in person may be also considered when the servicing is to a due procedural representative or a legal addressee who is entitled to receive legal papers (Since the

debtor becomes a party to the order for payment proceedings, regardless of and even against his/her will, it is hardly probable that he/she will have a due procedural representative or a legal addressee for the said proceedings.). The papers are not serviced in person when they are serviced to a person under Art. 46 of the CCP. The notion 'habitual residence' is not defined legally in the CCP. The legal definition is in Art. 48(7) of the PILC. When the debtor has a habitual residence in a member state one should take into account the definitions under Art. 59 of Council Regulation (EC) No44/2001 concerning the notion 'habitual residence' of legal persons and those under Art. 60 of Council Regulation (EC) No44/2001 concerning the notion 'habitual residence' of legal entities. In the case of a reversal under Art. 423 of the CCP the enforcement order and the writ of execution are invalidated because the case was not under the international jurisdiction of the Bulgarian courts on a general basis (*See* Art. 4, item '1' of the PILC and Art. 6 of Council Regulation (EC) No1896/2006, in connection with Art. 3 of Council Regulation (EC) No44/2001). The rule of Art. 423(1), item '2' of the CCP, in connection with Art. 411(1), item '4' of the CCP excludes the international competence of a Bulgarian court in order for payment proceedings. That is valid both for legal persons and legal entities.

3. The debtor was unable to learn of the servicing in due time because of special unforeseen circumstances (item '3'). Those are the cases when the debtor was not serviced with the enforcement order in person (Art. 46 of the CCP). Then there is not a procedural breach committed by the court.

4. The debtor was unable to lodge the objection because of special unforeseen circumstances which he/she was unable to overcome (item '4'). Those are circumstances which are beyond the debtors command both after he/she has been serviced and received the order. As seen from the comparison between items '3' and '4' in the hypothesis of Art. 423(1), item '4' of the CCP the debtor has been serviced duly with the enforcement order and he/she has learnt about it. However, he/she was unable to lodge the objection under Art. 414 of the CCP, because of special unforeseen circumstances which he/she was unable to overcome. The hypothesis is quite close to the one in Art. 303, item '5' of the CCP.

The debtor should prove under the circumstances of entire proof when he/she learnt about the enforcement order. The matter concerns the learning about the enforcement order itself, not learning about the grounds for the objection under Art. 423 of the CCP, foreseen in Art. 423(1) of the CCP.

The preclusive term for lodging an objection under Art. 423(1) of the CCP is one month and starts on the date of learning about the enforcement order (Ruling No 349 of 27 April 2010 on a com.c. No 238/2010, I-Com. Ch. of the SCC). The private appeal under Art. 419(1) of the CCP lodged with the objection on the grounds of Art. 423(1), item '2' of the CCP as well as the request for suspending the enforcement are determined by the expiry of the preclusion term (Ruling No 349 of 27 April 2010 on a com.c. No 238/2010, I-Com. Ch. of the SCC).

The grounds under Art. 423(1) of the CCP are circumstances that prevented the debtor's lodging the objection under Art. 414 of the CCP. Therefore it is stipulated that simultaneously with the objection, the debtor may exercise his/her rights under Article 413 (1) of the CCP (when appealing the enforcement order in its part on costs) and Article 419 (1) of the CCP (when appealing the writ for immediate enforcement). It is not specified explicitly that simultaneously with the objection under Art. 423(1) of the CCP, the debtor may also exercise his/her rights under Article 414 of the CCP. The reason is in the legislator's concept that the objection under Art. 423(1) of the CCP has also the role of an objection under Art. 414 of the CCP. It is obvious from the systematic place of the texts and from the title which used to be till its 2008 amendment (SG No.50 of 30 May 2008) 'Reversal due to inability to contest' which was changed to 'Objection before the intermediate appellative court.' With the regulation under Art. 423 of the CCP the legislator provided the possibility of relevating the objection under Art. 414 of the CCP, when the term under Art. 414 of the CCP was omitted due to circumstances listed thoroughly and explicitly in Art. 431(1) of the CCP (Ruling No 313 of 3 June 2009 on com. c. No 313/2009, I - Com. Ch. of the SCC; Ruling No 596 of 5 November 2009 on com. c. No 645/2009, I - Com. Ch. of the SCC; Ruling No 119 of 17 September 2010 on com. c. No 102/2010, I - Com. Ch. of the SCC). The objection under Art. 423 of the CCP admitted to be grounded in the hypothesis of Art. 410(1) of the CCP acts as an objection under Art. 414 of the

CCP (Ruling No 724 of 18 December 2009 on com. c. No 598/2009, I - Com. Ch. of the SCC; Ruling No 723 of 18 December 2009 on com. c. No 614/2009, I - Com. Ch. of the SCC). Therefore when the prerequisites under Art. 423(1) of the CCP exist and the court admits the objection, the situation that might have been, if the debtor has lodged the objection under Art. 414 of the CCP on time, is restored (Ruling No 14 of 13 January 2010 on com. c. No 653/2009, III - Com. Ch. of the SCC).

Lodging the objection before the intermediate appellative court under Art. 423(1) of the CCP does not suspend the enforcement. Upon the request of the debtor the intermediate appellative court may suspend the enforcement under Art. 282(2) of the CCP (Art. 423(2) of the CCP).

XIX. It is stipulated in Art. 423(3) of the CCP that having found that the prerequisites under Art. 423(1) of the CCP exist, the court admits the objection. If the objection is admitted, the execution of the enforcement order under Art. 410 of the CCP is suspended. When the objection is admitted, the court also considers the private appeals filed under Arts. 413(1) and 419(1) of the CCP together with the objection. When the objection is admitted because the prerequisites under Art. 411(2), items '3' and '4' of the CCP do not exist, the court invalidates *ex officio* the enforcement order as well as the writ of execution issued on its grounds.

The term 'admits the objection' is much debated in legal literature and practice. It cannot be found in other law texts. In the customary legal vocabulary the term is used in the sense of admitting the respective legal action. However, Art. 423(1) of the CCP does not imply such a meaning in the sense of upholding the objection as grounded. The legislator seems to have abandoned the term 'reversal' because upholding the objection under Art. 423(1) of the CCP is not connected with a reversal or invalidation of the enforcement order but with the possibility to take into account lodging the objection under Art. 414 of the CCP after the term foreseen in Art. 414 of the CCP. The admitted objection under Art. 423 of the CCP has the following consequences:

1. The execution of the enforcement order under Art. 410 of the CCP is suspended (Art. 423(1), sentence I, of the CCP). The suspension is necessary because: The issuance of a writ of execution on the grounds of the enforcement order under Art. 410 of the CCP, presupposes that the order has taken effect (Art. 416 of the CCP). Therefore the very executive proceedings on the said writ of execution presuppose that the order has taken effect. On the other hand, the order's taking effect is determined by the fact that no objection under Art. 414 of the CCP has been lodged. The similar situation is in the hypothesis of Art. 418 of the CCP, in connection with Art. 417, item '9' of the CCP. In its case the writ of execution is issued simultaneously with the enforcement order prior to its taking effect. The enforcement begins on the grounds of the said writ of execution, the debtor learns about the enforcement order from the Access to Information Programme. In the hypothesis of Art. 417, item '9' of the CCP the fact that an objection under Art. 414 of the CCP has been lodged is imperatively determined grounds for suspending the enforcement. Since the objection under Art. 423(1) of the CCP has also the role of an objection under Art. 414 of the CCP, the intermediate appellative court under the argument of Art. 424, sentence II of the CCP, in connection with Art. 420(1) of the CCP, should suspend the enforcement even when the debtor has not placed an explicit request for suspension. In fact, the need of an explicit act for suspending the case is being admitted, although it is due to considering clearness in the statement that the suspension in those cases is by rule (Ruling No 27 of 18 January 2010 on a com.c. No 486/2009, II-Com. Ch. of the SCC. It is assumed that in the hypothesis of Art. 423(1) of the CCP the court's refusal to pronounce on the request for suspending the enforcement is subject to appeal before the SCC on the grounds of Art. 274(2), sentence I, of the CCP, in connection with Art. 275(1), sentence I, of the CCP, provided the preclusive term under Art. 275(1), sentence I, of the CCP is met). Admitting the objection under Art. 423 of the CCP has not suspension of the enforcement order under Art. 418 of the CCP, in connection with Art. 417, items '1-8' of the CCP, as a consequence. The writ of execution is issued immediately provided there is an enforcement order issued on the grounds of a document under Art. 417, items '1-8' of the CCP without waiting for the order to take effect (Art. 418 of the CCP). Lodging an objection under Art. 414 of the CCP itself is not grounds for suspending the enforcement. Therefore, if a request for suspending the

enforcement is placed as well as in the hypothesis of an enforcement order under Art. 418 of the CCP, in connection with Art. 417 of the CCP, the debtor should request suspending the enforcement proceedings together with the objection under Art. 423(1) of the CCP. However, this request is not considered by the intermediate appellative court, even when the objection under Art. 423(1) of the CCP is 'admitted by the intermediate appellative court'. Then the case is sent to the regional court and the regional court will consider its suspending (Art. 423(4), sentence II, of the CCP). The same is valid for the suspension under Art. 420(2) of the CCP (Art. 423(4), sentence II, of the CCP), when the first instance court should judge on the existence of convincing enough written evidence about the receivable's nonexistence. The debtor is entitled with the objection under Art. 423 of the CCP to request suspending simultaneously the enforcement on the grounds of Art. 413(2) of the CCP (which is a special norm regarding Art. 420(1) of the CCP), in connection with Art. 282(2) of the CCP. When a request lodged under At. 423(2) of the CCP is furnished with a due security, the intermediate appellative court should pronounce on it immediately. If the court has not done so, there is not an obstacle to pronounce as an independent dispositive in the ruling on admitting the objection under Art. 423 of the CCP. The matter concerns imperatively determined grounds for suspending the enforcement when a due security is furnished. If a request for suspending the enforcement under Art. 420(1) of the CCP) furnished with a due security is placed after the expiry of the term under Art. 423(2) of the CCP (There is not a preclusive term for the said request - *see* para. XVI), the court conducting the order for payment proceedings is competent to pronounce on it.

2. Admitting the objection under Art. 423(1) of the CCP does not lead to invalidating the enforcement order neither under Art. 410 of the CCP, nor under Art. 418 of the CCP, n connection with Art. 417 of the CCP. The case is sent back to the regional court. The proceedings are continued with giving instructions to the applicant that he/she should file a claim under Art. 415 of the CCP Art. 423(4), sentence I of the CCP). As said above, the claim under Art. 415 of the CCP presupposes the debtor's filing an objection under Art. 414 of the CCP. For that reason it follows under the argument of Art. 423(4), sentence I of the CCP, that the objection under Art. 423(1) of the CCP has also the effect of the objection under Art. 414 of

the CCP. The rules outlined are applied to both types of order for payment proceedings (under Art. 410 of the CCP and under Art. 418 of the CCP,in connection with Art. 417 of the CCP).

After the case has been returned to the regional court, the said court resumes its consideration at the stage of the effect of the already admitted objection (Art. 415(1) of the CCP). Considering the order for payment proceedings in the hypothesis of Art. 418 of the CCP, in connection with Art. 417 of the CCP, the court considers the filed request for suspending the enforcement under Art. 420 of the CCP as well.

Since the matter is about attacking a court act, it is not specified explicitly that the objection under Art. 423(1) of the CCP should be filed with the regional court (arg. also in the term 'returns' and not 'sends' used in Art. 423(4), sentence I, of the CCP).

XX. There is not a foreseen possibility for appealing the ruling of the intermediate appellative court under Art. 423(1) of the CCP. Therefore it is assumed in the practice of the SCC that the said objection is not subject to appeal before the SCC (Ruling No 724 of 18 December 2009 on com. c. No 598/2009, I - Com. Ch. of the SCC; Ruling No 723 of 18 December 2009 on com. c. No 614/2009, I - Com. Ch. of the SCC; Ruling No 55 of 15 January 2009 on com. c. No 662/2009, I - Com. Ch. of the SCC; Ruling No 284 of 31 March 2010 on com. c. No 221/2010, I - Com. Ch. of the SCC; Ruling No 317 of 30 April 2010 on com. c. No 280/2010, II - Com. Ch. of the SCC; Ruling No 408 of 10 June 2010 on com. c. No 463/2010, I - Com. Ch. of the SCC; Ruling No 596 of 5 November 2009 on com. c. No 645/2009, I - Com. Ch. of the SCC; Ruling No 313 of 3 June 2009 on com. c. No 313/2009, I - Com. Ch. of the SCC; Ruling No 14 of 13 January 2010 on com. c. No 653/2009, III - Com. Ch. of the SCC; Ruling No 140 of 23 February 2010 on a com.c. No 65/2010, II-Com. Ch. of the SCC; Ruling No 249 of 1 April 2010 on a com.c. No 209/2010, II-Com. Ch. of the SCC; Ruling No 696 of 7 December 2009 on com. c. No 648/2009, I - Com. Ch. of the SCC; Ruling No 777 of 29 December 2009 on a com.c. No 779/2009, I-Com. Ch. of the SCC; Ruling No 428 of 3 June 2010 on com. c. No 395/2010, I - Com. Ch. of the SCC; Ruling No 179 of 17 February 2010 on a com.c. No 102/2010, I-Com. Ch. of the SCC; Ruling No 434 of 23 June 2010 on com. c. No 275/2010, II - Com. Ch. of the SCC).

In general the considerations are the following: Appeallability of those rulings has not been foreseen explicitly in the law. Although the legislator named the court 'intermediate appellative', it does not act with the powers of a true intermediate appellative instance. In this hypothesis the intermediate appellative court does not discuss the existence of the evidence on the claimed pretence. It does not pronounce on the merits of the executable right, therefore it does not act as a true intermediate appellative instance. Other proceedings (order for payment proceedings in the case) are also not determined on the merits by the ruling of intermediate appellative court under Art. 423(1) of the CCP. That is why the said ruling cannot be qualified as a ruling subject to cassation appeal on the grounds of Art. 274(3), item '2' of the CCP. The ruling of the intermediate appellative court under Art. 423(1) of the CCP is not a terminative one in the sense of Art. 274(2), item '2' of the CCP, in connection with Art. 274(1), item '1' of the CCP. The objection admitted as grounded under Art. 423 of the CCP in the hypothesis of an enforcement order under Art. 410(1) of the CCP acts as an objection under Art. 414 of the CCP. The execution of the enforcement order is suspended and the order of payment proceedings are returned to the first instance court for carrying out the procedure under Art. 415(1) of the CCP. The rulings subject to cassation control are specified in detail in Art. 274 of the CCP. The rulings of the intermediate appellative court under Art. 423(1) of the CCP are not amongst the said ones and due to the reasons mentioned above are not subject to cassation control as set in Art. 63(6) of the CSA, in connection with Art. 61(1) of the CSA. The nature of the proceedings is of an extra-instance verification of the debtor's right to participate the order for payment proceedings. As a rule, the acts rendered according to an extra-instance procedure are not subject to appeal. There is not an explicit norm foreseeing appellability of the ruling, hence what the intermediate appellative court has rendered by a court act is final. The similarity between the proceedings under Art. 623 of the CCP and those on the reversal under Art. 303 of the CCP is also brought as a support to the above statement. In the practice of the SCC, rulings of the intermediate appellative court are admitted to appeal when the objection was returned due to omitting the one month preclusive term under Art. 423(1) of the CCP, i.e. the admitted appeal is against rulings barring the progress of the extra-instance proceedings under Art. 423 of the CCP (Art. 274(1), item '1' of the CCP, Ruling No 752 of 19 October 2010 on com. c.

659/2010, I – Com. C. of the SCC; Ruling No 739 of 1 October 2010 on com. c. 637/2010, I – Com. C. of the SCC).

It is true that the proceedings before the intermediate appellative court under Art. 423 of the CCP are not an appeal. It is also true that those proceedings are analogous to the proceedings on the reversal of decisions that have taken effect under Art. 303 of the CCP, which are not an appeal. The fact is emphasized in all the quoted rulings of SCC panels, that have assumed that the act of the intermediate appellative court under Art. 423 of the CCP is not subject to appeal. Moreover, namely this similarity to the proceedings on the reversal of decisions that have taken effect under Art. 303 of the CCP, reveals definitely that the matter in the hypothesis of Art. 423 of the CCP is about special independent proceedings. It is also true that the legislator has not foreseen explicitly that the act rendered by the intermediate appellative court in these proceedings is not subject to appeal. It has been done because of the amendment of Art. 274(3), item '2' of the CCP aiming at bringing to an end the practice under item '6' of ID No. 1-2001-GMCC of the SCC. There is a detailed enumeration of the rulings subject to appeal before the SCC. This thoroughness is achieved not by references to the respective texts of the CPP but by outlining the characteristics of the act of the intermediate appellative court which is subject to appeal before the SCC. The ruling under Art. 423 of the CCP of the intermediate appellative court terminates independent proceedings. The fact that those proceedings are connected with the order for payment proceedings does not change the nature of the former. The reversal of decisions that have taken effect under Art. 303 of the CCP is also connected with the adversary proceedings, but this functional relation does not deny their nature of independent proceedings. It is true that the decision of the SCC on the procedure of the reversal under Art. 303 of the CCP is not subject to appeal. But this is not on the account of the fact that the reversal is independent proceedings. That is because the SCC is the supreme court of the Republic of Bulgaria on civil cases and there is not any other more superior court before which to appeal its decisions. In the hypothesis of Art. 423 of the CCP the legislator has chosen the competence of the intermediate appellative court, viewing the location closeness to

the regional court in order not to pile cases of order for payment proceedings on the SCC, and allowed appealability before the SCC in Art. 274(3) item '2' of the CCP.

XXI. It is specified in Art. 424(1) of the CCP that the debtor is entitled to contest the receivable by an adversary procedure, when there is newly discovered evidence or new written evidence of material relevance to the case, which he/she could not have known by the time the term for filing the objection expired, or could not procure such within the said term. The matter goes about a negative ascertainment claim as seen clearly from the text of the regulation cited. Art. 424(1) of the CCP is a special regulation, foreseeing the said claim, therefore the debtor does not need grounds of his/her legal interest in its filing. The prerequisites for filing the claim under Art. 424(1) of the CCP are identical to the grounds for the reversal of a decision that has taken effect under Art. 303 of the CCP. Due to the specifics of the order for payment proceedings and the enforcement order in the hypothesis of Art. 424(1) of the CCP, the legislator has found it more appropriate not to preclude the circumstances, the written evidence, respectively, which the debtor could not have known, could not procure, respectively, within the term under Art. 414 of the CCP. The claim under Art. 424(1) of the CCP is applicable both in the hypothesis of Art. 417 of the CCP and of Art. 410 of the CCP.

The negative ascertainment claim under Art. 424 of the CCP can be lodged while the enforcement proceedings are pending (Art. 424(1) of the CCP, in connection with Art. 439(1) of the CCP). Art. 424(1) of the CCP is a special regulation regarding Art. 439(2) of the CCP and excludes its application. The order for payment proceedings do not involve a court trial. The possibility of lodging a negative ascertainment claim on the grounds of newly discovered facts is foreseen explicitly in Art. 424(1) of the CCP. If the enforcement has been precluded, the debtor has not a legal interest in lodging a negative ascertainment claim. However, under the argument of Art. 424(1) of the CCP, the said claim can be lodged on the grounds of newly discovered facts and newly discovered written evidence.

The negative ascertainment claim under Art. 424(2) of the CCP is not connected with the claim under Art. 422(1) of the CCP when no objection under Art. 414 of the CCP, no claim under

Art. 422(1) of the CCP in connection with Art. 415 of the CCP, respectively, has been lodged. If the creditor has lodged such a claim, the debtor can present the newly discovered facts and newly discovered written evidence, respectively, being a defendant in the adversary procedure under Art. 422(1) of the CCP, in connection with Art. 415 of the CCP, taking into account the preclusions under Art. 133 of the CCP, in connection with Arts. 146(3) of the CCP (SG No.100/2010); Arts. 147 and 260(1), item '5' and 266 of the CCP. On the other hand, if there have been proceedings under Art. 422(1) of the CCP, in connection with Art. 415(1) of the CCP and the claim is disallowed by a decision that has taken effect, the debtor has not a legal interest in lodging a claim under Art. 424(1) of the CCP. If the claim of the creditor has been upheld by a decision that has taken effect, the means of the debtor's defence is under 303(1), item '1' of the CCP, i.e. by reversal of a decision that has taken effect with which the creditor's positive ascertainment claim under Art. 415(1) of the CCP, in connection with Art. 422(1) of the CCP has been upheld.

The claim under Art. 424(1) of the CCP can be lodged within a three month term following the day on which the debtor learns about a new circumstance or following the day when a new piece of written evidence is procured, but not later than an year following the extinguishing of the receivable (Art. 424(1) of the CCP). The term is preclusive.

Till the amendment of Art. 424 of the CCP (SG No. 50/2008, in force of 1 March 2008) the newly occurred facts used to be foreseen grounds for the claim under Art. 424(1) of the CCP as well. No exception for the term under Art. 424(2) of the CCP used to be foreseen for such a claim. The legislative solution regarding the term of this claim used to be criticized in procedure literature and practice. However, instead of specifying that the term does not concern the claim grounded on newly occurred facts, the legislator erased the words 'newly occurred' in Art. 424(1) of the CCP. Thus the negative ascertainment claim on the grounds of newly occurred facts is admissible on the grounds of Art. 124(1) of the CCP. Doubtlessly the debtor sued in executive proceedings on a writ of execution, issued on the grounds of an enforcement order, has a legal interest in a negative ascertainment claim under Art. 124(1) of the CCP, when new facts have occurred after the expiry of the term under Art. 415(1) of the CCP. However, if the

debtor has lodged an objection under Art. 414 of the CCP and the creditor has lodged the claim under Art. 415(1) of the CCP, in connection with Art. 422(1) of the CCP, the debtor should defend himself/herself by objections based on newly occurred facts, taking into account the preclusions under Art. 133 of the CCP, in connection with Arts. 146(3); 147 and 260(1), item '5' and 266 of the CCP.

Lodging the claim under Art. 424(1) of the CCP does not suspend the enforcement. The debtor being a claimant to this claim (to a pending adversary procedure or to a future one) having presented convincing written evidence or/and due security according to the procedure of security proceedings (Arts. 389-397 of the CCP), is entitled to request the court's admittance of a security of his/her claim and determining suspension of the enforcement (Art. 397(1), item '3' of the CCP) as a security measure.

Civil Procedure Review
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Un "nuevo" tipo procesal sumario: hacia la reconstrucción del proceso de cognición y su articulación con las tutelas de urgencia

(A new type of summary procedure: the reconstruction of cognition proceedings and their relation with provisional measures)

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> "…[el tribunal] también se adapta a las nuevas realidades, económicas, sociales y técnicas jurídicas tendientes a evitar que el derecho, y el proceso que le sirve, lleguen tarde o se conviertan en una respuesta vacía. Es que si la jurisdicción deja de atender ese "ahora y aquí", frustra lo mejor y necesario de ella y desnuda una modalidad de la privación de justicia, al no dar lo que correspondía brindar". *(*Augusto M. Morello, *Claves procesales*, Lajouane, 2007, p. 360).

Abstract: The paper talks about the social and economic changes, that impose a shift in the classical comprehension of civil proceedings, specially the relations between fact-finding, adjudication and provisional measures.

Keywords: Provisional Measures. Civil Procedure.

Sumario: I. Tutelas urgentes vs. proceso de cognición. II. El proceso justo constitucional entre efectividad y verdad de la tutela jurisdiccional. III. Tendencias que muestra el derecho comparado. IV. La necesaria reconstrucción del proceso de cognición plena y su articulación con las tutelas de urgencia.

I. Tutelas urgentes vs. proceso de cognición.

Dos décadas atrás, se debatía arduamente en Italia sobre la necesidad de arbitrar nuevas técnicas para la aceleración de los procedimientos, y cobraba cuerpo la idea de las tutelas anticipatorias, interinales y aún satisfactivas; sin embargo se señalaban certeros reproches que hacían centro en la preocupación que generaban tales tutelas diferenciadas por el menoscabo que suponían respecto de principios esenciales del contradictorio y el debido proceso. No estaba en discusión la premisa, en la que todos coincidían, que el factor tiempo, por la desmesurada e irrazonable duración del proceso común, constituye un presupuesto sustantivo de la efectiva prestación de justicia que aseguran las constituciones modernas, las convenciones internacionales y la propia jurisprudencia de los tribunales.

En ese marco resalta la certera y premonitoria advertencia del siempre recordado profesor de Milán, Giuseppe TARZIA, cuando afirmaba que la proliferación de las tutelas especiales, cualesquiera fueren sus circunstanciales justificaciones, constituye un factor concurrente de crisis de los valores sujetos a la tutela común ordinaria, como protección debida a todos los ciudadanos. Porque un régimen extendido de tutelas privilegiadas supone la necesaria "deformación" y consiguiente deflación y debilitamiento del sistema genérico de garantías. Sólo la recuperación de la funcionalidad del proceso común de cognición podrá reconducir las providencias cautelares en el cauce de aquella función, instrumental, subsidiaria e integradora -y no sustitutiva de la jurisdicción ordinaria-, que les corresponde en el diseño legislativo. El sistema de justicia asienta en la lógica del garantismo y de la eficiencia, que se logra al cabo de un proceso pleno, de ahí que el legislador debe sopesar sesudamente los

riesgos inherentes a la amplificación de las soluciones provisorias y coyunturales vis a vis el imperativo de seguridad, aún concebida como una seguridad dinámica, y la paralela garantía constitucional del debido proceso[1].

Lo acaecido ulteriormente, sin embargo, a través de las sucesivas intervenciones legislativas hasta el presente, lo ilustra otro insigne maestro, Federico CARPI: el mal es contagioso, la tendencia hacia la multiplicación de los modelos especiales alternativos se ha extendido sin fin. Es cierto que el pluralismo de la oferta es positivo, si está encaminado a garantizar las posiciones de los débiles, la realización de los derechos fundamentales y de la persona, por la urgencia en las situaciones particulares, cuando el proceso ordinario se revela inútil. Pero todo tiene un límite. El propio código, y numerosas leyes especiales, han creado procedimientos anticipatorios de los más diversos, tanto que es difícil, si no imposible, individualizar un tratamiento común a todos ellos, salvo el generalísimo aspecto de la técnica de la anticipación[2]. Por otro lado, está madurando la idea de la simplificación del modelo común de cognición, con el mismo objetivo de obtener un proceso más eficiente y una tutela más efectiva. La reciente ley nº 69/2009 abre grandes expectativas, por la decisión delegada al gobierno en materia de reducción y simplificación del procedimiento civil de cognición[3], cuya clave viene dada por los nuevos arts. 702-bis, 702-ter y 702-quater, que establecen un juicio a cognición simplificada, pero plena y exhaustiva, que desemboca en una sentencia con autoridad de cosa juzgada material[4].

La experiencia italiana muestra una línea de tendencia "virtuosa", en buena medida recorrida también por otras legislaciones contemporáneas, como la inglesa de 1999, en tanto sin despreciar el desarrollo de las tutelas especiales de urgencia en general, vuelve a reivindicar la necesidad de perfeccionar el proceso de cognición, bien que ahora (una vez más) con el

[1] TARZIA G., *Il nuovo processo cautelare, a cura di Giusseppe Tarzia*, Cedam, Padova, 1993, pp. XXXII-XXXIII.
[2] CARPI F., "La simplicazione dei modelli di cognizione ordinaria e l´oralitá per un processo civile efficiente", relación sintetizada al Seminario en homenaje a Ada Pellegrini Grinover, Sâo Paulo, agosto 2009, en *RePro* (Revista de Processo), nº 178, 2009, pp. 281 y ss., especialmente pp. 290-294.
[3] Ob. cit., pp. 295 y ss..
[4] BIAVATI P., "Apuntes introductorios sobre el nuevo proceso de cognición simplificada", en *RDP* (Revista de Derecho Procesal), Rubinzal-Culzoni ed., Santa Fe, 2010-1, pp. 541 y ss..

acento en la simplificación y la celeridad, y aún cabalgando sobre una todavía mayor autoridad del juez para conducir el proceso. Tanto como la rehabilitación de la cosa juzgada que cierra definitivamente el debate. Tales líneas principales de sentido se avizoran igualmente, total o parcialmente en otras legislaciones que hemos de anotar (Infra § III).

Interesa, antes, detenernos a analizar el sentido y las razones del retorno al proceso de cognición madre, en desmedro de la "balcanización" que supone la no querida proliferación indefinida de las tutelas urgentes.

II. El proceso justo constitucional entre efectividad y verdad de la tutela jurisdiccional.

a. El modelo de "proceso justo", es sabido, ha sido el producto de una larga elaboración –aún no concluída-, nutrida en la doctrina autoral y los avances jurisprudenciales, a partir de las declaraciones estampadas en la letra de las constituciones y pactos internacionales[5]. Su esquema de referencia se enuncia en fórmulas sintéticas abarcativas –debido proceso legal, *due process of law, giusto processo*- cuyo contenido es dinámico, cambiante, siempre abierto a nuevos o renovados alcances. Uno de esos capítulos –como señala TARUFFO[6]- se enfoca en la conexión funcional entre proceso y decisión, para afirmar que el proceso justo –el debido proceso- es tan solo aquel que está estructurado de manera que se orienta hacia la obtención de decisiones justas. No es suficiente que en el proceso se respete la garantía de la defensa de las partes; es necesario, además, que la sentencia que constituye su resultado, pueda ser justa[7]. Para ello se requiere que la decisión se funde en una determinación verdadera de los hechos de la causa[8]; el debido proceso presupone, entonces, la posibilidad de la búsqueda y reconstrucción de la verdad fáctica[9].

[5] MORELLO A.M., *El proceso justo*, Lexis Nexis. Abeledo Perrot/LEP, Bs. As., 2ª. ed., 2005, *passim*.
[6] TARUFFO M., "Determinación de los hechos y contradictorio" en *Páginas sobre justicia civil*, M. Pons, Madrid-Barcelona, 2009, trad. M. Aramburo Calle, pp. 270 y ss.. Asimismo en *La prova dei fatti giuridici. Nozioni generali*, Giuffré, Milano, 1992, pp. 7 y ss., 35 y ss..
[7] Ob. cit., pp. 282-283.
[8] MORELLO A.M., *El proceso justo*, ob. cit., pp. 67 y ss., 202 y ss.. Asimismo: BERIZONCE R.O., *El proceso civil en transformación*, LEP, La Plata, 2008, pp. 542-543. Como afirma PARRA QUIJANO, no es posible defender la justicia

Por razones diversas bien conocidas, vienen proliferando como hemos resaltado las denominadas tutelas urgentes, bajo las diversas modalidades de medidas cautelares, anticipatorias y satisfactivas. Sin embargo, en la forma en que están reguladas y que se actúan en la práctica, pueden entrar en colisión con el modelo teórico -y la garantía- del proceso justo, de raíz constitucional y convencional. No puede negarse la necesidad ética y social de consagrar ciertas tutelas diferenciadas o preferentes, que se valen de diversas técnicas orgánico-funcionales y procesales tendientes, en general, a brindar protección efectiva a ciertas situaciones o derechos fundamentales. Entre tales técnicas procesales adquieren particular relevancia y operatividad las medidas anticipatorias, satisfactivas y urgentes[10]. Se trata de técnicas específicas que, junto con otras diversas –procedimientos monitorios, la decisión temprana de la litis y aledaños- pueden reducirse a la categoría general de tutela sumaria, de antigua prosapia y que se remonta cuanto menos a la decretal *Saepe contingit*, de 1306[11]. Los denominados procesos sumarios propiamente dichos -diversos del tipo sumario de nuestros códigos, en realidad plenario abreviado- se caracterizan, como es sabido por la simplicidad de las formas que se halla determinada por la fragmentariedad o por la superficialidad del conocimiento judicial.

b. La cuestión central consiste en determinar en qué condiciones puede considerarse que las mentadas tutelas sumarias no cautelares son compatibles con los principios que definen el modelo del proceso justo. Está claro que los procesos de estructura monitoria no son cuestionables bajo este aspecto, desde que por un lado existe prueba escrita acreditativa del derecho y, además, la posibilidad que se concede al vencido obligado de tomar ulteriormente la

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de una decisión, si ella no se basa en una determinación real de los hechos, ni desde el punto de vista ideológico y mucho menos frente al sentido común (*Racionalidad e ideología en las pruebas de oficio*, Temis, Bogotá, 2004, p. 7).

[9] Al juez no puede resultarle indiferente el resultado del juicio, porque su "neutralidad" no le impide que su sentencia sea justa, que la victoria sonría al litigante que la merezca (BARBOSA MOREIRA J.C., "Breves reflexiones sobre la iniciativa oficial en materia de prueba" en *Temas de Direito Processual, Terceira Série*, Ed. Saraiva, Sâo Paulo, 1984, pp. 80-81).

[10] BERIZONCE R.O., *Tutelas procesales diferenciadas*, Rubinzal-Culzoni, Bs. As., 2009, *passim* y especialmente, pp. 18 y ss., 49 y ss..

[11] TARUFFO M., *Determinación de los hechos y contradictorio*, ob. cit., pp. 271 y ss..

iniciativa para proponer la revisión en un proceso de cognición amplio, supera cualquier objeción.

En realidad el problema se plantea en los mecanismos anticipatorios y satisfactivos, cuando se deciden sin el contradictorio de las partes, o aún con bilateralidad pero sin que haya una verdadera fase instructoria. No hay en estos casos la posibilidad de una determinación efectiva de los hechos de la causa, y por ello la decisión judicial se funda tan solo en la "verosimilitud" de los hechos alegados por el actor. La intervención del juez en muchos casos se limita a poco más que a la verificación formal de la regularidad de la petición formulada por el acreedor, porque la finalidad de la ley consiste en la concesión de una tutela rápida e informal para cierto tipo de acreedores o de situaciones jurídicas, lo que se considera razón suficiente para sacrificar el contradictorio, o la determinación verdadera de los hechos, o ambas cosas[12]. Claro que tales finalidades pueden ser valoradas positivamente cuando se trata de sujetos o situaciones jurídicas particulares con necesidad efectiva de una tutela especialmente rápida, que el procedimiento ordinario no está en capacidad de suministrar. Existe un fundamento objetivo para conceder, por razones de política jurídica, un tratamiento preferencial diferenciado -vgr., genéricamente entre nosotros en relación a las personas mencionadas en el art. 75 inc. 22., CN, niños, ancianos, mujeres, personas con discapacidad, y a condición que se demuestre que se encuentran en especiales dificultades para ejercitar sus derechos-. Se trata de derogaciones excepcionales al modelo constitucional del proceso justo y, como tales, deberían reducirse al mínimo, configurarse en términos limitados y restrictivos, y su introducción debe fundarse en razones particularmente fuertes. Lo cual conduce a la cuestión de los límites, las fronteras y confines de las tutelas sumarias diferenciadas[13].

c. En definitiva y recapitulando lo hasta aquí razonado, el debido proceso constitucional –el proceso justo- requiere indefectiblemente para su configuración como tal la observancia irrestricta del principio del contradictorio, la posibilidad concreta de acceder a la determinación

[12] TARUFFO M., ob. cit., pp. 276-279. Son tutelas "diferentes" porque carecen de las garantías esenciales de la tutela jurisdiccional (p. 278).
[13] Hemos tratado detenidamente esta álgida cuestión en *Tutelas procesales diferenciadas*, ob. cit., pp. 97 y ss., por lo que nos excusamos aquí de volver sobre el punto.

probatoria de la verdad de los hechos relevantes que se logra a través del modelo de cognición amplio. Solo por excepción y de modo restringido, resulta admisible la recurrencia a las estructuras sumarias que se sustentan en la necesidad de acordar tutela rápida y efectiva que el procedimiento común no puede dispensar, en casos particulares de derechos o situaciones que las normas fundamentales encarecen y consagran como necesitadas de tutelas preferentes[14]. Únicamente en tales acotados supuestos resulta legítimo flexibilizar, postergar y aún excepcionalmente, prescindir de aquellos principios que configuran el proceso justo constitucional.

d. Nos queda ahora recorrer, siquiera en trazos gruesos la legislación comparada para tomar nota de cómo se ha afrontado en los distintos países la regulación de las tutelas sumarias de urgencia, particularmente las técnicas de la anticipación de los efectos de la sentencia y otras similares. Al cabo, y para rematar, se abordará la necesaria articulación del proceso de cognición plena y las tutelas sumarias urgentes.

III. Tendencias que muestra el derecho comparado.

En las legislaciones contemporáneas resulta notoria una tendencia general a la adopción de técnicas diversas de agilización del proceso y, dentro de ellas, ocupan un lugar preferente los proveimientos de urgencia, y entre ellos, la anticipación de la tutela[15]. Si bien habitualmente y en modo paralelo, las tradicionales medidas cautelares han conservado sus típicos efectos conservativos, que las diferencian de aquellas, en la evolución de los sistemas, en algunos países se ha terminado por admitir la fungibilidad con las anticipatorias. Así, en el derecho

[14] El legislador procesal ordinario, como señala TARUFFO, no goza de una discrecionalidad ilimitada en la creación de los métodos de solución de controversias, porque no puede escoger técnicas de tutela que contraríen los principios fundamentales que garantizan la corrección del proceso (ob. cit., p. 281).

[15] BIAVATI P., "Tutela cautelar, anticipatoria y sumaria en al reforma italiana", en *RDP* (Revista de Derecho Procesal), Rubinzal-Culzoni ed., Santa Fe, 2009-2, pp. 493 y ss.. THEODORO JUNIOR H., "Tutela anticipada. Evoluçâo. Visâo comparatística…", *RePro* (Revista de Processo), 2008, nº 157, pp. 130 y ss., 145. RICCI E. F., "Tutela de conhecimento sem coisa julgada e tutela anticipada…" en *Estudos de Direito Processual Civil. Homenagem ao Prof. E. D. Moniz de Aragâo,* coord. L.G. MARINONI, Ed. Rev. dos Trib. (Edit. Revista dos Tribunais), Sâo Paulo, 2005, pp. 259 y ss..

brasileño, a partir de las reformas de la ley 10.444, de 2002, donde se considera que se trata de dos modalidades bajo criterio común, desde que unas y otras son provisorias y dependen del proceso principal para ser mantenidas (art. 273 § 7, CPC). En la reseña que sigue focalizamos la atención solo en algunas legislaciones; sin dejar de señalar que en Francia y Bélgica el *référé* funciona como una tutela general alternativa de la ordinaria, y que algo similar acaece en Alemania y Austria con las denominadas "disposiciones provisorias".

a. El Código General del Proceso uruguayo de 1989 –siguiendo la matriz del Código Modelo iberoamericano-, incluye dentro del proceso cautelar las medidas provisionales y anticipativas, que podrán ser adoptadas por el juez para evitar que se cause a la parte, antes de la sentencia, una lesión grave o de difícil reparación o para asegurar provisionalmente los efectos del pronunciamiento sobre el fondo (art. 317)[16]. La decisión provisional tiende a la inmediata satisfacción de la propia pretensión en razón de la gravedad de que la insatisfacción se extienda por más tiempo, dada la especial naturaleza del derecho violado. Constituye presupuesto para su otorgamiento la justificación sumaria de la "existencia del derecho" (art. 312 in fine); la petición debe necesariamente sustanciarse con la contraria y la decisión provisional hace cosa juzgada –rebus sic stantibus-[17].

b. En Brasil, cuya legislación y doctrina han sido las influyentes entre nosotros, la anticipación de la tutela representó una verdadera revolución en el sistema procesal[18], a partir de la reforma de 1994. Una amplísima elaboración doctrinaria[19], no siempre concordante, ha

[16] TARIGO E.J., *Lecciones de Derecho Procesal Civil según el nuevo Código,* F.C.U., Montevideo, 1994, v. II, p. 350. ABAL OLIU A., "Proceso cautelar y proceso provisional" en *Curso sobre el Código General del Proceso,* F.C.U., Montevideo, 1989, p. 77; id., *Sobre las medidas cautelares atípicas (medidas provisionales),* Anales del Foro, Montevideo, 1992, p. 221; id., "Medidas urgentes y medios para asegurar la efectividad de las sentencias en el Código Tipo Procesal Civil Iberoamericano"*, Rev. Urug. Der. Proc.* (Revista Uruguaya de Derecho Procesal), Montevideo, 1994, p. 57; id., *Medidas provisionales anticipadas (art. 317 C.G.P.)*, en *VIII Jornadas Nacionales de Derecho Procesal,* ed. Universidad, Montevideo, 1995, p. 23.

[17] ABAL OLIU A., *Medidas provisionales y anticipadas (art. 317 C.G.P.),* ob. cit., pp. 28-29. BARRIOS DE ANGELIS D., en cambio, ha sostenido la naturaleza cautelar de dichas medidas (*El proceso civil*, ed. Idea, Montevideo, 1990, v. II, p.89).

[18] ALVIM E.A., *Anticipacâo da tutela*, Jurúa, Curitiba, 2007, 1ª. ed., p. 411.

[19] Destacamos tan solo algunas de las obras más significantes: MARINONI G.L., *Tutela cautelar e tutela antecipatoria*, ed. R.T., Sâo Paulo, 1992; id., *A antecipaçâo da tutela na reforma do processo civil*, Malheiros ed., 2ª. ed., Sâo Paulo, 1996; id., *Novas linhas do processo civil*, Maleiros, Sâo Paulo, 1996, 2ª. ed., p. 75 y ss..

iluminado en los últimos tres lustros la interpretación de sus reglas, acompañando la no menos fructífera tarea de los tribunales. Se trata de una tutela jurídica diferenciada que tiene por objeto alcanzar la efectividad del proceso, que se otorga mediante cognición sumaria, debiendo el juez convencerse apenas de la probabilidad de existencia del derecho afirmado en juicio. Sistemáticamente, el precepto del art. 273 se incorpora en el Libro I, que tiene por objeto el proceso de conocimiento; ello ha permitido sostener que no es una tutela cautelar, sino una "tutela primaria satisfactiva", en la que la decisión judicial equivale, mutatis mutandi, a la procedencia de la demanda inicial -con la diferencia fundamental representada por la provisoriedad-[20]. La discrecionalidad del juez en su concesión se refleja en el poder legal de otorgar la tutela en cualquier tiempo, revocarla o modificarla; la provisoriedad le es inherente desde que la anticipación se funda en cognición sumaria. La ley no especifica el modo de concederla, por lo que corresponde al juez determinarlo en cada caso, en atención al derecho de que se trata, pudiendo exteriorizarse en resolución de declaración, constitución, condena, determinación, mandatos y en general, actos de satisfacción. En cuanto al presupuesto de verosimilitud del derecho alegado, uno de los conceptos más polémicos, ha sido interpretado como "probabilidad" -que es más que el fumus boni juris-; y debe ser apreciado prudentemente por el juez, en correspondencia con la medida a conceder, al cabo de una instrucción sumaria suficiente -aún in audita parte, en hipótesis excepcionales- y atendiendo a las consecuencias que derivarían de la anticipación[21].

DINAMARCO C.R., *A reforma do Código de Processo Civil,* Malheiros ed., Sâo Paulo, 1995, pp. 138-148, 270-272. NERY JUNIOR N., *Atualidades sobre o processo civil,* Ed. Rev. dos Trib. (Edit. Revista dos Tribunais), Sâo Paulo, 1995, pp. 45-59, 122-123. ARRUDA ALVIM, *Manual de Direito Processual Civil*, Ed. Rev. dos Trib. (Edit. Revista dos Tribunais), Sâo Paulo, 2008, 12ª. ed., pp. 389 y ss.. ALVIM E.A., *Anticipacâo da tutela*, ob. cit.. BARBOSA MOREIRA J.C., "Antecipacâo da tutela..." en *Temas de Direito Processual. Oitava Serie*, Saraiva, Sâo Paulo, 2004, pp. 77 y ss.. BEDAQUE J.R., dos S., *Tutela cautelar e tutela antecipada*, Malheiros, Sâo Paulo, 2006, 4ª. ed., *passim*. CARNEIRO A.G., *Da anticipacâo da tutela*, Forense, R. de Janeiro, 5ª. ed., 2004, *passim*. Una síntesis de las distintas posturas doctrinarias en torno a la interpretación del art. 273, puede verse en FIDÉLIS DOS SANTOS E. y FIDÉLIS SILVEIRA I., "Anticipacâo da tutela…", en *RePro* (Revista de Processo), nº 166, 2008, pp. 300 y ss..

[20] DINAMARCO C.R., ob. cit., pp. 139-140. Sobre los antecedentes en el derecho brasileño: NERY JUNIOR N., ob. cit., p. 50.

[21] MARINONI L.G., *Novas linhas...*, cit., p.78-81. Debe respetarse el principio de bilateralidad; de ahí que ha de concederse al demandado oportunidad suficiente para demostrar el defecto de los presupuestos para su concesión (ARRUDA ALVIM, ob. cit., pp. 408-409).

Como la anticipación es provisoria, no cabe admitirla cuando existiere peligro de irreversibilidad del pronunciamiento (art. 273, II, 2º), por la imposibilidad de volver las cosas al estado anterior. La ley 10.444, de 2002, agregó el § 6 estableciendo que la tutela anticipada también podrá ser concedida cuando uno o más pedidos acumulados, o parte de ellos, no fueren controvertidos. La falta de oposición dispensa el requisito del *periculum in mora*.

Finalmente, la ley 10.444, de 2002, incorporó el § 7 del art. 273, estableciendo que si el actor, a título de anticipación de tutela, requiriere providencia de naturaleza cautelar, podrá el juez cuando concurran los respectivos presupuestos, conceder la medida cautelar en carácter incidental del proceso[22]. Se dispensa la formación del proceso cautelar, pero no la obligatoriedad del contradictorio propia de la anticipación. De ese modo queda consagrada la fungibilidad de la tutela de los derechos, en homenaje al principio de instrumentalidad de las formas.

El art. 273 contempla dos situaciones indeseables, a ser combatidas mediante la anticipación de la tutela: a) que existe "temor fundado de daño irreparable o de difícil reparación", que tiende a atender las necesidades del litigante, privado del bien al que probablemente tiene derecho y que está impedido de obtenerlo; y b) el "abuso del derecho de defensa" o el "manifiesto propósito dilatorio del demandado", que configura un comportamiento procesal desleal, el litigante de mala fe[23]. El legislador utilizó conceptos vagos o indeterminados, “prueba inequívoca” y “verosimilitud”, “fundado recelo”, “daño irreparable”, “daño de difícil reparación”, “abuso de derecho”, ”peligro de irreversibilidad”, lo que deja amplio margen de interpretación. Pero el juez no puede aplicar tales conceptos de modo discrecional o arbitrario, sino que debe determinar racionalmente la delimitación correcta de su

[22] La solución se justifica en atención a las dificultades dogmáticas y prácticas en el trazado de líneas divisorias entre los dos terrenos. Desde que no se altere la sustancia del pedido, no se vislumbra obstáculo insalvable a la admisión de un requerimiento por el otro (BARBOSA MOREIRA J.C., “As reformas ao Código de Processo Civil…” en *Génesis*, *Rev. Dir. Proc. Civil* (Revista de Derecho Procesal Civil), Curitiba, 1996, Nº 2, pp. 342-343).

[23] La tutela concedida por el art. 273 es mucho más amplia que la prevista en el texto de los otros ordenamientos que analizamos, que sólo la acuerdan en supuestos de peligro en la demora. NERY JUNIOR N., ob.cit., p. 52 y n. 88, p.53.

campo de atingencia[24]. Por las normas generales del derecho común, si se generaren perjuicios a consecuencia de la anticipación, deberá responderse por quien se valió sin derecho de esa prerrogativa[25]. El instituto creado en la legislación de 1994 y sus sucesivas ampliaciones es, en definitiva, singular, difiriendo en la extensión y profundidad de los antecedentes comparados.

No se trata del anticipo de los efectos normativos de la sentencia (declarar y constituir), sino de los efectos ejecutivos y mandamentales. La tutela anticipatoria viene a exceptuar el principio de la "nulla executio sine titulo", fundamento de la distinción chiovendiana entre conocimiento y ejecución, basada en la idea que un derecho solo puede ser realizado después de la obtención de la "certeza jurídica" o de haber sido "declarado". Esa idea –se ha sostenido-, fruto del mito de la "búsqueda de la verdad", queda desnaturalizada por el uso de la tutela cautelar en la realización anticipada de los derechos[26].

En realidad -se ha señalado[27]- el art. 273, junto con los arts. 461 y 461-A integran un núcleo de técnicas procesales que tiene por finalidad preponderante sumarizar el *iter* procedimental, posibilitando la prestación de la tutela jurisdiccional en caso de urgencia o de evidencia, recurriendo para su efectivización a medidas de apoyo de carácter coercitivo, ordenatorio y restrictivo de derechos, que van desde la fijación de *astreintes*, por otras medidas de ejecución, y llegando inclusive para caracterizada doctrina (MARINONI), hasta la posibilidad de dictar orden de prisión para vencer la resistencia del deudor de obligación específica. Al punto de afirmarse que varios de los procedimientos especiales (vgr., tutelas posesorias típicas, *mandado de segurança*), puede ser considerados superados frente a aquel núcleo de técnicas procesales.

[24] ARRUDA ALVIM, ob. cit., pp. 418-420.
[25] DINAMARCO C.R., ob. cit., pp. 141-147.
[26] MARINONI L.G., *Novas linhas do processo civil*, ob. cit., p. 75.
[27] GUMERATO RAMOS G., *Proceso jurisdiccional civil…* en *VI Congreso Panameño de Derecho Procesal*, Panamá, 2009, pp. 584-585.

Según se ha expresado en un balance al cabo de quince años de su vigencia[28], lo que efectivamente caracterizó el instituto, bajo el aspecto de su aplicación práctica, no han sido, en verdad, las características propias de sus elementos definitorios legales, sino principalmente, la forma elástica y flexible de la discrecionalidad del juez en su concesión. Por lo demás, la anticipación pasó a constituirse en la verdadera disputa incidental del proceso de conocimiento[29].

Por último, interesa señalar que con la sanción de la nueva ley de *mandado de segurança*, de 2009, se ha reaccionado, finalmente, contra la discrecionalidad en el otorgamiento de las liminares y anticipatorias. En efecto, la ley 12.016, sustitutiva de la anterior normativa (ley 1533/51 y modif.) entre sus principales innovaciones ha introducido[30], y en lo que aquí interesa, ciertas restricciones a las tradicionales medidas liminares, que no serán concedidas cuando tengan por objeto la compensación de créditos tributarios, la entrega de mercaderías o bienes provenientes del exterior, así como para pago de cualquier naturaleza (art. 7, III, § 2); prohibición que se extiende a los casos de anticipación de tutela (§ 5)[31]. Igualmente destacable resulta la reglamentación del mandato de seguridad colectivo (art. 21 y 22).

[28] FIDÉLIS DOS SANTOS E. y FIDÉLIS SILVEIRA I., ob. cit., pp. 305-306. El uso desenfrenado, por así decir, de la nueva potestad, obligó en la práctica, no ha teorizar sobre conceptos de suyo controvertidos en doctrina, sino a resolver caso por caso los sentidos definitorios de los requisitos legales, a partir de situaciones subjetivas basadas en realidad práctica y teleológica justificativa. O sea, evitar el retardo del goce de los derechos, aunque ello pudiere importar el sacrificio de la seguridad de las partes. La anticipación de la tutela se desenvuelve en Brasil –afirman- suplantando todos los conceptos técnicos y jurídicos que provienen del legislador. En ese contexto, *prueba inequívoca y verosimilitud* pasaron en conjunto a significar estado de convencimiento, solo que no definitivo.

[29] Ob. cit., p. 306. Ello principalmente a partir del reconocimiento de la potestad judicial, acordada al relator, de conferir efecto suspensivo al recurso contra la resolución que la concede. La recurrencia sistemática a la medida ha provocado la desvirtuación del instituto y el abarrotamiento de los tribunales (pp. 307-308). Todo hoy se resuelve con el poder general de cautela (ARRUDA ALVIM WAMBIER T., "Sobre a subsistencia das açôes cautelares típicas", *RePro* (Revista de Processo), 175, 2009, p. 320).

[30] THEODORO JUNIOR H., *O mandado de segurança segundo a Lei n. 12.016, de 7 de agosto de 2009*, ed. Forense, R. de Janeiro, 2009, pp. 60 y ss..

[31] Tales restricciones no son inconstitucionales, pues si bien condicionan su otorgamiento en determinados supuestos, de todos modos no afectan la sustancia de la garantía del acceso a la jurisdicción (GUSMÂO CARNEIRO A., "Anotacôes sobre o mandado de segurança coletivo, nos termos da Ley 12.016/2009", en *RePro* (Revista de Processo), Nº 178, 2009, pp. 41 y ss.).

La medida liminar se dispone siempre inaudita parte en el proveimiento inicial, salvo en el mandato colectivo donde solo puede otorgarse después de la audiencia de la persona jurídica de derecho público (art. 22, § 2º). El poder del juez no está limitado a la suspensión del acto impugnado; puede dictar medidas activas, de anticipación de la tutela, siempre que resulte indispensable para la efectividad del derecho que se invoca. Como se ha señalado[32], lo que autoriza el art. 7º, III es un proveimiento de amplio espectro, que tanto puede configurar una medida cautelar, como también una satisfactiva, capaz de agotar incluso el objeto de la pretensión, como p.e. excepcionalmente la orden de provisión de medicamentos.

La liminar implica, casi siempre, una anticipación de tutela de carácter provisorio y temporario, pues sus efectos no van más allá de la sentencia (art. 7, § 3). Sin embargo, está sujeta a extinción por decaimiento decretable de oficio o a requerimiento del ministerio público, siempre que después de concedida el propio solicitante creara obstáculo a la marcha normal del proceso, o dejara de instar, por más de tres días útiles, los actos y diligencias que le correspondieren (art. 8º). Además, la liminar puede ser suspendida en sus efectos, "para evitar grave lesión al orden, a la salud, a la seguridad y a la economía pública", cuando fuere requerido por la persona jurídica de derecho público interesada (art. 15).

En el *mandado de segurança* colectivo, la liminar solo puede decretarse previa audiencia de la persona de derecho público interesada, a cuyo efecto se despacha, en la primera providencia, intimación para que se manifieste al respecto en plazo perentorio (art. 22, § 2)[33]. Bien que la jurisprudencia ha flexibilizado tal exigencia, ya antes de la ley 12.016, posibilitando en supuestos de excepción, su expedición *in audita parte* cuando fuere necesario para salvaguardar la efectividad de la tutela jurisdiccional[34].

[32] THEODORO JUNIOR H., ob. cit., pp. 24-25.
[33] GUSMÂO CARNEIRO A., ob. cit., p. 33. Las medidas liminares son concedidas, o denegadas, no al "prudente arbitrario del juez", sino cuando claramente se verifican los presupuestos legales (p. 34).
[34] THEODORO JUNIOR H., ob. cit., pp. 56-57.

c. En la legislación portuguesa, los proveimientos de urgencia, sean conservatorios o satisfactivos, se incluyen en el marco de la tutela cautelar[35]. Recientemente se instituyó un régimen procesal experimental, dec. ley 108/2006[36], que tiende a la sumarización de las formas del proceso, con incidencia especial en los clásicos sumarios determinados, donde se reduce la cognición judicial y cuyo ámbito ha terminado extendiéndose a los procedimientos cautelares y a los procesos de *injuntion*. Si bien se discute en general si tiene sentido mantener la relación de instrumentalidad entre las providencias cautelares y la acción principal, de todos modos el dec. ley 108/2006 establece que cuando han sido traídos al procedimiento cautelar los elementos necesarios para la resolución definitiva del caso, el tribunal puede, previa audiencia de las partes, anticipar el juzgamiento de la causa principal (art. 16, dec.-ley. cit.)[37].

Lo más significativo en punto al proceso de cognición sumario que se crea, es que se establece un procedimiento simple, abierto y flexible encomendando al juez amplias funciones de dirección y ordenación de las causas, con el objetivo de acelerar y simplificar sus desarrollos, en atención a la materia singular en disputa. Con ese fin, crea incentivos para premiar la colaboración de las partes entre sí y con el tribunal[38].

d. Resulta particularmente interesante la evolución que en esta materia se ha dado en el régimen procesal civil italiano. La tutela anticipatoria se introdujo originalmente por preceptos especiales, como la *ordenanza provisionale di pagamento* en el proceso del trabajo (art. 423 CPC); o en el proceso contra la aseguradora de responsabilidad civil por riesgo de automotores (art. 24, ley 990, de 1969). La ulterior reforma de 1990 fue cautelosa, pues introdujo solo dos proveimientos específicos: una *ordenanza per il pagamento di somme non contestate* y una *ordenanza di ingiunzione* (art. 633, CPC), al lado de la tradicional tutela general asegurada por

[35] FERREIRA DA SILVA C.M., *Providencias anticipatorias no processo civil portugués*, conferencia pronunciada en las *XVI Jornadas Iberoamericanas de Derecho Procesal*, Brasilia, 1998, nº 25.

[36] TEIXEIRA DE SOUSA M., "Um novo processo civil portugués: a la recherche du temps perdu?" en *RePro* (Revista de Processo), 2008, nº 161, p. 216-217. Sobre el régimen procesal experimental (dec-ley 108/2006), de flexibilización de las formas: CORREIA DE MENDONÇA L., "Processo civil líquido e garantías…" en *RePro* (Revista de Processo), nº 170, 2009, pp. 215 y ss..

[37] CORREIA DE MENDONÇA L., ob. cit., p. 235.

[38] CORREIA DE MENDONÇA L., ob. cit., pp. 239-240. Se ha señalado críticamente que se trata de un proceso "líquido", en el sentido de un modelo de enjuiciamiento en que las formas se desintegran, completamente modelado por el juez y que deja abierta la posibilidad de la arbitrariedad (pp. 249-250).

el art. 700, encasillada como proveimiento cautelar[39]. Con posterioridad, el art. 186 quater CPC traído por la reforma de la ley 21-6-95, posibilitó al juez instructor el dictado de una ordenanza de condena provisional, inserta en el momento de la clausura de la instrucción con base en la valoración anticipada de la prueba y que constituye título ejecutivo[40].

En ese camino, no siempre lineal, un significativo punto de inflexión se denota cuando se adopta una técnica procesal diferente a partir de la reforma de 2005 (art. 669 octies CPC y correlativos), que abandonó el carácter accesorio que caracterizaba tradicionalmente el procedimiento de la tutela de urgencia y acogió un sistema similar al del *référé* francés, donde prevalece la autonomía y sumariedad de las acciones cautelares satisfactivas. Se trata de atender tan sólo ciertas situaciones que suponen la irreparabilidad del perjuicio sufrido; y en ese esquema, las medidas anticipatorias constituyen una forma generalizada, rápida y sumaria de tutela jurisdiccional, alternativa al proceso ordinario de cognición, que si bien se concreta en pronunciamientos tan solo provisionales, que no producen cosa juzgada, son directamente ejecutables. Sin perjuicio de que puedan ser revocadas en juicio declarativo posterior[41].

Se ha flexibilizado, en definitiva, la clásica regla de la instrumentalidad, lo que viene a posibilitar la pervivencia del pronunciamiento cautelar, con independencia y sin necesidad de promover el juicio de cognición; la clásica tutela cautelar conservativa asume así típicos perfiles anticipatorios y aún satisfactivos. En ciertas situaciones que presuponen derechos de tutela preferente –a la vida, a la salud, a la integridad física, etc.- por la irreparabilidad del perjuicio que se deriva, se habilita el dictado de decisiones provisionales pero que devienen

[39] De la nutrida opinión autoral, puede verse una síntesis en: DITTRICH L., "Natura e presupposti del provvedimento d'urgenza"; en *Il nuovo processo cautelare, a cura di Giuseppe TARZIA*, Cedam, Padova, 1993, pp. 190 y ss.. CONTE R., "Tutela d'urgenza tra diritto di difesa, anticipazione del provvedimento ed irreparabilitá del pregiudizio", *Riv. Dir. Proc.* (Rivista di Diritto Processuale), Cedam, Padova, 1995, pp. 213 y ss..

[40] LAPERTOSA F., "L'art 186 quater C.P.C. una rivoluzionaria novitá nella giustizia civile", *Riv. Dir. Proc.* (Rivista di Diritto Processuale), Cedam, Padova, 1996, p.54. DIDONE A., "Per la difesa dell'ordinanza succesiva alla chiusura dell'istruzione", *Riv. Dir. Proc.*(Rivista di Diritto Processuale), Cedam, Padova, 1996, p. 71.

[41] Sobre las reformas del art. 669 *octies*, inc. 6º del CPC italiano: DITTRICH L., *Il provedimento d´urgenza ex art. 700 CPC,* en TARZIA G., *Il proceso cautelare*, 2a. ed., Padova, 2004, p. 227. SALETTI A., *Le misure cautelare a strumentalita attenuatà*, en *Il processo cautelare* a cura di G. Tarzia y A. Saletti, 3a. ed., Cedam, 2008, pp. 289 y ss.; *id, "*El nuevo régimen de las medidas cautelares y posesorias" en *Rev. Peruana de Derecho Procesal*, Lima, 2008, XI, pp. 387 y ss. BIAVATI P., *Tutela cautelar, anticipatoria y sumaria…*, ob. cit., pp. 497 y ss..

directamente ejecutables (art. 669 octies), cuyos efectos perduran y se tornan definitivos, a menos que se instaure por cualquiera de las partes el proceso de cognición plena. De ahí que –como se ha observado[42]- haya perdido virtualidad la tradicional distinción entre medidas conservatorias y anticipatorias, sustituido por lo que se ha denominado como régimen de "instrumentalidad atenuada".

En su más reciente evolución se ha introducido un procedimiento sumario de cognición –ley n. 69/2009-, regulado en los arts. 702-bis, 702-ter y 702-quater del CPC, que instituye un procedimiento análogo al regulado en el art. 669-sexies y siguientes de las tutelas anticipatorias. Se trata de un mecanismo procesal de cognición simplificada idóneo para el dictado de un pronunciamiento que produce cosa juzgada y resulta inmediatamente ejecutivo, aplicable a todas las situaciones –y no solo a aquellas de resguardo diferenciado regidas por el estatuto de las medidas anticipatorias-. En un marco más amplio, el legislador italiano se propone reconducir el sistema vigente a tres tipos o modelos de procesos: el tipo ordinario de cognición plena, el tipo especial de las controversias del trabajo y, finalmente, el tipo especial sumario –en el que se insertan la tutela cautelar y anticipatoria[43]-.

e. En la tradición del *common law*, de su lado, las *Rules of Civil Procedure* (RCP) inglesas de 1999 instituyen bajo la denominación genérica de *interim remedies* un conjunto de medidas cautelares conservativas y de otras que encajan en la moldura de la tutela anticipada –las *interim injunctions*, que posibilitan el dictado de órdenes judiciales de hacer o no hacer alguna cosa, rule 25.1(1)(a)-, que pueden otorgarse en cualquier tiempo, incluso antes de la

[42] SALETTI A., *La misure cautelare,* ob. cit., pp. 303 y ss..

[43] BIAVATI P., *Tutela cautelar, anticipatoria y sumaria…*, ob. cit., pp. 514-516. En Italia el legislador en el convencimiento de la imposibilidad de asegurar a todos los ciudadanos una decisión en tiempo razonable, pone el énfasis sobre la tutela cautelar y anticipatoria con un adecuado control de las medidas y, al mismo tiempo, favorece todas las situaciones que puedan conducir a la estabilidad del proveimiento provisorio. Se acerca de ese modo a la transformación de la cautela en una tutela común. Al mismo tiempo, se trata de auspiciar todas las vías alternativas, tanto el arbitraje como la mediación o conciliación; además, se apuesta a la consulta preventiva por finalidades conciliatorias, siquiera como efecto eventual de la formación de prueba temprana para el proceso. El resultado final es que la tutela actuada mediante el proceso ordinario resulta ahora un fenómeno en retroceso (ob. cit., pp. 519-520).

instauración del proceso, cuando medien razones de urgencia o cuando el interés de la justicia lo haga deseable, fórmula flexible que abre al juez un considerable margen de apreciación[44].

No menos importante para nuestro análisis es advertir que las RCP regulan varios tipos procesales: un *small claim track*, un *fast track* y un *multi track*, confiriendo al juez el poder de escoger de entre ellas, y para cada caso, el trámite adecuado en atención al valor de la causa, la complejidad de los hechos, la naturaleza de la providencia que se pretende, el número de las partes, la importancia del pleito para terceros (rule 26.1, 26.4, 26.6, 26.7, 26.8). Se consagra, así, una considerable flexibilidad en la elección del procedimiento, que ha de fijarse mediante resolución expresa susceptible de impugnación[45].

f. En cambio, la LEC española Nº 1/2000 ha traído consigo innovaciones muy modestas. A la simplificación del proceso en general apuntan, entre otras técnicas, la nueva regulación del juicio verbal, el proceso monitorio[46], la sistematización de las medidas cautelares. Sin embargo, solo se legisla específicamente sobre tutelas anticipatorias en los procesos familiares –alimentos provisionales (art. 768.2)-. A su vez, el art. 762.2 autoriza medidas satifactivas, si bien con carácter temporal, provisional, condicionado y susceptible de modificación y alzamiento, y no habrán de prejuzgar la sentencia que en definitiva se dicte[47]. En realidad la aceleración de los desarrollos litigiosos encuentra su principal escenario en los denominados juicios verbales (arts. 437 a 447), cuya materia se regula en el art. 250, comprensiva de la tutela sumaria de la posesión, de los derechos reales inscriptos, pretensiones relacionadas con la compraventa a plazos de bienes muebles y otros, además de las demandas de menor cuantía que no excedan el tope legal. Se trata de un tipo procesal abreviado de cognición fragmentada que culmina con sentencia que, cuando resuelve sobre tutela sumaria, no produce cosa juzgada material (art.

[44] BARBOSA MOREIRA J.C., "Uma novidade: o Código de Processo Civil inglés", en *Temas de Direito Processual, Sétima Série*, ed., Saraiva, Sâo Paulo, 2001, pp. 179 y ss.. ZUCKERMAN A.A.S., "Court control and party compliance…" en *The reforms of Civil Procedure in comparative perspective*, ed. N. TROCKER and V. VARANO, G. Giappichelli ed., Torino, 2005, p. 143 y ss..

[45] BARBOSA MOREIRA J.C., "La revolución procesal inglesa", en *RDP* (Revista de Derecho Procesal), Rubinzal-Culzoni ed., Santa Fe, 2009-II, pp. 552-553.

[46] CORREA DEL CASO J., *El proceso monitorio de la nueva LEC*, Marcial Pons, Madrid, 2000, *passim*. Sobre el éxito de su aplicación práctica: PICO I JUNOY J., *El proceso monitorio…* en *XXV Congreso Nacional de Derecho Procesal*, UBA-AADP, Bs. As., 2009, pp. 1090 y ss..

[47] ORTELLS RAMOS M., *Derecho Procesal Civil*, Aranzadi, 3ª. ed., Navarra, 2002, pp. 995-996.

447.2, 3 y 4), lo que posibilita un proceso posterior[48]. Ello ha llevado a afirmar que tal regulación ha implicado un verdadero retroceso, al estar ausente ahora la tutela jurídica mediante procesos de cognición sumaria o limitada[49].

IV. La necesaria reconstrucción del proceso de cognición plena y su articulación con las tutelas de urgencia.

a. Si algo pone en evidencia la somera revista pasada a la legislación de los diversos países en óptica, es lo que ANDOLINA ha señalado recientemente[50]: la creciente fermentación de lo que denomina la tutela provisoria de mérito, dentro de una tendencia más general a abrir el proceso a los hechos sobrevenidos *in itinere* y, mejor, externos a los desarrollos procedimentales, para asegurar una más estricta "soldadura" entre procesos y derecho, (que es como decir) una mayor coherencia del proceso a la realidad extraprocesal. Fenómeno que se exterioriza en la introducción de nuevas, y siempre más numerosas figuras de tutelas provisorias de mérito, connotadas por la sumariedad de la cognición, condicionadas a la cláusula *rebus sic stantibus*, inidóneas a la formación de la cosa juzgada, aunque de todos modos dotadas de elevada *efectividad*, en cuanto provistas de inmediata fuerza ejecutiva y de efecto ultraactivos, desde que sobreviven a la extinción del juicio de mérito. Se va delineando de esta forma, expresa el maestro italiano en lúcida síntesis, un modelo alternativo de tutela jurisdiccional ya no más focalizado sobre la cosa juzgada, y la cognición plena; no más encaminado a la comprobación incontrovertible de los hechos deducidos en juicio. Un proceso sumario que no ambiciona la comprobación de la verdad, sino que se contenta con un juicio de verosimilitud; y de todos modos capaz de arribar, en tiempos breves, a un resultado judicial

[48] ORTELLS RAMOS M., ob. cit., pp. 654 y ss.; 605-606. Para una severa crítica del art. 447: FAIREN GUILLEN V., *Lo "sumario" y lo "plenario" en los procesos civiles…*, Centro de Estudios, Madrid, 2006, pp. 721 y ss.; 785 y ss., para quien los procesos sumarios han pasado a ser simples medidas precautorias, confundidas casi con las cautelares (p. 730).
[49] VAZQUEZ SOTELO J.L., "El nuevo Código Procesal Civil español…" en *Studi di Diritto Processuale Civile in onere di Giuseppe Tarzia*, Giuffré ed., Milano, 2005, v. I, pp. 775-777.
[50] ANDOLINA I., "Il tempo e il processo", en la obra del mismo título, *Scritti scelti di Italo Andolina*, a cura di G. Raiti, Universitá di Catania, G. Giappichelli ed., Torino, 2009, v. I, pp. 31 y ss., especialmente p. 43.

efectivo, idóneo a incidir con su fuerza ejecutiva sobre la afirmación de los intereses en conflicto.

b. Es lo cierto que en la mayoría de los sistemas nacionales, sea por mandato del legislador o ya por creación pretoriana, se delinean dos modelos diferenciados de enjuiciamiento civil: a) el proceso común de cognición, con las características típicas derivadas de los principios del debido proceso, el proceso justo, a cognición exhaustiva y que dirime la litis en su totalidad, de una vez y para siempre. Aunque con diferencias de grado en cuanto tan solo su estructura y formalidades, existen a su vez el plenario mayor u ordinario; el plenario abreviado –nuestro proceso sumario todavía operable en la mayoría de las legislaciones provinciales- y el plenario "abreviadísimo" –el sumarísimo de las mismas legislaciones y, al menos, en su literalidad, el regulado por el art. 498 CPCN vigente)-; y b) el propio de las medidas urgentes, anticipatorias y satisfactivas en general, preordenado a la producción inmediata y provisional de efectos prácticos, con todas las demás características que hemos visto. Lúcidamente, se ha aludido[51], en relación a la actual legislación italiana –pero vale por extensión a la mayoría de los esquemas- a un sistema de "doble binario" de la justicia civil, uno de velocidad reducida, que privilegia el "hacer bien" y el otro de alta velocidad que persigue "hacer pronto". Sistema que, puede agregarse siguiendo la metáfora, que está definitivamente instalado, que no podrá ser removido en adelante; solo tolerará el ajuste de algunas de sus piezas. Y de eso se trata ahora: encausar mejor y perfeccionar las tutelas de urgencia y, por otro lado, reconstruír (¿una vez más?) el proceso madre de cognición, para tornarlo más adecuado para el efectivo cumplimiento de sus fines.

c. La "reingeniería" del proceso de cognición debería comenzar, en nuestro sistema, por ajustar el proceso plenario abreviado. Es bien sabido que el proceso sumario constituyó uno de

[51] ANDOLINA I., ob. cit., pp. 43-44. El modelo de "alta velocidad", organizado en función de la producción de proveimientos inmediatos y provisorios de mérito, está coherentemente asentado sobre la bisagra del *rebus sic stantibus* y, por consiguiente, necesariamente abierto a los *nova*, al sobrevenir de los hechos, a la confrontación constante con la realidad externa en perenne devenir (p. 45).

los más significativos avances que trajo consigo el CPCN de 1968[52], como también su triste destino que comenzó con su desnaturalización, sobremanera por la inoperancia por la práctica de los operadores que convirtió en "letra muerta" el mecanismo de la audiencia de vista de la causa del originario art. 489, y remató finalmente en la retrógada supresión que consagrara la ley 25.488, de 2001. Se trata, entonces, de remodelar ese tipo procesal, reconvirtiéndolo como un proceso ágil, desformalizado, que recoja los mejores aportes que exhibe, p.e., la reciente reforma italiana de la ley 69/2009 –arts. 702 bis, 702 ter y 702 quater-; los de la LEC española Nº 1/2000, que regula los juicios verbales, arts. 437 a 447; y aún, los traídos por el régimen procesal experimental portugués –dec. ley 108/2006-.

Una tutela sumaria "buena", en la expresión de TARUFFO[53], cumple con la exigencia de llegar a emitir rápida y eficazmente un pronunciamiento de mérito, sin menoscabo de las garantías fundamentales del proceso, porque opera sobre las formas del procedimiento simplificándolo fuertemente. El juez procede "omitiendo toda formalidad no esencial para el contradictorio", lo que implica, no obstante que el contradictorio efectivamente se lleve a cabo; y fundar la decisión sobre los hechos en la "información sumaria" supone, de todas maneras, que el juez debe determinar –aunque de manera simplificada e informal- la verdad de los hechos.

d. En verdad, no se trata de contraponer o enfrentar dos modelos opuestos, los del "doble binario" a que aludía ANDOLINA. En todo caso, la fórmula constitucional del debido proceso, o la del proceso justo si se prefiere, alberga las dos vías y, entonces, resulta necesaria su articulación de modo que, respetando la natural individualidad de una y otra, pueden ser ensambladas para que ganen todas operatividad y, en definitiva, se asegure el mejor y más efectivo rendimiento de la tutela jurisdiccional.

[52] PALACIO L.E., *Derecho Procesal Civil*, Abeledo-Perrot, Bs. As., 1967, v. I, pp. 319 y ss.; v. VI, pp. 213 y ss.. MORELLO A.M., SOSA G.L. y BERIZONCE R.O., *Códigos Procesales…*, Abeledo-Perrot/LEP, Bs. As., 2ª. ed., 1989, v. IV-A, pp. 314-319.
[53] *Determinación de los hechos…*, ob. cit., pp. 282 y 283.

El proceso madre de cognición sumaria aunque acabada y plena, en la versión procedimentalmente simplificada, ágil, desformalizada y adecuada al caso concreto, bajo la batuta ordenadora del juez[54], no rechaza la mixtura que deriva de la necesaria e imprescindible –por razones funcionales y de efectividad- inserción en su propio curso, in itinere, de medidas anticipatorias y de urgencia, provisorias aunque inmediatamente operativas. La conjugación armoniosa del "hacer pronto" y del "hacer bien" garantiza la oportuna composición de los diferentes intereses en conflicto, pues mientras la parte urgida puede recibir, concurriendo los requisitos que establece la ley, una tutela presurosa aunque de todos modos provisional, igualmente queda salvaguardada la garantía plena del contradictorio, para la contraria, sustentada en la comprobación plena y definitiva de la que deriva la cosa juzgada. La tutela provisoria de urgencia viene, de ese modo, a correlacionarse y ensamblarse con la tutela definitiva asentada en el conocimiento pleno y acabado de la litis, como único modo de asegurar el proceso justo constitucional[55].

Queda por delante para nosotros la improba, aunque apasionante tarea de concretar en la ley procesal la remodelación del plenario abreviado y, al mismo tiempo, articular en consonancia las tutelas provisorias de urgencia, de modo que una y otra tributen en definitiva al debido y justo proceso constitucional y convencional.

[54] Sobre el principio de *adecuación judicial de las formas*, o de flexibilidad, por todos: CALAMANDREI P., *Instituciones de Derecho Procesal Civil*, EJEA, Bs. As., 1943, trad. S. Sentis Melendo, pp. 247 y ss.. Aplicación concreta de dicho principio lo constituye el art. 702-*ter*, CPC italiano, texto ley n. 69/2009, ya aludido. En el derecho inglés, el *case management* acuerda al juez la potestad de optar entre distintos tipos procesales –*fast track*, *small track* y otros- en atención a las particularidades de cada caso, como se explicó *supra*.

[55] TARUFFO M., *Determinación de los hechos…*, ob. cit., pp. 271 y ss., 276 y ss..

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AB OMNIBUS PRO OMNIBUS

The various roots of Civil Litigation in China and the influence of foreign laws in the global era*

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Abstract: The article seeks to analyse the historical influences of the chinese procedural law system and relate them with our modern era of globalization.

Keywords: Civil Procedure. China.

1. Introduction

My report focuses on the influence of foreign laws on China's civil litigation over the past two decades, and introduces the present circumstances and issues relating to legal institutions, theory and practice.

Part One: The various roots of China's civil litigation

Before I begin to estimate the degree to which China's civil litigation has been influenced by foreign law over recent years, it is necessary to mention a number of roots of the system which form the basic framework. To begin with, even in the period before China became entrenched in globalization, China's civil litigation did not simply progress independently by preserving fixed or old traditions, nor was it the result of transferred or received institutions or theories from one single country. One of the characteristics of China's

* Translated from Japanese by **Melanie Trezise.**

civil litigation system is the existence of extremely broad and complicated roots, brought about by the experience of an era of major transformation of modern society.

The long period up until the mid-nineteenth century marked the era of the so-called indigenous laws of China, at which point strong advancements began under the influence of confrontation with Western European powers. At that time, the "hearing civil case", which existed at the basic level of the state and county bureaucratic systems, was the representative system for civil dispute settlements that corresponded with lawsuits and trials. Focusing on the characteristics of this system, Professor Shuzo SHIGA, an eminent Japanese scholar in the field of Eastern legal history, has described the "hearing civil case" as 'didactic conciliation'.[1] Tts essence retains a strong influence on present day civil litigation in China.

With the invasion by Western powers in the nineteenth century, China was increasingly unable to maintain its unique legal system and attempted to fully receive western European modern laws in the form of legislative processes through legal codification at the end of the Qing dynasty, approximately 100 years ago. Japanese academics were invited as advisors on legislation for the civil litigation system and drafts were made using German laws as the blueprint, though these were withdrawn without being completed as laws with the fall of the Qing dynasty. As I will touch upon later, the German and Japanese legal trends within the basic framework of the litigation system are able to be seen clearly in Chinese civil litigation today.

On the other hand, in the region called the "base area", controlled by the communist party during the Sino-Japanese war (1937-1945), a new civil litigation style was devised in a form to serve the purposes of the revolution ideology and the objectives of the war. This civil litigation style had the structure and content such that when the parties instituted a claim, a certain judge, or even executive members of the party, would go to the site of the dispute, collect evidence and clarify the facts, and then a group of the party's peers would propose a decision and convince the parties to accept it. These characteristics were readily evident with slogans such as "fact investigation (or inquiry into facts)", "mediation focus" and "mobilization

[1] See shuzo Shiga, Law and Adjudication of Qing Dynasty's China, Tokyo: Sobundo Press,1984,231-257.(滋賀秀三、清代中国の法と裁判、東京：創文社、1984年、231-257頁.)

of the masses". This kind of trial system later formed the pragmatic basis for dispute resolution in the courts of the People's Republic of China, and is an element which cannot be ignored as being a very important legal root, even in observing civil litigation in China today.

With the formation of the People's Republic of China, all laws were abolished by the Kuomintang government, including the civil litigation law, and for over three decades between 1949 and 1982, no legislation existed in relation to civil litigation. However, there was a period in the 1950s in which the basic concepts, principles, and theory systems of the so-called socialistic civil litigation studies from the former Soviet Union were enthusiastically studied and introduced. This period of learning from the former Soviet Union was short-lived, and although the influence was limited, this influence filled the void left after the rejection of German-style civil litigation studies, and prima facie, it provided an academic basis to civil litigation of the time, which was almost completely deficient in theory. In this sense, yet another root of present day Chinese civil litigation comes from the laws of the former Soviet Union, in the form of socialist law.

However, restricting the discussion only to the practice of the civil courts at that time, instead of applying the letter of the law and theory, while this was frequently controlled by party ideology and policy or political campaigning, a "mediation focused" trial system was maintained which was essentially formulated in the "base area" during the war of 1937-1945. It is also important to point out that at this time, China's civil litigation, which was experiencing social upheaval such as in the "cultural revolution" and which was cut off from the world, was almost entirely divorced from foreign legal influence.

Part two: The influence of foreign laws in the period of reform and liberalization

The influence of foreign laws began to emerge prominently from the period of reform and liberalization in the 1980s, especially in 1982 with the formulation of the first law on civil litigation since the establishment of the People's Republic of China. This law emphasized the

collection of evidence and fact finding by judges and viewed from the prescribing of the principle of "emphasizing mediation", and so on, it can of course be said that the law was essentially built upon the "new traditional" trial system which traced back to the "base area" period of the communist party revolution. However, by developing the *Allgemeiner Teil·Besondever Teil* (general and specific rules) structure, it is clear that it adopted the framework of the German civil litigation law. At the same time, with the trial session, which is similar to court opening procedures corresponding to the hearing date and lawsuit participation, it is possible to say that this code was joined by the lessons learned from the civil litigation law and legal theory of the former Soviet Union.[2] Moreover, legislators as well as general academics barely made mention of foreign legal influence at the time. For example, if we go to the two most representative textbooks published in the late 1980s, one of these raised foreign laws under the heading "Civil litigation laws in bourgeois society" and criticized these simply as "protecting and giving into the service of bourgeois profits"[3]. The description contained in the other textbook was that "we must refer to the successful legislative techniques and beneficial methods of foreign countries", though concrete examples of these points of reference were given only as "the areas of jurisdiction and legal assistance in external civil and financial matters related to foreign countries". [4] Looking back on this now, the mood of China's civil litigation academic community throughout the entire 1980s was the feeling of political and ideological barriers to stating that there was a connection with foreign laws, and the introduction of comparative law materials and research was not an especially active area of academia. Translation work on the civil litigation laws of foreign countries and their theories

[2] Please refer to the following materials for more details on the civil litigation system of the former Soviet Union in these areas: Yaxin Wang, On the Structure of Chinese Civil Procedure, Kazuyuki Tokuda.et al ,edit, The Phases of Modern Judicial System: To Professor Yasuhei Taniguchi for His Seventy's Birthday, Tokyo: Seibundo Press, 2005.264-265.
王亜新、中国民事訴訟の審理構造についての一考察、谷口安平先生古稀祝賀『現代民事司法の諸相』、東京：成文堂、2005年、264－265頁)；
Yiwei Pu, The Third Person in Civil Procedure, Unpublished Paper at Tsinghua University.117-121. (蒲一葦、民事訴訟第三人制度研究、清華大学法学博士学位論文、117－121頁.)

[3] Fabang Cai, edit, Civil Procedure, Beijing: Pekin University Press,1988, 11-12. (柴発邦編、民事訴訟法学、北京大学出版社、1988年、11－12頁.)

[4] Huaian Wang ,edit. Chinese Civil Procedure, Beijing: People's Court Press, 1988, 18. (王懐安編、中国民事訴訟法教程、人民法院出版社、1988年、18頁.)

was undertaken sporadically in the form of providing "internal reference" for the purpose of providing internal reference materials for legislative bodies, universities and so on, and translations for sale remained quite insubstantial.

However, this mood was transformed from the 1990s, and especially after 1992 with the rapid marketization of the economy. In legislation, and its interpretation or educative research, citing the civil litigation system of foreign countries became normal and no ideological barriers were felt. The comparative research of civil litigation became popular, and as for all other fields, there has been an unparalleled translation boom in relation to civil litigation. In the background to this situation, the influence of foreign laws was spreading throughout the Chinese civil litigation academic community with a force never seen before. It goes without saying that it is this period after the 1990s when society and economics in China became more completely and profoundly caught up in globalization.

Foreign civil litigation systems and theories were perceived positively, and one important catalyst for driving the general attitude of actively studying these was the overall reform of the civil litigation system in 1991, and the completion of the civil litigation law. This newly formulated law took on many elements from continental European and Anglo-American laws. For example, the basic '*Allgemeiner Teil·Besondever Teil*' (general and specific) structure derived from German law , *Mahnverfahren* (summary procedure) and *Aufgebots Verfahren* (Right-exclusion judgment procedure) and so on, clearly involve elements introduced from civil litigation in continental European countries. We can also find clauses in this law which were developed with reference to American law. Representative of this is Article 55 which now provides for "a representative in cases with an undetermined number of parties" for litigation with numerous parties or group litigants. The object of this article is so that even when litigating in matters where the number of litigants is undetermined, through the procedures for notification, registration and so on, an elected representative is entrusted with pursuing the litigation and it is possible for the decision from that case to be incorporated afterwards by latent parties to the same dispute in other litigation also. Seen in this way, the system of "represented litigation for an undetermined number of parties" is found situated beyond the

general framework of continental European law relating to litigation involving a large number of parties and also obviously has similarities with class actions suits in American law.[5]

Furthermore, the introduction of the doctrines and theories of foreign countries' civil litigation became popular in the 1990s. For example, there have been arguments surrounding a number of important concepts such as the "onus of proof" and the "*Verhandlungsmaxime*" (doctrine of oral arguments) , and a new climate has transpired in the civil litigation academic community. For example, throughout the 1980s "onus of proof" was generally only understood at the level of corresponding with "subjective" or "behavioral" burden of proof or "the burden of producing evidence". Facing these circumstances, some academics at the beginning of the 1990s relied on the theories of Leo Rosenberg to actively introduce the concept of "objective" or "resultative" burden of proof, and began to emphasize the most crucial parts of the concept of the onus of proof such as at the level of solving non liquet problems.[6] In the end, understanding the "onus of proof" on both subjective and objective levels gained consensus in the civil litigation academic community, becoming a general idea and commonly accepted notion. In time, this academic consensus ushered in the basic concept of adversarialism, that is, that in the case of non liquet the party with the burden of proof must accept the risk of unsuccessful litigation, and this consensus also played a large part in the litigation system itself and the management of court administration. Furthermore, as I will touch upon in the next section, this understanding of "onus of proof", as an impact from foreign scholarship, is connected to the dissemination of the concept of "legal truth" (procedurally restricted truth), replacing the concept of the "absolute, substantive truth", and the establishment of a system of "time limits for evidence" (the effective loss of a right in relation to late presentation of offensive and defensive means).

[5] There were a number of introductions to "class actions" before and after this Article was promulgated. For an explanation on how legislative bodies were also influenced by these, see: Yu Fan, edit, Group Litigation: About its Problems of System and Practice, Beijing: Pekin University Press, 2005.274-276. (範愉編著、集団訴訟問題研究、北京大学出版社、2005年、274－276頁.)

[6] For a representative work on this see: Hao Li, On Burden of Proof in Civil Procedure, Beijing: Chinese Law and Politic University Press, 1993. (李浩、民事挙証責任研究、北京：中国政法大学出版社、1993年.) This study by Professor Li Hao is primarily based on articles by Taiwanese academics and other translated works, and takes into consideration the theories of Rosenberg and others, and the doctrine of the onus of proof in German and Japanese law.

Moreover, if we raise one more example of a large influence on China's civil litigation academic community and court practices, there is the introduction of the "*Verhandlungsmaxime*" (doctrine of oral arguments) by borrowing important concepts and principles from civil litigation theory of continental European law. For a long time in contemporary Chinese civil litigation, there was a customary practice of judicial inquisition and in the academic community also, the principle of judicial inquisition (*Untersuchungsgrundsatz*) was dominant and there was a background of having rejected the "*Verhandlungsmaxime*" on ideological grounds without sufficiently understanding its sense and purpose. The term used in place of "*Verhandlungsmaxime*" in the text books and so on was "the principle of oral arguments" , and this takes on the meaning that both parties in all circumstances must make assertions and oral arguements, though this would not bind the judge in deciding whether the parties would be heard or not. In the end of the 1980s, the courts of the People's Republic of China launched a reform into civil litigation procedure in order to amend the custom of judicial inquisition[7], however, the civil litigation academic community at the time was still not sensitive to the reformist trend and no solid basis could be given to the movement in practice from the point of view of the doctrine of oral arguments. As well as introducing in detail the concepts and content of the "*Verhandlungsmaxime*" in the civil litigation of Germany and Japan, the "principle of oral arguments" in the Chinese legal academic circles had the position of a "non-binding principle" and the argument that this should be replaced with "*Verhandlungsmaxime*" began to be made public from the middle of the 1990s, starting to become the dominant theory.[8] Recently, through the publication and promulgation of the new litigation rules by the Supreme Court of the People's Republic of China, the legal principles similar in content to the "*Verhandlungsmaxime*", have eventually become accepted into the Chinese civil litigation system and were able to be transferred into practice.[9]

[7] See Yaxin Wang, The Study on Chinese Civil Procedure, Tokyo: Nippon Hyoronsya Press.1995,12-56. (;王亜新、中国民事裁判研究、東京：日本評論社、1995年、12-56頁.)

[8] For a representative discussion of these findings, see Weiping Zhang, Review the principle of oral arguments, Beijing: Jurisprudence Study 6,1996. (張衛平、「我国民事訴訟弁論原則重述」、法学研究1996年第六号.)

[9] For a discussion on this new trend, see: Yaxin Wang, The New Trend of Chinese Civil Procedure: about the New Rules of the Supreme Court, Sapporo:Hokkaido University Jurisprudence Study, 54-6,2004.227.

The increasing influence of foreign laws throughout the 1990s was adopted into the legislative system and consisted not only of the introduction of theories and legal principles, but extended to the general perception and basic ideas of litigation and procedure. Through this, the terms and concepts such as "procedural justice" and "due process" gained currency as "civil rights" in China's civil litigation academic community and were expressed as phenomena such as the concepts becoming slogan-like or even epidemical. Until the end of the 1980s, it was commonly recognized that civil litigation laws, as procedural rules, had an instrumental existence for the sake of essentially realizing substantive justice, a recognition which was also shared by those in the study of civil litigation laws, and civil litigation seemed to take its place at the outer edge of the legal academic world. However, discussions began to be introduced regarding due process in Anglo-American law and procedural justice in Japanese academic circles,[10] and gradually it came to be widely understood that the legal process and court procedures had a major part to play in Western legal systems and philosophy. Coupled with the expansion of judicial system reform, which by the second half of the 1980s had become a frantic boom, the importance of procedure was frequently referred to not only by civil litigation academics, but also by researchers in various fields such as legal philosophy and substantive legal studies. These days, it is no exaggeration to say that these concepts are now shared widely throughout the legal academic community to the extent that "due process" and "procedural justice" are basic keywords in the legal system and legal studies as a whole. These are also the most remarkable signs and results of the influence of foreign law.

Against this background of the various movements outlined above, it should be also pointed out that there now exists the biggest translation boom since the creation of the People's Republic of China (or alternatively, over the thousands of years of Chinese history).

(王亜新、中国民事訴訟の新しい展開——最高人民法院の証拠に関する最新の訴訟規則を中心として、北大法学論集第５４巻第６号、2004年、227頁以下.)

[10] For an introduction to due process, see: Weidong Ji, On Legal Procedure, Beijing: Chinese Social Science, 1993, 1 (季衛東、論法律程序、中国社会科学1993年第１号); for an introduction on the debate in Japanese legal academic circles, see: Yasuhei Taniguchi (translated by Yaxin Wang and Rongjun Liu), Procedural Justice, Beijing: Chinese Law and Politic University Press,1995. (谷口安平著、程序的正義与訴訟（王亜新、劉栄軍訳）北京：中国政法大学出版社、1995年) (additionally, this translation was published in an expanded edition in 2002.)

This boom, which embraces any number of fields includes the domain of civil litigation, dates from the beginning of the reform period and has continued until today. The results of this boom should be given our attention, especially those since the last half of the 1990s. Below I will cite, though not exhaustively, the major translated works in the following order: procedural codes/litigation rules; textbooks; and research works/collected papers. [11]

First, for reasons of geographical proximity to Japan, the large number of civil litigation researchers from China who have studied in Japan both long- and short-term, as well as the relatively frequent exchanges between the civil litigation academic circles of China and Japan, the period of Japanese publication translations came fairly early and as a result of that, it probably also ranks the highest in terms of the quantity translated. The following are the main translated works with regard to civil litigation in Japan.

The New Civil Procedure Law of Japan,(translated by Lvxuan Bai). Beijing: Chinese Legal System Press 2000.白緑玄訳、日本新民事訴訟法、中国法制出版社、2000年；

Hajime Kaneko and Morio Takesita (translated by Lvxuan Bai.) Civil Procedure (new edition), Beijing: Law Press, 1995.兼子一、竹下守夫著、白緑玄訳、民事訴訟法（新版）、法律出版社、1995年；

Takaaki Hatori,et al, (translated by Xingyou Zhu), Civil Trial Procedure of Japan, Xi'an: Shannxi People Press,1991.羽鳥高秋、ヘンダソン著、朱興有訳、日本民事審判程序、陕西人民出版社、1991年；

[11] In addition, there are also great numbers of books and articles written by Chinese scholars, which introduce or provide research on the civil litigation systems and theories of various foreign countries, however I will not go into them here.
Furthermore, in the list below I provide the original title, publisher, date of publication and so on where these are known. However, where these are not known, for the reason of not being clear in the collected works from translators and translated books, I have had to give an abbreviated description.

Hidero Nakamura (translated by Gang Chen et al.) Textbook on New Civil Procedure, Beijing: Law Press,2001.中村英郎著、陳剛ら訳、新民事訴訟法講義、法律出版社、2001年；

Yasuhei Taniguchi (translated by Yaxin Wang and Rongjun Liu), Procedural Justice, Beijing: Chinese Law and Politic University Press, First Edition 1995 (improved edition, 2004).谷口安平著、王亜新、劉栄軍訳、程序的正義与訴訟、中国政法大学出版社、初版1995年（増補版、2004年）；

Hiroshi Takahashi (translated by Jianfeng Lin), Civil Procedure: Deep Analysis on System and Theory. Beijing: Law Press,2003.高橋宏志著、林剣峰訳、民事訴訟法：制度与理論的深層分析、法律出版社、2003年；（重点講義・民事訴訟法、有斐閣、1998年）

Yoshimasa Matsuoka (translated by Zhiben Zhang), On Civil Evidence, Beijing: Chinese Law and Politic University Press,2004. 松岡義正著、張知本訳、民事証拠論、中国政法大学出版社、2004年；

Takeshi Kojima, et al (translated by Zuxing Wang), The History and the Future of Judicial System, Beijing: Law Press, 2000.小島武司ら著、汪祖興訳、司法制度的歴史与未来、法律出版社、2000年；

Takeshi Kojima (translated by Gang Chen, et al), The Theory and Practice of Litigation System Reform, Beijing: Law Press, 2001.小島武司著、陳剛ら訳、訴訟制度改革的法理与実証、法律出版社、2001年；（民事訴訟の基礎法理、有斐閣、1988年）

Takao Tanase (translated by Yaxin Wang), Dispute Resolution and Adjudication System, Beijing: Chinese Law and Politic University Press, 1st edition 1994(2nd edition 2005)棚瀬孝雄著、王亜新訳、糾紛的解決与審判制度、中国政法大学出版社、初版1994年（新版2005年);

Yoshinobu Someno (translated by Jianfeng Lin), Civil Adjudication System in the Transforming Eras, Beijing: Chinese Law and Politic University Press, 2004.染野義信著、林剣峰訳、転変時期的民事裁判制度、中国政法大学出版社、2004;

TakeshiKojima and Shin Yito,edit. (translated by Jue Ding) , The Methods of Alternative Dispute Resolution, Beijing: Chinese Law and Politic University Press, 2005.小島武司、伊藤真編、丁捷訳、訴訟外糾紛解決法、中国政法大学出版社、2005年;

Morio Takeshita (translated by Weiping Zhang and Rongjun Liu), Execution Law, Chongqin: Chongqin Press, 1991.
竹下守夫著、張衛平、劉栄軍訳、強制執行法、重慶出版社、1991年；

On the other hand, the interest in German law, one of the origins of Japanese civil litigation laws, has grown in recent years and as the number of researchers who go directly to Germany to study is increasing each year, there are also many translated works on German civil litigation, which are also garnering respect. The main works are given below.

Civil Procedure Law of Germany, (translated by Huaishi Xie). Beijing: Chinese Law and Politic University Press,2001.謝懐栻訳、徳意志連邦共和国民事訴訟法、中国法制出版社、2001年；

Dieter Knoringer (translated by Hanfu Liu), Germany Civil Procedure Law and Practice. Beijing: Law Press, 2000.著、劉漢富訳、徳国民事訴訟法律与実務、法律出版社、2000年；

Othmar Jauemig (translated by Chui Zhou), Zivilprozessrecht,27th edition, Beijing: Law Press, 2003. Othmar Jauemig著、周翠訳、民事訴訟法（第27版）、法律出版社、2003年；（Zivilprozessrecht,27th edition, Verlag C. H. Beck OHG, München,2002）

Hans-Joachim Musielak (translated by Chui Zhou),Grundkurs ZPO , Beijing: Chinese Law and Politic University Press, 2005. Hans-Joachim

Musielak著、周翠訳、徳国民事訴訟法基礎教程(第6版)、中国政法大学出版社、2005年；（Grundkurs ZPO, Verlag C. H. Beck OHG, München,2002）

Hans Pruetting (translated by Yue Wu), Modern Problem of the Burden of Proof, Beijing: Law Press, 2000. Hans Pruetting著、呉越訳、現代証明責任問題、法律出版社、2000年；

Leo Rosenberg (translated by Jinghua Zhuang), Burden of Proof: on the Base of Civil Code and Civil Procedure Code of Germany, Beijing: Chinese Law and Politic University Press,2002.Leo Rosenberg 著、荘敬華訳、証明責任論：以徳国民法典和徳国民事訴訟法典為基礎、中国法制出版社、2002年；（Die Beweislast, 4, Aufl. 1956, C. H. Beck'sche Verlagsbuchhandlung, München）

M Stürner edit.(translated by Xiuju Zhao), Collection of Civil Procedure of Germany. Beijing: Chinese Law and Politic University Press,2005. M Stürner編、趙秀挙訳、徳国民事訴訟法学文粋、中国政法大学出版社、2005年；

Simultaneously, in American civil litigation also, there has been scholarly interest in the representative domain of Anglo-American law to date, and by the 1980s, there were already resources on American civil litigation published for use as learning materials in comparative law in one section of universities. Heading towards the 1990s, many of the bulky textbooks were translated further, and even the somewhat alternative textbooks were published, aimed at the greater studying convenience for researchers and students with English capabilities, which catalogued the contrast between the English originals and the Chinese translations.

American Federal Rules of Civil Procedure, (translated by Lvxuan Bai and Jianlin Bian), Beijing: Chinese Law and Politic University Press,2000.白緑玄、卞建林訳、美国連邦民事訴訟規則、中国法制出版社、2000年；

Green. M. D. An Introduction to American Civil Procedure, (translated by Law Department, Literature School of Shanghai University). Beijing: Law Press, 1988.著、上海大学文学院法律学系訳、美国民事訴訟程序概論、法律出版社、1988年；

Geoffrey. C. Hazard, Michele Taroffo (translated by Mou Zhang), American Civil Procedure: An Introduction, Beijing: Chinese Law and Politic University Press,1998. Geoffrey. C. Hazard, Michele Taroffo著、張茂訳、美国民事訴訟法導論、中国政法大学出版社、1998年；(American Civil Procedure: An Introduction, Yale University Press, 1993)

Introduction the Federal Courts,(translated by Weijian Tan et al), Beijing: Law Press, 2001.
湯維健ら訳、美国連邦地区法院民事訴訟流程、法律出版社、2001年；（Introduction the Federal Courts, Federal Judicial Center Series, Program Three, 1998）

Stephen N Subrin、Margaret Y. K. Woo (translated by Yanmin Cai and Hui Xu), The Nature of American Civil Procedure: In Historical, Cultural and Practical Perspectives. Beijing: Law Press, 2003. Stephen N Subrin、Margaret Y. K. Woo著、蔡彦敏、徐卉訳、美国民事訴訟的真諦、法律出版社、2003年；()

Stephen N Subrin, Martha L. Minow, Mark S. Brodin, Thomas O. Main (translated by Yulin Fu et al) ,Civil Procedure: doctrine, practice, and context, Beijing: Chinese Law and Politic University Press,2004. Stephen N Subrin, Martha L. Minow, Mark S. Brodin著、付郁林ら訳、民事訴訟法：原理、実務与運作環境、中国政法大学出版社、2004年；（Civil Procedure: doctrine, practice, and context, Aspen Law & Business, 2000）

Jack H Friedenthal, Mary Kay Kane and Arthur R Miller (translated by Dengjun Xia et al) ,Civil Procedure, Beijing: Chinese Law and Politic University Press, 2005. Jack H Friedenthal, Mary Kay Kane and Arthur R Miller著、夏登峻ら訳、民事訴訟法、中国政法大学出版社、2005年；

Stephen C. Yeazell, Civil Procedure, Casebook Series , 5th edition, Zhongxin Press,2003. 中信出版社2003年

Furthermore, the following translated English works are not from certain countries but concern European or American civil litigation generally, and international comparative studies.

Bing Song edit, Collection of Trial System and Adjudication Procedure of America and Germany, Beijing: Chinese Law and Politic University Press,1998.宋氷編訳、読本：美国与徳国的司法制度与司法程序、中国政法大学出版社、1998年；

Mauro Cappelletti ,edit. (translated by Junxiang Liu, et al), Welfare States and Access to Justice. Beijing: Law Press, 2000. Mauro Cappelletti編、劉俊祥ら訳、福利国家与接近正義、法律出版社、2000年；

Mauro Cappelletti, et al (translated by Xin Xu), The Basic Procedural Guarantee of Parties and Civil Litigation in the Future. Beijing: Law Press, 2000. Mauro Cappelletti,ら著、徐昕訳、当事人基本程序保障権与未来的民事訴訟、法律出版社、2000年；

Mirjan R. Damaška (translated by Ge Zheng), The Faces of Justice and State Authority: A Comparative Approach to the Legal Process, Beijing: Chinese Law and Politic University Press,2004. Mirjan R. Damaška著、鄭戈訳、司法和国家権力的多種面孔、中国政法大学出版社、2004年；(The Faces of Justice and State Authority: A Comparative Approach to the Legal Process, Yale University Press,1986)

Adrian A S Zuckerman,edit. (translated by Yulin Fu,et al), Civil Justice in Crisis: Comparative Perspectives of Civil Procedure, Beijing: Chinese Law and Politic University Press,2005. Adrian A S

Zuckerman編、付郁林ら訳、危機中的民事司法：民事訴訟程序的比較視角、中国政法大学出版社、2005年； (Civil Justice in Crisis: Comparative Perspectives of Civil Procedure, Oxford University Press,1999)

Additionally, there are many codes and rules translated and published regarding the civil litigation laws of countries other than those given above. Please see the translations of the representative laws given below for examples:

New Civil Procedure Code of France, (translated by Jiezhen Luo), Beijing: Chinese Legal System Press, 1999.羅結珍訳、法国新民事訴訟法典、中国法制出版社、1999年；

Jean Vincent,Serge Guinchard (translated by Jiezhen Luo), Procédure Civile,25th édition, Beijing: Chinese Legal System Press, 2001.Jean Vincent,Serge Guinchard著、羅結珍訳、法国民事訴訟法要義(上、下)、中国法制出版社、2001年；(Procédure Civile,25th édition,Dalloz,1999)

Jean Vincent,Jacque Prévault (translated by Jiezhen Luo), Voies D'Execution et Procédure De Distrubution,19th édition, Beijing: Chinese Legal System Press,2002. Jean Vincent,Jacque Prévault Voies著、羅結珍訳、法国民事執行程序法要義(上、下)、中国法制出版社、2002年；(Voies D'Execution et Procédure De Distrubution,19th édition,Dalloz,2002)

The Rules of Britain Civil Procedure,(translated by Xin Xu), Beijing: Chinese Legal System Press, 2001.徐昕訳、英国民事訴訟規則、中国法制出版社、2001年；

Civil Procedure Code of Russia,(translated by Daoxiu Huang), Beijing: Chinese People Gongan University Press, 2003.黄道秀訳、俄羅斯連邦民事訴訟法典、中国人民公安大学出版社、2003年。

Part three: The dynamics between the influence of foreign laws and Chinese civil litigation

Historically, China has, for a long time, been proud of its own legal traditions, which can be said to have a legal personality not easily open to the incorporation of foreign legal influence due to dispute resolution systems corresponding to civil litigation. In this tradition, the resourceful and capable procedures and techniques of mediation had been developed. This personality is also reflected in phenomena such as the Communist party revolution's rejection of European and American legal systems and following from this trend, the declaration of a total divorce from civil litigation laws. On the other hand, in recent years, Chinese civil litigation in a different era has the background of actively learning about systems and theories from any number of foreign countries, and of being influenced by them. This is also a kind of historical "path dependence" and is thought to have exerted a considerable effect on the global era which followed. In the period since the 1980s, reform and the opening up of Chinese society, in the sense of starting to participate in world-scale globalization, has provided the background to urge increased foreign legal influence on the field of civil litigation. Specifically, however, through what kind of social conditions and by what dynamics was foreign legal influence increased? This question is dealt with below.

As I have touched upon in the sections above, the process and mechanisms which increased foreign legal influence in the field of civil litigation is in fact deeply tied to "adjudication system reform" in the courts of the People's Republic of China which began in the second half of the 1980s. Originally, this reform, which related to the specific methods of litigation practice and procedures, was not born from the reception of some kind of influence from foreign civil litigation systems, but was, unexpectedly, almost entirely set into motion "endogenously" by the internal situation of the courts of the People's Republic of China. The origins of this reform in an attempt to amend the procedural customs of judicial inquisition and the strengthening of the "onus of proof", or in other words, shifting the onus and responsibility for the collection of evidence from the judge to the parties. In the background to this

movement were a number of changes to social conditions brought about by the major historical turning point of China's reform and opening-up. There was a high incidence of problems involving assets and financial disputes along with the large scale transition of people goods and capital, which emerged as a phenomenon directly related to civil litigation, and it was many of these cases which swamped the courts of the People's Republic of China. For example, the number of civil trial cases received in 1979 was still less than 300-odd thousand cases, but by 1989 this had swelled to approximately 2,500,000 cases which represents an impressive increase of almost 800 percent over 10 years. These circumstances meant that in each individual matter the courts of the People's Republic of China reached the limits of their human and physical resources in order to research facts and collect evidence. Therefore, the very practical considerations to do with the "efficiency" of the courts, such as economizing on the courts' resources and receiving and dealing with a higher number of cases within a limited period of time, were reform-motivated and became connected with the slogan of "strengthening the onus of proof" on the parties.

There are two reasons why this relationship was made possible. One reason is the incorporation of foreign legal theories, and the other, more basic reason is the permeation of society with the doctrine that commercial goods equate to a market economy. The academic movement which introduced continental legal theory on the concept of "onus of proof" could already be seen from the beginning of the 1980s in one section of the civil litigation academic community, but without really attracting a response from those in legal practice, the discussion regarding this concept and doctrine was for the most part brought to a standstill at a fairly premature level. However, once the trial system reform began in the courts of the People's Republic of China, to shift the burden of evidence collection to the parties in the circumstances given above, the concept of the onus of proof along with the corresponding foreign legal theory suddenly came under the spotlight. The phrase "onus of proof" frequently made an appearance in the internal court procedural rules and reports, and furthermore the theories learnt from foreign laws were also soon adopted as a foundation to lend legitimacy to trial system reform. Conversely, this attitude of legal practitioners greatly stimulated discussion in the academic

community and was not only limited to continental law, but further popularized the impassioned introduction of related concepts from foreign civil litigation systems such as the "burden of producing evidence" and the "burden of persuasion" from Anglo-American law. However, at a more basic level, in the background of these concepts and theories borrowed from abroad forming the legitimizing foundation for Chinese court practice, the logic of private autonomy and self-responsibility was of course infiltrating society based on the concept that commercial goods equate to a market economy, which followed China's liberalization and reform. The court custom of judicial inquisition was reformed by the courts, and the slogan or catch phrase of "strengthening the onus of proof" in order to get the parties to take on the burden and responsibility of collecting and presenting evidence, had an affinity with the market economy behavioral patterns of subject autonomy and self-responsibility. The start of the trial system reform which gave effect to these principles, occurred after these market principles were introduced to the so called planned economy system after a finite period of time, a timing which was in no way accidental. This also formed the general background for the movement brought about by the market economy which was to actively introduce civil litigation systems and theory from foreign countries.

Through the changes to the social conditions and environment given above, the ideological barriers were removed and the social groundwork for receiving foreign legal influence was prepared in order to learn legal concepts and theories from foreign countries, however in the domain of civil litigation, the process itself of learning from foreign countries and accepting their influence naturally satisfies a certain kind of internal logic and has come via a unique path. In other words, the influence of foreign laws on the Chinese civil litigation academic community was initially fragmented and limited only to seemingly "helpful" fields and concepts. Nevertheless, following the continued expansion of reform at the level of legal practice and the development of comparative legal studies in the academic community, this influence eventually became more principled and systematic and went as far as the basic procedural structure and fundamental philosophies or overall litigation system. Looking at this specifically, the trial system reform, which began with the "strengthening of the onus of proof"

was, by and large, not only pragmatically and opportunistically motivated at aimed at "improving efficiency". In the academic community, which had been stimulated by this turn of events and was experiencing a boom, the study of comparative law and the introduction of foreign laws were similarly unsystematic and there was a sense that this was a "piecemeal" movement. Similar to the reaction to practical speculation that "onus of proof" was to shift the burden of the collection of evidence onto the parties, the phrase "onus of proof" initially only had the meaning of the responsibility to submit evidence which was not disadvantageous and from which there was no risk of losing a case. In other words, while preserving the concept of the "absolute substantive truth", even more so the general thought at the time was that in order to get the parties to take on the burden of following up on litigation, the division of roles between the parties and the court with regards to the collection and presentation of evidence was not to be apportioned evenly, but to have a kind of multi-layered structure which expressed each role in different dimensions. However, in reality, there were no legal means by which to enforce the parties to collect and present resources for litigation and in practice there was a tendency for the burden of investigating facts and collecting evidence to fall to the courts, and realizing the reform goal was extremely difficult. Under these circumstances, the introduction of the concept and related theory of 'objective' or 'resultative' "onus of proof" from abroad provided an invaluable catalyst for a breakthrough on the difficult aspects in practice as given above. The concept that parties in non liquet cases who do not present evidence, or whose evidence is inadequate, must take the risk of losing their case, gradually permeated through both academic and legal practice circles. Following this, concepts such as "absolute substantive truth" and "complete alignment of subjective recognition with past objective facts" were eventually left behind, while "legal truth" and "procedural truth" were emphasized in their place. Furthermore, throughout that process, the slogan borrowed from abroad of "procedural justice" also assumed a major role and for a time it was the catchphrase of the civil litigation academic community. Today it can be counted as one of the basic legal concepts which are firmly fixed in Chinese law.

Similarly, one more dynamic process which began with the reform towards "strengthening the onus of proof" is linked to the impact on the litigation structure. When judges receive a claim, in the conventional trial process which consists of immediately going to the place of the dispute and investigating facts and collecting evidence, for example by way of broad ranging interviews, the collection of evidence and formulating the investigation and evaluation of evidence are liable to become integrated with one another in a single trial structure. However, the division of stages in the litigation trial has already been encapsulated by the division of roles, putting the burden of collecting evidence onto the parties and of carrying out the investigation onto the courts after they have the evidence presented. Because in mediation centered practices the judge engages in the investigation of the facts and collection of evidence, and at the same time consistently approaches and persuades the parties using the resources gathered, there is therefore little necessity to convene the court. Moreover, since the "substantive" pleadings have been performed, an "opening of the court" session is generally nothing more than a formality. In contrast, by putting the "onus of proof" onto the parties, theoretically the parties need to approach the judge with their evidence and arguments and with the increasing decision rate, there is also an increasing necessity to convene trials. Following this trend, there is a possibility that the "opening session" becomes an independent stage in litigation as the more appropriate "location" for these approaches to be made. The trial system reform process that started with the "strengthening of the onus of proof" will soon become associated with the slogan of "trial centered in public courts" and the motivation for reform that was grounded in improving efficiency also transformed into acquiring new legitimacy by making "opening sessions" substantive. In this process also, the rules of the "*öffentlichkeit*" (doctrine of public disclosure), the "*Verhandlungsmaxime*" (doctrine of oral arguments) and "*Unmittelbarkeitsgrundsatz*" (direct, face to face dealings) which were brought in from foreign countries, as well as the concept of "due process", had a major influence and offered a foundation for legitimacy from the new angle of procedural security of the parties in public trials.

There has therefore lately been encouragement received from the movement of recent years towards an Anglo-American trial structure and civil litigation pre-trial procedures from Germany, Japan among other countries. The Chinese civil litigation academic community has also prepared pre-trial procedures and this, combined with more productive trial opening sessions, has continued to bring about consensus on realizing the so-called two-stage court structure. On the institutional side, the Supreme Court of the People's Republic of China issued civil litigation rules called the "minor provisions on evidence in civil litigation" in December 2001 and stated that from April 1 of the following year they would formally implement the content of these provisions.[12] These rules, as stated above, contain provisions which prohibit judicial inquisition in principle and which establish "legal truth" in the place of "absolute substantive truth". Additionally, with regards to court structure, these rules aim for broad productivity in pre-trial procedures and hammer out a system of "time limits to produce evidence" which can lead to the forfeiting of rights. Hence, the division of stages of the trial process into the "opening of the trial" and the "pre-opening of the trial" become substantive and expanded and are crystallized systematically. With regards to the procedures in preparation for opening the trial and their effect, the above litigation regulations are largely bound to the following rule. That is, by Article 33 of the regulations, when the court receives a case and serves the complaint and other documents, both parties must be sent a "notice of evidence" which includes a time limit of no less than 30 days to present evidence, and provides that both parties may decide the time limit on consultation. Articles 34 to 40 determine various particulars and procedures including: the effect of the loss of a right by evidence being rejected where it is presented after the time limit has passed as a method of offense/defense; the principle that changes to a claim and the filing of cross claims must be done within a time limit; a motion by a party to extend the time limit for evidence and the conditions to do so; and the relationship between the session for pre-trial evidence exchange between the parties and the time limit for producing evidence. The "exchange of evidence" comes from pretrial discovery in American civil litigation and is an attempt at trial system reform which has already taken place

[12] See The Note of the Supreme Court of People Republic of China, Number 1,2005. (中華人民共和国最高人民法院公報2005年第一号)

in one section of the courts. This is not a formal trial opening but rather both parties gather at the court or some other location and a session is conducted to exchange various information held by the parties, in front of the judge and court officers. In this attempt, as well as helping with the evidence collection by the parties, and facilitating settlement, as a pre-trial procedure it is expected to have the function of determining what issues are in dispute and consolidating evidence. The next litigation rules will systemize and put this attempt into statutory form, and will regulate various matters including the following: the exchange of evidence being performed by means of an application of the parties or the authority of the court; when the court arranges such sessions, that day, in other words, will become the time limit for the presentation of evidence; and that in principle the evidence exchange will be limited to two sessions. As is implied from this content, the composition of the litigation trial process which has arisen from this, the parties put out all the arguments and evidence they can before the trial so that when the formally court opens, the presentation of new arguments and evidence are essentially precluded by the loss of a right and the majority of cases can be concluded in one trial opening session. This composition is clearly similar to the two-stage trial structure which forms the basis of civil litigation in America, or lately also in Germany and Japan. It goes without saying that these reform attempts in pursuit of this structure as well as the process of planning the next litigation rules have exposed the courts of the People's Republic of China to civil litigation comparative law information from foreign countries such as the United States and Japan and continues to deliver this influence.

The changes to the institutional framework surrounding the trial structure in Chinese civil litigation, were not simply an approach toward division of the trial stages, such as the division of "trial" and "pretrial" in Anglo-American law, or the division of "procedures to consolidate the issues in dispute" and "the day to present the main oral submissions" in German and Japanese law. Rather, the changes were, more importantly, deeply related to a shift in the basic philosophies and values of litigation and the courts. In other words, civil litigation in China until now has had the "courts versus the parties" structure as its foundation while the judge's judicial inquisition and persuasion or education of the parties, and so on, were

driven by the court's initiative. However, throughout "trial system reform", the pursuit of litigation has shifted the emphasis to the expansion of the offensive and defensive elements between the parties and after the change of the basic structure of procedural development to "plaintiff versus defendant" the adjustment of procedural regulations regarding the litigating behavior of each party gradually became a practical concern. The regulations regarding the "time limit for evidence" and "exchange of evidence" seen in the litigation rules produced by the Supreme Court, encourages the strengthening of vigorous, early-stage presentation of evidence by the parties and attempts to actualize a productive offense/defense becomes clear, and are simply rules to give shape to the adjustment of the offensive and defensive elements between the parties. For the courts also, the deployment of these rules demands the performance of strict self-responsibility, premised by the establishment of the parties' independence, in other words, showing the existence of an all-out adversarial mind-set. Based on what has taken place up until this point, we can say that the procedural rules of Chinese civil litigation have recently come to the point of totally adopting the mindset of the basic philosophies and foundations which exist in the background to Western-style civil litigation.[13]

Part 4: The complicated phenomenon of foreign legal influence

As we have seen above, the influence of foreign law in China is not simply a case of academically introducing comparative legal learning, to then instantly spread to legal practice. Rather, it spreads gradually via a kind of internal logic, under the constraints of the general conditions of society and selectively received in response to the practical demands of the time and place. During this process, a wide variety of elements interacted with each other, such as promoting reform toward adversarialism on the practical level, the expansion of comparative legal studies on the academic level and the change in general social circumstances such as the

[13] These basic philosophies and mindsets are thought to be common to both Continental European law and Anglo-American law. For an attempt at developing a theoretical model which takes into consideration the adversarial relationship of the parties, and the elements of self-selection and self-responsibility, underlying civil litigation in the West, see: Yaxin Wang, A Model of Civil Procedur's Basic Structure, Taibei: Cross-Strait Law Review,3. 2003 (王亜新、関於民事訴訟基本構造的一個理論模型、台北：月旦民商法雑誌2003年第三号).

development of the market economy, and produced a complicated and dynamic modality. At present, from the founding philosophies and thoughts held in common with Western civil litigation as the starting point, basic philosophies and theories or a part of the technical procedural framework have become settled in Chinese civil litigation and this influence is now exercised in a stable way. However at the same time, if the rules regarding civil litigation from foreign countries are "imported" into an environment which has a radically different system and doctrine, naturally it is not possible to maintain the original shape and form of those rules as they cannot be exercised in the same role as they had in the origin country. In particular, if we consider elements such as the fact of China's massive geographical area and huge population, and moreover the developmental inequalities and differences which stand out between cities and rural communities and the geographical areas of the relatively economically advanced east coast compared with the lagging central-west areas, the Chinese civil litigation academic community has still not become a single combined "legal community". It is therefore not difficult to understand that the attempts in litigation practice and procedural reform in the courts of the People's Republic of China are varied over different regions. Under these circumstances, the influence from foreign law is not omnipresent in a simple form in Chinese civil litigation, but rather we must say that at present it is a very complicated phenomenon.

What I must point out from the outset is that the part of the system which has taken on foreign legal influence in its procedural laws is not necessarily being utilized in practice. One example of this, as touched on before, is the "represented litigation for an undetermined number of parties" which was newly created by the civil litigation laws in 1991, and learned from American "class actions". Even though it has been more than ten years since Article 55 put this system into place, there are scant cases where this article has been applied and on the practical side there is even a sense that its application is avoided as much as possible. [14] The elements which affect or regulate these circumstances are extremely complicated and indicate

[14] There are still no results of systematic or empirical investigation into the circumstances of the operation of the system or its causes, however there are numerous materials on the state of affairs. For example, a certain author pointed out that "the articles regarding represented litigation for an undetermined number of parties are mostly empty text": Yu Fan, edit, Group Litigation: About its Problems of System and Practice, Beijing: Pekin University Press, 2005.361. (範愉編著、集団訴訟問題研究、361頁,)as cited above.

many things, however it is perhaps the following situation which forms the most basic factor. As opposed to the "class action" procedure in American civil litigation by giving an incentive to the institutional means and to those mobilized for a number of dispersed parties to come together to form a group or association, it appears that presently in China, in litigation practice it is often judged to be certainly not in the best interests for a large number of parties legally mobilized or associated where the scope and number of litigants is not defined, since social stability is given considerable emphasis. Ultimately, in most cases where the application of the article on representative litigation in which the number of litigants is undefined, the practical norm is to deal with claims by dividing them up and dealing with them separately, only consolidating them at the trial stage.

Furthermore, it is difficult to say that the procedures introduced from continental civil litigation laws are being sufficiently utilized. For example, *Mahnverfahren* (summary procedure) is the system utilized more than civil litigation ordinary procedures in Germany, France and Japan. However, in contrast to these countries, since these *Mahnverfahren* were introduced in China in 1991 by the current civil litigation law, summary proceedings are applied in only a small number of cases by comparison with the number of ordinary procedures received each year. [15] The causes of this problem have not been systematically investigated, however there are normally two explanations which are argued as generally indicative factors. [16] One is the explanation that from the point of view of institutional design, when parties use summary proceedings make a claim for a payment of a debt, their opponent normally institutes a direct notice of opposition. As the court is unable to make a substantive investigation of this, the case can only be aborted, and hence summary proceedings are rarely used because they become an inefficient and work intensive system in which the applicant has no choice but to make an amended claim. One further explanation is that, taking into account the court's financial

[15] Chinese justice statistics do not include summary proceedings and no systematic data exists. According to fragmentary media coverage, in one section of the courts of the People's Republic, the summary proceeding matters processed per annum seems to only be a small percentage of the ordinary procedures matters. See: Wusheng Zhang, The Study on summary procedure, Beijing: Chinese People University Press,2002 172. (章武生、民事簡易程序研究、北京：中国人民大学出版社、2002年、172頁.)

[16] For example, see Xuezai Liu,et al, Some Problems of summary procedure, Lawyer World, 2001. 7. 45-46. (劉学在、胡振玲、督促程序的適用現状及其立法完善、律師世界2001年第７号、45－46頁.)

incentives, if the court accepts an ordinary case, the litigation fee comes into the court proportionate to the litigation expenses. However, in summary proceedings the payment of fees is kept at a nominal amount, and therefore there are few merits to summary proceedings, and a lack of motivation to advance and promote its use in courts which rely financially on litigation fees. Although there is as yet no empirical research to support these explanations, I think that we must pay attention to points in each explanation and I suggest that the utilization of institutions and procedures borrowed from abroad is in fact related to many social conditions and environments which exist both inside and outside of the law.

Therefore, the basic thoughts and concepts adapted from foreign laws are already fixed in Chinese civil litigation procedures and have become a part of the institution and doctrine. However, it will be some time before they can be effectively utilized since the factors and conditions which form the necessary premise and setup for these elements are insufficient and underdeveloped. Let me explain this by way of the "onus of proof" concept discussed above. With the reception of the concept of the "onus of proof" and other basic notions into the civil litigation system, one of the more important roles of the concept was to distribute risk and the burden of the delivery and verification of arguments evenly between the parties. As I touched upon in the previous section, the concept and basic notions of the onus of proof in Chinese civil litigation come from continental European law. In continental European civil litigation, these burdens and risks are essentially distributed according to the organization requirements in each individual article in the substantive law. Doctrinally, there is "regulative theory" and "legal requisite classification theory" and both the academic conflict and practical treatment are developed surrounding substantive law and these doctrines. In other words, the division of the onus of proof is closely connected to the content of the substantive law and in one sense presupposes its related theoretical framework and doctrine. However, as is typified by the lack of civil code or general commercial code in China, the substantive law on the relationship between civil and commercial matters is still being developed. In this situation, despite the concept of the onus of proof being a major concern in the Chinese civil litigation academic community, there is almost no detailed research being conducted on the allocation of the onus

of proof in accordance with the individual laws in the substantive laws and their organizational requirements and added to this is the fact that there are almost no personnel with a detailed knowledge of both substantive and procedural laws. It is therefore difficult to say that that this legal concept sufficiently exercises its function in civil litigation in China today, despite being the quickest concept to be adopted from foreign laws and settled in the law.

On the other hand, we can also identify the phenomenon that although the institutions and procedures formed via influence from foreign laws may be used frequently in litigation practice in one region, in another region or in a different part of the courts it may be barely utilized at all. We can raise the example of the system of "time limits for evidence" through which delay tactics in the offense and defense may cause the loss of a right. In this system, the litigation contest is fought out even where it is contrary to the "substantive truth", and moreover, by being able to legitimize the win/loss result based only upon the principles of the independence and self-responsibility of the parties, it seems to mean that "procedural justice" is replaced with "substantive justice". It does not seem so extraneous that these philosophies and substantiated procedures are far divorced from the traditional social conventions of China. This is because in civil litigation procedures, the parties normally employ a lawyer, as expert in the law, as their representative and it is in the context of the social environment of modern advancements such as industrialization and urbanization and of large urban centers which consist of strangers. However, there are other cases in which the parties to a dispute are from expansive agricultural communities who have essentially maintained their traditional way of life, who often do not have the financial means to employ a lawyer and where they cannot comprehend the foreign specialized technical procedures and philosophies. In these cases it is hard to imagine the courts strictly applying the "time limits for evidence" regulations, or to directly impose court sanctions to take away rights for being late with the presentation of arguments and evidence.

Furthermore, despite continuing to formulate consensus between both the academic and practical spheres with regard to receiving a certain type of legal thought from foreign laws and establishing particular institutions and procedures, there are also examples where this

consensus can not be realized as a system of civil litigation due to the various problems and obstacles caused by China's specific historical traditions and current social conditions. For example, philosophies and thoughts such as *res adjudicata* and the finality of a judgment which are extremely important factors and form the bedrock of Western style civil litigation systems, have become more widely known in the spheres of Chinese civil litigation academia and practice, via comparative legal research and introduction in recent years. Under this influence, there is much criticism against the "system of directed civil trials" under the current laws, in which already confirmed judgments can be relatively easily overturned and matters can be repeatedly contested even where they have been concluded legally. Furthermore, there is also strong emphasis from Chinese scholars and legal practitioners pushing for the review of retrial procedures, heavily weighted in the finality of judgments and based on the theory of *res adjudicata* as well as on the retrial systems in continental European law. On a practical level, because the "system of directed civil trials" is becoming one of the obstacles to denying the finality of decisions, a legal arrangement between mainland China and the Special Administrative Region of Hong Kong (based on British law) to enforce those decisions made in each other's jurisdiction has yet to be reached, causing an atmosphere of frustration between the two. However, at the present, with the various proposals for reform not yet making it onto the legislative agenda due to difficult political and social challenges, and also looking forward into the near future, it will surely not be a simple matter to change the "system of directed trials" in the present civil litigation law from the ground up by following the Western style of "retrial procedures" and "review".

In one sense, the various aspects I have provided with regards to foreign legal influence are the complicated conditions and the outcome of problems directly faced by Chinese society, which is approaching a profound turning point, and the Chinese legal system in its entirety, are given from one aspect on the condition of Chinese civil litigation today. From now into the future, with China increasingly being drawn deep into globalization, China will also become more closely and more frequently engaged in exchange with other countries and will continue to be influenced from outside its borders in the area of civil litigation. However, on the other

hand, in the academic "space" in Chinese civil litigation legal scholarship, reflected in the diverse university research institutes and knowledge structures of researchers, the cooperation and exchange between researchers in pursuit of scholarship is not necessarily close-knit and the "academic sphere" is itself multi-tiered and constructed very loosely. Hence, even if there are research results into foreign laws and comparative law, these do not spread and permeate throughout the entire academic sphere. Therefore, one issue which we must research is by what processes and mechanisms can we share and accumulate knowledge. Simultaneously, because the numerous courts of the People's Republic are distributed over wide and developmentally disproportionate geographical areas, rather than there being commonality been civil litigation and the practice of the courts, there are large sections which differ from others. In these circumstances, the systems and procedures adopted from foreign countries are not guaranteed to be applied uniformly or generally, but rather these are ruled and influenced according to the customary methods and management of each area and are used selectively. The phenomena of the occurrence of subtle differences between court practices in different geographical areas are likely to continue into the future.

The issue of foreign legal influence in the area of Chinese civil litigation must be understood against the background and phenomena of the unification and diversification of procedural law and the related academic agency in the era of globalization on a world-wide scale. Chinese civil litigation legal scholars have also come to resemble that seen in the academic spheres of Japan, Korea and Taiwan, and are increasingly "taking the view of integrated comparative legal scholars"[17]. However, the important issue from now on should be the full cooperation in international academic circles and participation in those discussions that take place within.

[17] See
谷口安平、比較民事訴訟法の課題・序説、京都大学法学部創立百周年記念論文集第三巻・民事法、東京：有斐閣、1999年、523頁.

Civil Procedure Review
AB OMNIBUS PRO OMNIBUS

Rapporti tra procedimento di mediazione e processo giurisdizionale nell'ordinamento italiano

(Relations between mediation and judicial dispute resolution in Italy)

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Abstract: The article relates the so-called ADRs, specially mediation, with judicial law suits.

Keywords: Mediation. Judicial Dispute Resolution. Civil Procedure

Parole-chiave: Mediazione. Processo Giuridizionale. Processo Civile.

1. Premessa. - La recenti disposizioni in materia di mediazione, che sono state introdotte nell'ordinamento italiano dal decreto legislativo 4 marzo 2010, n. 28, stabiliscono che l'esperimento del tentativo di conciliazione costituisce condizione di procedibilità della domanda giudiziale.

Questo scritto esamina i rapporti tra il procedimento di mediazione ed il processo, che si svolge davanti al giudice ordinario.

Il legame tra procedimento di mediazione e processo civile è regolato dall'art. 5 del decreto legislativo 4 marzo 2010, n. 28, "*Attuazione dell'art. 60 della l. 18 giugno 2009, n. 69, in materia di mediazione finalizzata alla conciliazione delle controversie civili e commerciali*", che ha la rubrica "*Condizione di procedibilità e rapporti con il processo*".

Questa disposizione stabilisce che la parte deve esperire il tentativo di conciliazione prima di iniziare il processo davanti al giudice ordinario in numerose materie[1]; se la parte instaura la controversia davanti al giudice civile prima di avere esperito il tentativo di conciliazione, il giudice non può decidere la causa e deve sospendere il processo, assegnando alle parti un termine per esperire il tentativo di conciliazione.

A fronte di queste rilevanti novità legislative, l'indagine dello studioso non può rimanere limitata all'esame delle disposizioni che impongono adempimenti a carico delle parti.

Per una corretta comprensione della portata e della rilevanza delle nuove disposizioni occorre esaminare anche la natura e le caratteristiche della nuova disciplina in materia di mediazione.

Prima di procedere alla disamina dei rapporti tra il procedimento di mediazione e il processo giurisdizionale davanti al Giudice dello Stato, appaiono necessarie alcune precisazioni terminologiche, che consentano di chiarire cosa debba intendersi per "*mediazione*" secondo la nuova normativa italiana.

Innanzitutto va sottolineato che con il termine "*mediazione*" facciamo riferimento al nuovo istituto introdotto dal decreto legislativo 4 marzo 2010, n. 28, "*Attuazione dell'articolo 60 della legge 18 giugno 2009, n. 69, in materia di mediazione finalizzata alla conciliazione delle controversie civili e commerciali*"[2].

[1] Ai sensi dell'art. 5, comma 1, del d.lgs. n. 28 del 2010 il tentativo di conciliazione è condizione di procedibilità nelle controversie "*in materia di condominio, diritti reali, divisione, successioni ereditarie, patti di famiglia, locazione, comodato, affitto di aziende, risarcimento del danno derivante dalla circolazione di veicoli e natanti, da responsabilità medica e da diffamazione con il mezzo della stampa o con altro mezzo di pubblicità, contratti assicurativi, bancari e finanziari*". Si tratta di una gran parte del contenzioso civile.

[2] Il decreto legislativo è stato emanato in forza della delega contenuta nell'art. 60 della legge 18 giugno 2009, n. 69, "*Disposizioni per lo sviluppo economico, la semplificazione, la competitività nonché in materia di processo civile*".

In questo testo legislativo il termine "*mediazione*" viene utilizzato secondo una accezione diversa da quella propria della nostra tradizione giuridica.

Segnatamente con la parola mediazione viene indicato un istituto, che sino ad oggi era estraneo al nostro ordinamento: il legislatore ha così attribuito un nuovo significato a questo termine.

Al riguardo va ricordato che nel nostro codice civile, entrato in vigore nel 1942, la mediazione è regolata tra i contratti tipici (artt. 1754 ss.).

Il mediatore è colui il quale mette in contatto due parti per la conclusione di un affare; dalla conclusione dell'affare sorge il diritto del mediatore al compenso[3]. Le leggi successive al codice civile hanno continuato a fare uso dello stesso significato del termine mediazione[4].

[3] L'art. 1754 c.c. definisce mediatore chi "*mette in relazione due o più parti per la conclusione di un affare, senza essere legato ad alcuna di esse da rapporti di collaborazione, di dipendenza o di rappresentanza*". Per completezza va ricordato che parte della dottrina esclude la natura contrattuale della mediazione regolata dal codice civile: cfr., anche per richiami, Cataudella, A., *Note sulla natura giuridica della mediazione*, in *Riv. dir. civ.*, 1978, 65 ss.

[4] Ad esempio, la legge 21 marzo 1958, n. 253, "*Disciplina della professione di mediatore*", successivamente modificata dalla legge 3 febbraio 1989, n. 39 "*Modifiche ed integrazioni alla legge 21 marzo 1958, n. 253, concernente la disciplina della professione di mediatore"*, la quale ha istituito, presso le Camere di Commercio, un ruolo degli agenti di affari in mediazione.
La stessa accezione viene utilizzata, tra l'altro, dal recente decreto legislativo 13 agosto 2010, n. 141, che ha modificato il decreto legislativo 1 settembre 1993, n. 385, "*Testo unico delle leggi in materia bancaria e creditizia*": la c.d. legge bancaria. L'art. 128 *sexies*, del d.lgs. n. 385 del 1993 regola la figura dei "*Mediatori creditizi*", che sono definiti come i soggetti che mettono in relazione, "*anche attraverso attività di consulenza, banche o intermediari finanziari (...) con la potenziale clientela per la concessione di finanziamenti sotto qualsiasi forma"*.
Analoghe caratteristiche ha la figura del mediatore richiamata dall'art. 2, del decreto legislativo 1 settembre 2003, n. 276, "*Attuazione delle deleghe in materia di occupazione e mercato del lavoro, di cui alla L. 14 febbraio 2003, n. 30*", che nella lettera b) definisce intermediazione "*l'attività di mediazione tra domanda e offerta di lavoro*".
Prima delle legge delega 18 giugno 2009, n. 69, il termine mediazione era stato occasionalmente utilizzato dal legislatore per indicare un istituto giuridico diverso rispetto a quello regolato dal codice civile. L'art. 29, del decreto legislativo 28 agosto 2000, n. 274, "*Disposizioni sulla competenza penale del giudice di pace*", stabilisce che il giudice di pace "*quando il reato è perseguibile a querela, promuove la conciliazione tra le parti. In tal caso, qualora sia utile per favorire la conciliazione, il giudice può rinviare l'udienza per un periodo non superiore a due mesi e, ove occorra, può avvalersi anche dell'attività di mediazione di centri e strutture pubbliche o private presenti sul territorio. In ogni caso, le dichiarazioni rese dalle parti nel corso dell'attività di conciliazione non possono essere in alcun modo utilizzate ai fini della deliberazione*".
In materia penale va segnalata pure la *Raccomandazione n. (99) 19 sulla mediazione in materia penale* adottata dal Consiglio d'Europa il 15 settembre 1999; l'espressione "*mediazione penale*" è utilizzata pure in altri provvedimenti normativi, come il D.P.R. 2 luglio 2003, "*Piano nazionale di azione e di interventi per la tutela dei diritti e lo sviluppo dei soggetti in età evolutiva 2002-2004*". La mediazione penale ha un campo specifico di applicazione nel processo minorile, come forma di superamento di conflitti e di riduzione delle conseguenze del reato, soprattutto al fine di agevolare il reinserimento sociale del minore.

Anche la legge che regola la professione di avvocato utilizza il "*mediatore*" nel significato tradizionale e stabilisce che "*l'esercizio delle professioni di avvocato e di procuratore è incompatibile (...) con la qualità di (...) mediatore*"[5]; allo stesso modo il codice deontologico approvato dal Consiglio Nazionale Forense stabilisce che l'avvocato "*non deve porre in essere attività commerciale o di mediazione*" (art. 16).

Il decreto legislativo n.28 del 2010 usa il termine mediazione con un diverso significato, che non era estraneo alla lingua italiana, ma era rimasto al di fuori del linguaggio giuridico degli studiosi del diritto e del processo civile[6].

Nel vocabolario della lingua italiana leggiamo che per mediazione si intende anche la "*azione esercitata da una persona (o anche da un ente, un'associazione, una collettività, una nazione) per favorire accordi fra altre o per far loro superare i contrasti che le dividono*"[7].

Questo uso del termine deriva dal latino tardo *mediatio* ed era stato abbandonato dal nostro legislatore.

Adesso, nel decreto legislativo n. 28 del 2010 si usa il termine mediazione per indicare uno strumento diretto a favorire il superamento di contrasti tra le parti, è entrato nel linguaggio giuridico.

Anche la legge 8 febbraio 2006, n. 54, "*Disposizioni in materia di separazione dei genitori e affidamento condiviso dei figli*" ha utilizzato il termine mediazione per indicare forme di superamento di conflitti. Segnatamente, l'art. 2 della legge n. 54 del 2006 ha introdotto nel codice civile l'art. 155 *sexies*, il quale stabilisce che nei procedimenti relativi all'affidamento di minori, "*il giudice, sentite le parti e ottenuto il loro consenso, può rinviare l'adozione dei provvedimenti (...) per consentire che i coniugi, avvalendosi di esperti, tentino una mediazione per raggiungere un accordo, con particolare riferimento alla tutela dell'interesse morale e materiale dei figli*". In materia di famiglia la legge 28 agosto 1997 n. 285 "*Disposizioni per la promozione di diritti e di opportunità per l'infanzia e l'adolescenza*" aveva introdotto la mediazione familiare, istituto che mira a superare conflitti, ma ha caratteristiche ben diverse rispetto alla mediazione introdotta dal decreto legislativo n. 28 del 2010. Sulla mediazione familiare si vedano le chiare pagine della *Introduzione* in BATTAGLINI M., CALABRESE M., MARCHIO F., SACCU C., STAMPA P, *Codice della mediazione familiare*, Milano, 2001, pag. 1 ss.

[5] Art. 3, r.d.l. 27 novembre 1933, n. 1578, "*Ordinamento delle professioni di avvocato e procuratore*". La nuova legislazione, contenuta nel d.lgs. n. 28 del 2010, stabilisce che i Consigli dell'Ordine degli Avvocati possono istituire organismi di mediazione in locali messi a disposizione dal Presidente del Tribunale (art. 18). Questa disposizione è basata sul presupposto che l'avvocato possa svolgere la nuova attività di mediazione regolata dal decreto legislativo n. 28 del 2010 e mira ad incentivare lo svolgimento di questa attività da parte degli avvocati.

[6] Come è stato segnalato nella nota 4, da alcuni anni il termine mediazione aveva fatto il suo ingresso in altri settori, come il diritto penale e il diritto di famiglia.

[7] Questa è la definizione contenuta nel Vocabolario Treccani della lingua Italiana.

Al fine di evitare equivoci, è bene chiarire che l'utilizzo di questo termine non è conseguenza della scelta del legislatore di fare rivivere la nostra tradizione linguistica.

La parola mediazione è, più semplicemente, la traduzione di testi provenienti dalla Comunità Europea, dove viene adoperato il termine *mediation*, che da tempo era usato nei paesi di lingua inglese, soprattutto negli Stati Uniti d'America.

La parola *mediation*, a sua volta, deriva dal latino *mediatio*.

Questo termine è stato quindi esportato nei paesi di lingua inglese per poi ritornare in Italia[8].

La dottrina italiana negli anni passati non aveva dimenticato le affinità esistenti tra la mediazione, come contratto regolato dal codice civile, e la conciliazione delle controversie.

Per questa ragione la dottrina aveva sottolineato che ogni conciliazione "*ha la struttura della mediazione: quando, nella teoria del diritto privato, si insegna che il mediatore avvicina i contraenti, non si dice nulla di sostanzialmente diverso da ciò perché i contraenti non sono altro che i due soggetti di un conflitto di interessi e il contratto non è altro che la sua composizione*"[9].

Dopo questa necessaria premessa sulle origini del termine "*mediazione*", dobbiamo sottolineare che il nuovo istituto, introdotto dal decreto legislativo n. 28 del 2010, porta con sè qualcosa di nuovo rispetto alla figura classica del mediatore o del conciliatore.

Le nuove disposizioni devono essere esaminate con l'ausilio della dottrina straniera, soprattutto americana, che negli ultimi decenni ha approfondito l'istituto della *mediation* ed ha

[8] Non sembra quindi fuori luogo richiamare le parole di SHAKESPEARE, "*the wheel is come full circle*": la ruota ha compiuto un giro completo (ed è tornata al punto di partenza): *Re Lear*, atto quinto, scena terza, verso 175.

[9] CARNELUTTI, F., *Sistema del diritto processuale civile*, I, Padova, 1936, 174. Alla mediazione faceva riferimento pure la relazione PISANELLI al codice di procedura civile del 1865, nella parte relativa alla composizione bonaria delle controversie innanzi al giudice conciliatore. PISANELLI osserva che il processo verbale di conciliazione innanzi al giudice conciliatore equivaleva ad un titolo esecutivo, se la controversia non eccedeva la sua competenza per valore. "*Quando il valore eccede o sia indeterminato, l'ufficio dello stesso giudice risolvendosi in quello di semplice mediatore, la conciliazione non potrà avere che la forza di una scrittura privata riconosciuta in giudizio*" (cfr. PISANELLI, G., *Relazione ministeriale sul libro primo del progetto di codice di procedura civile*, in *Codice di procedura civile del Regno d'Italia, 1865*, in *Testi e documenti per la storia del processo*, a cura di N. Picardi e A. Giuliani, Milano, 2004, pag. 5 ss.). Sul punto, anche per ulteriori richiami, PUNZI, C., *Mediazione e conciliazione*, in *Riv. dir. proc.* 2009, 845 ss.

spinto all'uso di nuovi strumenti di risoluzione convenzionale delle controversie.

Il giurista italiano deve confrontarsi con gli studi stranieri in questa materia, che viene generalmente indicata con l'acronimo *A.D.R.*: *alternative dispute resolution*[10].

La terminologia adoperata dal legislatore e dai primi commentatori richiama le esperienze straniere, che però spesso sono fraintese sia nei presupposti che nell'ambito di applicazione.

Ulteriori difficoltà di comprensione e di inquadramento dell'istituto in esame derivano dal fatto che il legislatore ha voluto utilizzare un vocabolo proprio del nostro linguaggio extragiuridico e nello stesso tempo ha attribuito al termine "*mediazione*" significati nuovi, creando uno specifico istituto di diritto positivo, che deve essere analizzato alla luce delle disposizioni vigenti.

Con l'uso del termine "*mediazione*" il legislatore ha voluto designare un nuovo complesso di regole, che deve essere rinvenuto dall'interprete in diverse fonti normative ed attraverso il coordinamento tra diversi istituti.

Il giurista deve esaminare il diritto positivo per comprendere e inquadrare l'istituto della mediazione, regolata dalle disposizioni contenute nel decreto legislativo n. 28 del 2010.

Si tratta di un impegno che richiede attenzione, con la consapevolezza che la mediazione è un prodotto di diritto positivo e l'uso di un termine di uso comune potrebbe trarre in inganno sul contenuto e le caratteristiche di questo nuovo istituto.

Il giurista non può adagiarsi su concetti astratti e non può attribuire alle parole usate dal legislatore il significato che considera più appropriato: deve confrontarsi con il diritto positivo, per interpretarlo, scomporlo, ordinarlo e ricostruirlo all'interno del sistema, confrontandosi con l'intero ordinamento.

Questa premessa, essenziale per lo studio di qualsiasi istituto, appare necessaria per lo

[10] Risoluzione alternativa delle controversie: con questa espressione si intende, in modo generico, la risoluzione delle controversie in modo differente rispetto alla decisione del giudice. Gli strumenti di ADR sono fondati sulla volontà negoziale, ma possono essere tra di loro profondamente diversi, come ad esempio la conciliazione e l'arbitrato.

studio della mediazione in materia civile e commerciale, introdotta dal decreto legislativo n. 28 del 2010.

Basti considerare che, secondo il comune sentire (e secondo la normativa comunitaria, come vedremo), la mediazione dovrebbe essere un procedimento ben diverso dal processo giurisdizionale, per un motivo fondamentale: la mediazione dovrebbe essere basata sul consenso volontario e non dovrebbe prevedere l'esercizio di poteri di imperio.

La mediazione non dovrebbe costituire fonte di conseguenze pregiudizievoli per le parti; dovrebbe svolgersi su basi volontarie e con forme snelle: se il mediatore si limita ad aiutare le parti nella ricerca di una soluzione condivisa, non occorre neppure tutelare il contraddittorio[11].

Di contro, la legislazione italiana sembra in contrasto con la libertà delle parti nel procedimento di mediazione. Si vedrà che, in forza delle disposizioni introdotte dal decreto legislativo n. 28 del 2010, la "mediazione" mira a forzare la volontà della parti[12] e sono previste forme di coazione, che appaiono in contrasto con i principi dettati dall'Unione Europea in materia di mediazione e con alcuni fondamentali principi in materia di giurisdizione.

2. La mediazione come strumento di ADR. - L'Unione Europea guarda con favore lo sviluppo di politiche dirette a incoraggiare la conciliazione delle controversie civili e commerciali, attraverso l'uso di forme di mediazione[13].

[11] In ragione di queste caratteristiche, la *mediation* è stata definita un "*procedimento privato estremamente informale e confidenziale, colto a riconciliare le parti in conflitto attraverso l'ausilio di un terzo neutrale, non legato alle parti né da vincoli legali né da vincoli contrattuali*": SANTAGADA, F., *La conciliazione delle controversie civili*, Bari, 2008, 102.

[12] Si è parlato acutamente di "*mediazione forzata*": MONTELEONE G., *La mediazione forzata*, in *Il giusto processo civile*, 2010, 21 ss.

[13] Sulla scorta della Direttiva della Comunità Europea n. 52 del 21 maggio 2008, "*Direttiva 2008/52/CE del Parlamento Europeo e del Consiglio del 21 maggio 2008 relativa a determinati aspetti della mediazione in materia civile e commerciale*" possiamo considerare controversie "*civili e commerciali*" tutte le cause in materie regolate dal codice civile e dalle leggi speciali e relative a diritti disponibili: sono escluse le controversie relative a diritti di cui le parti non possono disporre e, in particolare, le controversie in materia fiscale, doganale e amministrativa o derivanti da responsabilità dello Stato per atti o omissioni nell'esercizio di pubblici poteri (*acta iure imperii*) (art. 1 della Direttiva).

La mediazione è considerata dall'Unione Europea una forma di tutela alternativa, volontaria e rapida, che facilita l'accesso alla giustizia ed amplia il sistema della tutela dei diritti dei cittadini europei.

La mediazione deve essere incentivata dagli stati membri perché rende più agevole l'accesso alla giustizia da parte dei cittadini e da parte dei consumatori: la mediazione non è vista come un *escamotage* a disposizione dello Stato per posticipare la instaurazione delle causa e neppure come uno scudo per tutelare un sistema giudiziario inadeguato rispetto alla domanda di giustizia; è invece diretta ad agevolare la possibilità di fare valere i propri diritti e consente di ottener un risultato condiviso dalle parti, che saranno indotte a dare spontanea esecuzione agli accordi conclusi bonariamente.

Si tratta, dunque, di uno strumento di tutela dei diritti che si aggiunge alle altre, tradizionali forme di tutela.

Inizialmente la Comunità Europea si è occupata di mediazione, come strumento di ADR, diretto ad agevolare e rendere omogenea la tutela dei consumatori, nella consapevolezza che è più semplice introdurre regole uniformi in questa materia, rispetto ad altri settori della giustizia civile.

Gli strumenti alternativi di soluzione della lite sono stati pensati e suggeriti dalla Comunità Europea per offrire alle parti uno strumento adeguato per la soluzione di quei conflitti che presentano caratteristiche peculiari, a fronte delle quali il processo civile, seppur efficiente e di durata ragionevole, potrebbe rilevarsi, sotto altri profili, non del tutto soddisfacente[14].

Lo sviluppo di sistemi di soluzione alternativa delle controversie è stato oggetto di numerosi provvedimenti comunitari, tra i quali spicca il *"Libro Verde relativo ai modi alternativi*

In materia di famiglia e di lavoro la Direttiva può trovare applicazione nei limiti in cui la legislazione applicabile ritiene che le parti "*hanno la facoltà di decidere da sole in base alla pertinente legge applicabile*" (punto n. 10 dei "Considerando", che costituiscono la premessa alla Direttiva).
La Direttiva trova applicazione soltanto nelle controversie transfrontaliere ma gli Stati membri possono applicare le relative disposizioni ai procedimenti di mediazione interni. Scopo della Direttiva è di "*garantire un miglior accesso alla giustizia*" ("Considerando" n. 5).

[14] CUOMO ULLOA, F., *La conciliazione. Modelli di composizione dei conflitti*, Padova, 2008, 179.

di risoluzione delle controversie in materia civile e commerciale"[15].

Il Libro Verde, come è noto, è un atto atipico e non produce effetti vincolanti, ma esprime gli indirizzi della Commissione della Comunità Europea.

Ora, secondo il *"Libro Verde relativo ai modi alternativi di risoluzione delle controversie in materia civile e commerciale*" il ricorso a strumenti alternativi di soluzione della lite non dovrebbe essere diretto a sopperire alla crisi del sistema giudiziario: al contrario, gli "*ADR forniscono una risposta alle difficoltà di accesso alla giustizia*"[16].

Il loro scopo è consentire alle parti di porre fine al conflitto in modo semplice e, soprattutto, conveniente per entrambe.

La mediazione secondo l'Unione Europea presenta una specifica differenza rispetto ad altri strumenti che pongono fine alla controversia: la esistenza di uno specifico "procedimento", che è organizzato con la collaborazione di un terzo (il mediatore) in modo da consentire alle parti di raggiungere un risultato negoziale, volontario, che possa riconciliare le parti e porre fine alla lite.

In questa prospettiva, l'Unione Europea ha posto in evidenza che nei procedimenti di ADR occorre evitare lo scontro tra le parti: "*nelle forme di ADR in cui i terzi non prendono alcuna decisione, le parti non si affrontano più, ma al contrario s'impegnano in un processo di riavvicinamento, e scelgono esse stesse il metodo di risoluzione del contenzioso svolgendo un ruolo più attivo in tale processo per tentare di trovare da sole la soluzione che conviene loro di*

[15] I provvedimenti emessi dalla Comunità Europea sono numerosi. Tra i più importanti, vanno ricordati il Codice Europeo di Condotta per Mediatori (si tratta di un codice deontologico per i mediatori elaborato dalla Commissione, insieme ad esperti del settore, nel luglio 2004), la Raccomandazione della Commissione del 4 aprile 2001 (2001/310/CE) sui principi applicabili agli organi extragiudiziali che partecipano alla risoluzione consensuale delle controversie in materia di consumo; la Raccomandazione della Commissione del 30 marzo 1998 (98/257/CE) riguardante i principi applicabili agli organi responsabili per la risoluzione extragiudiziale delle controversie in materia di consumo. Molte Direttive di settore (*e-commerce*, servizi postali, servizi finanziari, energia) a loro volta sollecitano l'adozione di programmi ADR. Nel 2008 è stata approvata la "*Direttiva 2008/52/CE del Parlamento Europeo e del Consiglio del 21 maggio 2008, relativa a determinati aspetti della mediazione in materia civile e commerciale*". Sul tema si rinvia a VIGORITI, V., *La direttiva europea sulla* mediation*. Quale attuazione?*, in *Riv. arb.* 2009, p. 1.; ID., *Europa e mediazione: le sollecitazioni della Commissione*, sul sito www.judicium.it.
Si ricorda che la Comunità Europea dal primo dicembre 2009, data di entrata in vigore del Trattato di Lisbona, ha assunto la denominazione di Unione Europea. Nel testo vengono utilizzate entrambe le denominazioni.

[16] Punto n. 5 del Libro Verde.

più. Questo approccio consensuale aumenta le possibilità per le parti di mantenere, una volta risolta la lite, le loro relazioni di natura commerciale o di altra natura"[17].

Il nucleo fondamentale della mediazione è costituito dalla presenza di un soggetto terzo, che assiste le parti, in modo da agevolare "*una risoluzione extragiudiziale conveniente e rapida delle controversie in materia civile e commerciale attraverso procedure concepite in base alle esigenze delle parti*".

Attraverso la mediazione: le parti possono ottenere un risultato che considerano soddisfacente e "*gli accordi risultanti dalla mediazione hanno maggiori probabilità di essere rispettati volontariamente e preservano più facilmente una relazione amichevole e sostenibile tra le parti*"[18].

Il procedimento di mediazione tende a soddisfare entrambe le parti e anche sotto questo profilo il risultato del procedimento di mediazione non è equiparabile a quello del processo giurisdizionale davanti al giudice dello Stato.

Basti considerare che all'esito del processo giurisdizionale viene emessa una sentenza e almeno una delle parti rimane insoddisfatta del risultato ottenuto; spesso la decisione viene impugnata dalle parti e può anche accadere che essa non soddisfi le concrete esigenze di alcuna delle parti; la decisione, poi, viene eseguita dalla parte soccombente soltanto in virtù della sua efficacia esecutiva, in quanto idonea all'esecuzione forzata. E non è raro che la parte soccombente possa ricorrere a stratagemmi per sottrarsi all'esecuzione.

La soluzione concordata, invece, di solito è gradita ad entrambe le parti ed ha maggiori probabilità di essere eseguita bonariamente.

[17] Punto n. 10 del Libro Verde. La precedente raccomandazione della Commissione del 30 marzo 1998, "*riguardante i principi applicabili agli organi responsabili per la risoluzione extragiudiziale delle controversie in materia di consumo*" aveva messo in evidenza che nel caso in cui le procedure di ADR, "*indipendentemente dalla loro denominazione, portano ad una risoluzione della controversia tramite l'intervento attivo di un terzo che propone o impone una soluzione*" deve trovare piena applicazione il principio del contraddittorio e deve svolgersi un procedimento disciplinato da regole certe. Diverse caratteristiche hanno invece "*le procedure che si limitano a un semplice tentativo di riavvicinare le parti per convincerle a trovare una soluzione di comune accordo*".
[18] "Considerando" n. 6 della Direttiva.

3. Il procedimento di mediazione secondo la Direttiva 2008/52/CE. – In seguito al Trattato di Amsterdam del 2 ottobre 1997 la cooperazione giudiziaria in materia civile è divenuta materia di competenza della Comunità Europea[19] e il Consiglio può adottare misure nel settore del riconoscimento e dell'esecuzione delle decisioni in materia civile e commerciale, comprese le decisioni extragiudiziali.

Poiché la cooperazione giudiziaria in materia civile è diventata una competenza comunitaria, la Comunità Europea ha potuto adottare, in questa materia, numerosi provvedimenti vincolanti per gli Stati membri o per i cittadini: regolamenti, direttive e decisioni (i c.d. strumenti giuridici comunitari).

Tra i provvedimenti emessi dalla Comunità Europea nella vigenza del Trattato CE vi è la "*Direttiva 2008/52/CE del Parlamento Europeo e del Consiglio del 21 maggio 2008, relativa a determinati aspetti della mediazione in materia civile e commerciale*".

In seguito alla entrata in vigore del Trattato di Lisbona, la cooperazione giudiziaria in materia civile è ora ricompresa tra le materie elencate dall'art. 81 del Trattato sul Funzionamento dell'Unione Europea (TFUE)[20].

Come si è detto nel precedente paragrafo, secondo la Comunità Europea lo sviluppo di metodi alternativi non costituisce uno strumento per deflazionare il processo giurisdizionale; ha invece lo scopo di consentire alle parti di pervenire autonomamente e volontariamente ad una definizione rapida, che tenga conto delle loro esigenze. In questo senso si esprime il *"Libro Verde relativo ai modi alternativi di risoluzione delle controversie in materia civile e commerciale*".

Nel Libro Verde si legge, tra l'altro, che un "*approccio consensuale aumenta le possibilità*

[19] Il Trattato di Amsterdam è entrato in vigore il 1° maggio 1999.

[20] Prima della entrata in vigore del Trattato di Lisbona, la cooperazione giudiziaria in materia civile era regolata dall'art. 65 del Trattato della Comunità Europea. In forza dell'art. 81 del TFUE l'Unione Europea "*sviluppa una cooperazione giudiziaria nelle materie civili con implicazioni transnazionali*" e può adottare "*misure intese a ravvicinare le disposizione legislative e regolamentari degli Stati membri*": si tratta di una competenza molto ampia.

per le parti di mantenere, una volta risolta la lite, le loro relazioni di natura commerciale o di altra natura" e che i "*I metodi di ADR si caratterizzano per la loro flessibilità, nel senso che le parti sono, in linea di principio, libere di ricorrere all'ADR, di decidere quale organizzazione o quale persona incaricare della procedura, di determinare quale procedura seguire, di scegliere se parteciparvi personalmente o se farsi rappresentare e infine di deciderne l'esito*" (punti 10 e 11 del Libro Verde).

Questi obiettivi e la salvaguardia della volontà delle parti sono state rafforzate nella "*Direttiva 2008/52/CE del Parlamento Europeo e del Consiglio del 21 maggio 2008, relativa a determinati aspetti della mediazione in materia civile e commerciale*".

Nel "*Considerando*" n. 6 leggiamo che: "*La mediazione può fornire una risoluzione extragiudiziale conveniente e rapida delle controversie in materia civile e commerciale attraverso procedure concepite in base alle esigenze delle parti. Gli accordi risultanti dalla mediazione hanno maggiori probabilità di essere rispettati volontariamente e preservano più facilmente una relazione amichevole e sostenibile tra le parti. Tali benefici diventano anche più evidenti nelle situazioni che mostrano elementi di portata transfrontaliera*".

Nella Direttiva si mette spesse l'accento sulla volontarietà.

Nei "*Considerando*" si legge, ad esempio:

- "*(10) La presente direttiva dovrebbe applicarsi ai procedimenti in cui due o più parti di una controversia transfrontaliera tentino esse stesse di raggiungere volontariamente una composizione amichevole della loro controversia con l'assistenza di un mediatore*";

- "*(13) La mediazione di cui alla presente direttiva dovrebbe essere un procedimento di volontaria giurisdizione nel senso che le parti gestiscono esse stesse il procedimento e possono organizzarlo come desiderano e porvi fine in qualsiasi momento*"[21].

[21] La versione italiana della Direttiva non rispetta il testo originale inglese, che ha il seguente contenuto: "*The mediation provided for in this Directive should be a voluntary process in the sense that the parties are themselves in charge of the process and may organise it as they wish and terminate it at any time*". L'espressione "*voluntary process*" è stata tradotta come "*volontaria giurisdizione*", ma non ha nulla a che vedere con la volontaria giurisdizione, che designa quei procedimenti in cui il giudice interviene nel processo formativo della volontà

La stessa definizione di mediazione, nell'art. 3 mette in risalto la libera volontà delle parti: la mediazione è definita come "*un procedimento strutturato, indipendentemente dalla denominazione, dove due o più parti di una controversia tentano esse stesse, su base volontaria, di raggiungere un accordo sulla risoluzione della medesima con l'assistenza di un mediatore. Tale procedimento può essere avviato dalle parti, suggerito od ordinato da un organo giurisdizionale o prescritto dal diritto di uno Stato membro*"[22].

Nella Direttiva si pone quindi l'accento su tre elementi:

a) la esistenza di un procedimento strutturato, che si svolge con l'assistenza del mediatore;

b) la centralità delle parti, che "*tentano esse stesse*" di raggiungere un accordo;[23]

c) la volontarietà del procedimento.

Il Codice Europeo di Condotta del Mediatore, a sua volta, sottolinea la necessità che l'eventuale accordo sia frutto di un consenso pieno e chiarisce che "*le parti possono ritirarsi dalla mediazione in qualsiasi momento senza fornire alcuna giustificazione*" (art. 3.3.).

Corollario della volontarietà del procedimento e della libertà delle parti è la riservatezza, che è fondamentale per garantire alle parti la possibilità di dialogare senza remore nel corso delle trattative[24].

giuridica di un soggetto ed emette autorizzazioni o omologazioni, ovvero procedimenti di nomina di curatori o tutori. Secondo la Direttiva il procedimento di mediazione è, più semplicemente, un procedimento volontario, "*voluntary process*", rimesso alla disponibilità ed alla autonomia delle parti.

[22] Appare interessante notare che nel decreto legislativo n. 28 del 2010 non si trova mai la parola "*volontario*", neppure nella definizione di "*mediazione*". Soltanto nell'art. 2, comma 2, "*Controversie oggetto di mediazione*" si legge che "*Il presente decreto non preclude le negoziazioni volontarie e paritetiche relative alle controversie civili e commerciali, nè le procedure di reclamo previste dalle carte dei servizi*": il legislatore riconosce che la volontarietà deve essere ricercata in altre fonti, diverse dal decreto in materia di mediazione!

[23] Appare evidente il richiamo alle c.d. mediazioni facoltativa, o mediazione *tout court*. Sulla distinzione tra mediazione facilitativa e c.d. mediazione aggiudicativa (o valutativa), si veda *infra.*

[24] Si vedano al riguardo il "Considerando" n. 23 e l'art. 7 della Direttiva.

4. Mediazione facilitativa e c.d. mediazione valutativa. - Nella disamina dei provvedimenti dell'Unione Europea vanno sottolineate la volontarietà del procedimento e la centralità delle parti, che "*tentano esse stesse*" di raggiungere un accordo.

Il mediatore non deve "decidere" la causa, non deve "anticipare" la decisione e non deve fare pronostici: la volontarietà della mediazione comporta come corollario che il mediatore non può condizionare le parti.

Il mediatore può contribuire per fare emergere gli interessi sottesi al conflitto e individuare eventuali forme di componimento, ma non può in nessun caso esercitare pressioni, dirette o indirette, prospettando il possibile esito della causa: questa è una attività propria del legale, non del mediatore.

Il mediatore non è un legale e neppure un giudice, non *dicit jus*, ma invita le parti a dialogare per ricercare una soluzione *volontaria*.

Se il mediatore condiziona la volontà delle parti con minacce più o meno velate, egli tradisce la sua vera funzione.

Questa constatazione è alla base della mediazione ed è confermata dai Codici etici, dove sono presenti disposizioni, che vietano al mediatore di lasciare intendere quale sarà, secondo lui, l'esito della causa: la prospettazione dell'esito della controversia costituisce una forma di indebita coazione del mediatore sulla volontà delle parti.

Secondo l'Unione Europea e secondo la prassi diffusa sino ad ora anche in Italia, tra gli organismi di mediazione che operano da alcuni anni presso le Camere di Commercio, davanti al mediatore non si deve svolgere una attività giurisdizionale: non si deve stabilire chi ha torto e chi ha ragione, perché le parti non devono litigare, ma vengono aiutate a cercare una definizione bonaria.

Il mediatore non è un giudice e non deve *jus dicere*, nè può esercitare forme surrettizie di giurisdizione, coartando la volontà delle parti.

Come si vedrà tra breve, la legislazione italiana si è discostata da queste caratteristiche,

invocando una presunta distinzione tra "*mediazione facilitativa*" e "*mediazione aggiudicativa*".

Secondo questa distinzione la c.d. "*mediazione facilitativa*"[25] avrebbe lo scopo di agevolare le parti al raggiungimento in via autonoma di una conciliazione: il mediatore si può attivare per indurre le parti a trovare una intesa, indagando sugli interessi sottesi al conflitto, ma deve restare neutrale e non può pronunciarsi sul merito della controversia.

Nella c.d. "*mediazione aggiudicativa*"[26] invece il conciliatore dovrebbe valutare - seppur allo stato degli atti e con delibazione sommaria - la fondatezza delle rispettive pretese, per prendere posizione sulle stesse e formulare una proposta, che può essere o meno accettata dalle parti.

Il legislatore italiano ha voluto optare per la c.d. mediazione aggiudicativa ed ha pure introdotto forme di coazione, stabilendo che la proposta del mediatore produce effetti nel successivo processo giurisdizionale.

Ha altresì stabilito che il mediatore ha diritto ad un compenso maggiore nel caso in cui le parti raggiungono un accordo[27].

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[25] La espressione "*mediazione facilitativa*" è la traduzione dei termini inglesi "*facilitative mediation".* Si tratta di termini che sono stati coniati dalla letteratura giuridica degli Statu Uniti d'America: per ampi richiami si veda *infra*.

[26] Traduzione di "*adjudicative mediation*". La letteratura straniera usa in realtà usa di solito la espressione "*evaluative mediation"*: per *adjudication* la letteratura straniera intende infatti un procedimento che si conclude con un provvedimento emesso da un terzo. La distinzione tra mediazione facilitativa e aggiudicativa è richiamata nella relazione ministeriale al decreto legislativo n. 28 del 2010. Per una critica all'uso dell'espressione "*mediazione aggiudicativa*" invece di "*mediazione valutativa"*, si veda BESSO, C., *La mediazione italiana: definizione e tipologie*, in *Revista Electronica de Dereito Processual*, anno 4, vol. VI, 2010, p.253.

[27] La legge delega stabilisce che le indennità spettanti ai conciliatori devono essere poste a carico delle parti e devono essere determinate, anche con atto regolamentare, in misura maggiore per il caso in cui venga raggiunta la conciliazione tra le parti (art. 60 della legge n.69 del 2009, comma 3, lettera m).
Il successivo decreto legislativo n. 28 del 2010, ha rimesso la determinazione delle tariffe ad un decreto ministeriale, che avrebbe pure fissato "*c) le maggiorazioni massime delle indennità dovute, non superiori al venticinque per cento, nell'ipotesi di successo della mediazione*" (art. 17, comma 4).
Il Decreto Ministeriale 18 ottobre 2010, n. 180, "*Regolamento recante la determinazione dei criteri e delle modalità di iscrizione e tenuta del registro degli organismi di mediazione e dell'elenco dei formatori per la mediazione, nonché l'approvazione delle indennità spettanti agli organismi, ai sensi dell'articolo 16 del decreto legislativo 4 marzo 2010, n. 28*" ha stabilito che il compenso dovuto dalle parti all'organismo di mediazione (*id est*: il costo a carico delle parti) va maggiorato sia nel caso di conciliazione, sia nel caso in cui le parti non si conciliano, ma il mediatore formula una proposta, anche se le parti non hanno chiesto la formulazione della proposta. Il particolare, il compenso "*b) deve essere aumentato in misura non superiore a un quinto in caso di successo della mediazione; c) deve essere aumentato di un quinto nel caso di formulazione della proposta ai sensi dell'articolo 11 del decreto legislativo*" (art. 16, comma 4).

Da un breve esame della dottrina e delle legislazioni straniere emerge però che la c.d. mediazione aggiudicativa in realtà non ha ricevuto alcuna conferma legislativa ed è la negazione della mediazione.

Nelle legislazioni straniere, anche laddove il mediatore formuli una proposta, questa perde qualsiasi efficacia se non viene accettata dalle parti e non produce effetti nel processo; la divulgazione del contenuto della eventuale proposta formulata dal mediatore sarebbe contraria al principio di riservatezza del procedimento[28].

Nel diritto nord americano si distingue tra *mediation*, nella quale il mediatore non può pronunciarsi sul merito della lite ma deve indurre le parti a trovare la conciliazione, e istituti affini di ADR, come la *adjudication*, che ha ben altri presupposti ed è un procedimento nel quale si chiede ad un terzo (che non viene chiamato mediatore) di pronunciarsi sul merito delle rispettive pretese.

La distinzione tra mediazione facilitativa e valutativa (o aggiudicativa) ha dato luogo ad un ampio dibattito negli Stati Uniti d'America, paese nel quale la dottrina ha dedicato ampia attenzione agli strumenti di risoluzione alternativa delle controversie (ed ha coniato la espressione *Alternativa Dispute Resolution*: *A.D.R.*).

Segnatamente, la tesi secondo la quale esisterebbe una c.d. mediazione valutativa trae origine dalla teoria che il mediatore potrebbe muoversi su diversi piani: può agevolare le parti a

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Non è chiaro se se nel caso di proposta, cui segua la stipula del verbale, debbano applicarsi entrambe le maggiorazioni.

In ogni caso, sta di fatto che in forza di queste previsioni il mediatore ha un interesse immediato e diretto all'esito favorevole della conciliazione: il mediatore non presenta, quindi, le garanzie di imparzialità che sono imposte dal Codice europeo di condotta del mediatore.

La previsione della possibilità per il mediatore di formulare la proposta di ufficio fa venire meno la facoltà delle parti di porre fine alla mediazione e la volontarietà del procedimento, prescritte dall'Unione Europea: anche se una delle parti vuole ritirarsi dal procedimento di mediazione, il mediatore – secondo la legge italiana – sembra conservare il potere proseguire il procedimento e di formulare la proposta per ottenere un aumento dei propri compensi.

[28] Sono previsti rari casi in cui la proposta può produrre effetti vincolanti per una sola delle parti, ma si tratta di procedimenti di *ADR* nell'interesse dei consumatori e la determinazione del mediatore è vincolante soltanto per il professionista: il consumatore resta libero di adire l'autorità giudiziaria. Questi procedimenti sono rimessi alla autoregolamentazione degli operatori economici. Per ampi richiami, si veda CAMILLI, E. L., *Sistemi di risoluzione alternativa delle controversie e sistemi di vigilanza: un'analisi comparativa*, in *Giur. Comm.* 2009, I, 240 ss. e spec. 245 ss, ove pure si mettono in evidenza i dubbi di legittimità costituzionale di eventuali limiti al diritto di azione.

ricercare esse stesse una soluzione, ovvero può fornire soluzioni o pareri legali e suggerire alle parti quale soluzioni adottare[29]. Il mediatore può operare all'interno di una griglia ("*grid*"): se le parti non riescono a trovare una intesa, il mediatore può farsi promotore di eventuali proposte e addirittura prospettare il possibile esito della controversia, in modo da indurre le parti a trovare un accordo.

La tesi, che attribuisce al mediatore il potere di fornire indicazioni alle parti e di prevedere il possibile esito della controversia, è stata sottoposta a serrate e fondate critiche, in quanto la valutazione sulla fondatezza delle rispettive pretese stravolge lo spirito della mediazione.

E vi è ormai unanime consenso nel ritenere che la mediazione aggiudicativa non esiste, ovvero non è mediazione.

Se il "mediatore" è in condizione di guidare l'esito del procedimento in una determinata direzione, attraverso la formulazione di proposte o di pareri sul possibile esito della controversia, non si può più parlare di "mediazione", ma si è in presenza di qualcosa di diverso.

Le parti, invero, non si ritrovano più a dialogare per tentare di raggiungere un accordo, ma sono naturalmente indotte a tentare di convincere il mediatore di essere dalla parte della "ragione".

Nella c.d. mediazione aggiudicativa gli incontri tra le parti non sono un luogo diretto a consentire un dialogo con la controparte, ma a convincere il mediatore della fondatezza delle proprie deduzioni[30].

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[29] Principale sostenitore di questa tesi è LEONARD L. RISKIN, *Understanding Mediators' Orientations, Strategies, and Techniques: A Grid for the Perplexed,* 1 Harv. Negot. L. Rev. 7, *23-24* (1996), che comunque sviluppa il suo ragionamento nell'ambito di una mediazione affidata ad un soggetto nel quale le parti ripongono ampia fiducia, anche in ragione della sua preparazione tecnica.

[30] LELA P. LOVE, *The Top Ten Reasons Why Mediators Should Not Evaluate,* 24 Fla. St. U. L. Rev. 937 (1997). Osserva Luiso, F.P., *La conciliazione nel quadro della tutela dei diritti*, in *Riv. trim. dir. proc. civ.*, 2004, 1216, che se il procedimento impone al conciliatore di formulare una proposta è ovvio che il conciliatore deve formarsi una opinione circa la posizione delle parti: "*ciò determina il modo di atteggiarsi delle parti nel procedimento conciliativo: ciascuna di esse porterà gli argomenti (che ritiene) utili ad incidere sul giudizio del conciliatore, in modo da ottenere la proposta a lei più favorevole. (…) Anche il procedimento conciliativo assume necessariamente*

La c.d. mediazione aggiudicativa è stata quindi considerata un "*ossimoro*"; e viene ormai abbandonata[31].

La sola mediazione è quella c.d. facilitativa, mentre le c.d. mediazione aggiudicativa è qualcosa di diverso, assimilabile alla richiesta di un parere legale.

La migliore riprova è data dal fatto che pure i fautori della c.d. mediazione aggiudicativa pongono in risalto che si tratta di qualcosa di diverso rispetto allo mediazione[32], in quanto non ha ad oggetto la ricerca della soddisfazione degli interessi delle parti; e si afferma che la mediazione valutativa è praticabile soltanto se il mediatore è un soggetto munito di specifiche cognizioni giuridiche, fermo restando che il "mediatore aggiudicativo" non deve esercitare indebite pressioni sulle parti, influenzando le loro decisioni attraverso la prospettazione dell'esito del giudizio[33].

Se, dunque, il ruolo del mediatore/conciliatore non può trasformarsi in quello di giudice o di arbitro, e neppure in quello dell'avvocato che fornisce pareri legali, sembra corretto ritenere che il mediatore sia tenuto e limitare il suo intervento alla c.d. mediazione facilitativa: diversamente egli perderebbe la posizione di terzo imparziale, che è condizione necessaria per evitare che la mediazione diventi una forma surrettizia di esercizio della giurisdizione o, peggio, una forma di coazione ai danni della parti.

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una struttura peculiare, che esclude, ad esempio, la possibilità di colloqui separati con le parti, essendo necessario che il giudizio del conciliatore si formi nel contraddittorio degli interessati".

[31] KIMBERLEE K. KOVACH & LELA P. LOVE, *"Evaluative" Mediation Is an Oxymoron,* 14 Alternatives To High Cost Litig. 31 (1996).

[32] Ad esempio, un *indipendent legal advise.*

[33] Per tutti: MURRAY S. LEVIN, *The Propriety of Evaluative mediation. Concerns About the Nature and utility ality of an Evaluative mediation*, in 16 Ohio St. J. Disp. Resol. 2000-2001; 267 e 281 ss.; JEFFREY W. STEMPEL, *The Inevitability of the Eclectic: Liberating ADR from Ideology*, in *Journal of dispute resolution*, 2000, 250 ss.; LELA P. LOVE AND JOHN W. COOLEY,*The Intersection of Evaluation by Mediators and Informed Consent: Warning the Unwary*, in *21Ohio St. J. Disp. Resol*, 2005 45 ss.; JOHN BICKERMAN, *Evaluative Mediator Responds, 14* alternatives to high cost litig. 70 (1996); SCOTT H. HUGHES, *Facilitative or Evaluative Mediation: May Your Choice Be a Wise One,* 59 Ala. Law. 246 (1998); JOHN LANDE, *How Will Lawyering and Mediation Practices Transform Each Other?,* 24 Fla. St. U. L. Rev. 839, 849-56 (1997); CURIE MENKELMEADOW, *When Dispute Resolution Begets Disputes of Its Own: Conflicts Among Dispute Professionals, 44* Ucla L. Rev. 1871 (1997); ROBERT B. MOBERLY, *Mediator Gag Rules: Is It Ethical for Mediators to Evaluate or Advise?,* 38 S. Tex. L. Rev. 669 (1997); Joseph B. Stulberg, *Facilitative Versus Evaluative Mediator Orientations: Piercing the "Grid" Lock,* 24 Fla. St. U. L. Rev. 985 (1997). Per un richiamo a questo dibattito, si veda pure SILVESTRI E., *Conciliazione e mediazione*, in *Encicl. dir. - Annali*, Milano, 2007, vol. I, p. 280.

Questa è una garanzia minima perché si possa giungere ad una *equa conciliazione*[34], che richiede due garanzie necessarie: quella del contraddittorio e quella della neutralità/imparzialità del mediatore[35].

Fermo restando che ciascun ordinamento ha proprie caratteristiche e non è possibile "importare" istituti, che trovano fondamento in altri ambienti culturali, sociali e giuridici, non si può fare a meno di segnalare che negli Stati Uniti le diverse legislazioni nazionali sono molto caute nell'attribuire poteri al mediatore.

Ad esempio, è interessante esaminare la legislazione della Florida.

La *Rule* 10.370 (in precedenza *Rule* 10.060) emessa dalla *Florida Supreme Court* disciplina i *Certified and Court-Appointed Mediators* (mediatori nominati dalla Corte) e stabilisce espressamente che un mediatore non deve in alcun modo esercitare pressioni per indurre le parti a conciliare; prevede che il procedimento di mediazione deve essere un procedimento equilibrato rimesso alla volontà delle parti; contiene il divieto espresso al mediatore di esprimere un'opinione personale o professionale su come la corte potrebbe risolvere la controversia; se una delle parti non comprende in modo pieno ed esauriente i propri diritti o questioni giuridiche, il mediatore deve invitare le parti a richiedere una consulenza legale [36].

[34] GHIRGA, M.F., *Strumenti alternativi di risoluzione della lite: fuga del processo dal diritto? (Riflessioni sulla mediazione in occasione della pubblicazione della Direttiva 2008/52/CE)*, in *Riv. dir. proc.* 2009, 377.

[35] La importanza del ruolo del conciliatore-mediatore è sottolineata da SILVESTRI E., *Conciliazione e mediazione*, cit., 281, la quale sottolinea che il "*conciliatore – mediatore rappresenta l'ago della bilancia del procedimento*".

[36] Sulla legislazione della Florida si veda JEFFREY W. STEMPEL, *The Inevitability of the Eclectic: Liberating ADR from Ideology*, 2000 *J. Disp. Resol.* 245 2000, pag. 19 ed ivi richiami alla legislazione di altri Stati. Appare utile trascrivere alcune regole vigenti in Florida, per consentire al lettore di esaminare il testo inglese: 10.220 "*Mediator's Role. The role of the mediator is to reduce obstacles to communication, assist in the identification of issues and exploration of alternatives, and otherwise facilitate voluntary agreements resolving the dispute. The ultimate decision-making authority, however, rests solely with the parties*"; 10.230 "*Mediation Concepts. Mediation is based on concepts of communication, negotiation, facilitation, and problem-solving that emphasize: (a) self determination; (b) the needs and interests of the parties; (c) fairness; (d) procedural flexibility; (e) confidentiality; and (f) full disclosure*".
Va ancora segnalato che ai sensi della *Rule* 1.720 "*Mediation Procedures*" delle *Florida Rules of Civil Procedure* il mediatore deve essere scelto di comune accordo tra le parti e soltanto se le parti non trovano un accordo il mediatore può essere designato dal giudice: appare evidente che la volontarietà del procedimento e le possibilità di un esito favorevole richiedono innanzitutto che le parti possano scegliere la persona del mediatore, in quanto le parti devono avere fiducia nel mediatore. La legislazione italiana invece prevede che le parti devono rivolgersi all'organismo di mediazione e il responsabile dell'organismo designa il mediatore incaricato (art. 8, comma 1, d.lgs. n. 28 del 2010).

5. La mediazione regolata dal decreto legislativo n. 28 del 2010. - Prima di esaminare brevemente alcuni aspetti censurabili delle nuove disposizioni in materia di mediazione, appare utile segnalare che la mediazione italiana si atteggia ad istituto autonomo e interamente locale, ben diverso dal concetto di mediazione recepito dall'Unione Europea.

Una prima constatazione si impone all'attenzione del giurista: in Italia il nuovo istituto non affida alla volontà delle parti la soluzione delle liti al di fuori del processo, ma è un procedimento paragiurisdizionale ad ogni effetto, con la sola differenza che non si svolge davanti al giudice ordinario, ma davanti a soggetti privati ed è gestito da enti privati, i c.d. organismi di conciliazione[37].

La natura giurisdizionale del procedimento è confermata da molteplici elementi:

- innanzitutto la legge parla di "*domanda di mediazione*", che deve indicare l'organismo adito, le parti, l'oggetto e le ragioni della pretesa, gli stessi elementi che devono essere contenuti nella domanda giudiziale;

- la domanda di mediazione, dopo la comunicazione alle altre parti, "*produce sulla prescrizione i medesimi effetti della domanda giudiziale*" (si tratta, quindi, dell'equivalente dell'atto introduttivo di un processo civile: citazione o ricorso);

- se una delle parti non compare davanti al mediatore, il giudice nella successiva fase davanti a lui "*può desumere argomenti di prova (...) ai sensi dell'articolo 116, secondo comma, del codice di procedura civile*" (art. 8, comma 5, del d.lgs. n. 28 del 2010). A tal fine il mediatore, quale "ausiliario del giudice", deve verbalizzare la mancata partecipazione di una delle parti (art. 11, comma 5, del d.lgs. n. 28 del 2010). L'art. 116, secondo comma, c.p.c. stabilisce che "*Il giudice può desumere argomenti di prova dalle risposte che le parti gli danno a norma*

[37] Le nuove disposizioni, che prevedono la istituzione di organismi di conciliazione deputati alla gestione dei procedimenti di conciliazione, hanno creato "*un circuito paragiurisdizionale parallelo alla giurisdizione civile affidato ai mediatori*": MONTELEONE, G., *La mediazione forzata*, cit., 23.

dell'articolo seguente, dal loro rifiuto ingiustificato a consentire le ispezioni che egli ha ordinate e, in generale, dal contegno delle parti stesse nel processo". Questo conferma che anche la mediazione è un processo.

- le spese del procedimento di mediazione sono trattate allo stesso modo delle spese giudiziali;

- in caso di mancata conciliazione, il mediatore può formulare, *sua sponte* ed anche contro la volontà delle parti, una proposta di conciliazione, che va comunicata per iscritto alle parti; in questo caso "*informa le parti delle possibili conseguenze di cui all'articolo 13*" (si veda l'art. 11, comma 1, del d.lgs. n. 28 del 2010).

L'art. 13 del d.lgs. n. 28 del 2010 regola le conseguenze nel caso in cui le parti non aderiscono alla proposta del mediatore[38].

Se il contenuto del provvedimento che definisce il successivo giudizio coincide interamente con la proposta rifiutata, la parte vittoriosa, ma responsabile del "gran rifiuto"[39], viene condannata alle spese del giudizio, nelle quali vanno comprese le spese per la mediazione[40], l'indennità corrisposta al mediatore e l'eventuale compenso che è stato pagato all'esperto, che può essere nominato per agevolare l'opera del mediatore.

[38] "*1. Quando il provvedimento che definisce il giudizio corrisponde interamente al contenuto della proposta, il giudice esclude la ripetizione delle spese sostenute dalla parte vincitrice che ha rifiutato la proposta, riferibili al periodo successivo alla formulazione della stessa, e la condanna al rimborso delle spese sostenute dalla parte soccombente relative allo stesso periodo, nonché al versamento all'entrata del bilancio dello Stato di un'ulteriore somma di importo corrispondente al contributo unificato dovuto. Resta ferma l'applicabilità degli articoli 92 e 96 del codice di procedura civile. Le disposizioni di cui al presente comma si applicano altresì alle spese per l'indennità corrisposta al mediatore e per il compenso dovuto all'esperto di cui all'articolo 8, comma 4.*
2. Quando il provvedimento che definisce il giudizio non corrisponde interamente al contenuto della proposta, il giudice, se ricorrono gravi ed eccezionali ragioni, può nondimeno escludere la ripetizione delle spese sostenute dalla parte vincitrice per l'indennità corrisposta al mediatore e per il compenso dovuto all'esperto di cui all'articolo 8, comma 4.
3. Il giudice deve indicare esplicitamente, nella motivazione, le ragioni del provvedimento sulle spese di cui al periodo precedente".

[39] L'espressione è di MONTELEONE, G., *La mediazione forzata*, cit, 21 ss.

[40] L'art. 13 del d.lgs. n. 28 del 2010 espressamente prevede che tra le spese devono essere ricomprese quelle della mediazione. L'art. 17, comma 2, del d.lgs. n. 28 del 2010 a sua volta stabilisce che "*Tutti gli atti, documenti e provvedimenti relativi al procedimento di mediazione sono esenti dall'imposta di bollo e da ogni spesa, tassa o diritto di qualsiasi specie e natura*": le due disposizioni sembrano in contrasto. La verità è che le nuove disposizioni, nonostante la declamazione contenuta nell'art. 17, prevedono ingenti costi a carico delle parti. Questi costi sono stati fissati con Decreto Ministeriale 18 ottobre 2010, n. 180.

La parte condannata alle spese deve anche versare all'erario una ulteriore somma pari al contributo unificato dovuto per la lite: si tratta di una vera e propria multa, una sanzione di natura penale, conseguenza del rifiuto della proposta del mediatore.

Questa forma di coazione è in contrasto con la volontarietà del procedimento di mediazione, più volte sottolineata dalla disciplina comunitaria.

Inoltre la previsione di una sanzione a carico della parte che ha agito o resistito in giudizio appare in contrasto con il diritto di agire in giudizio, sancito dall'art. 24 della Costituzione, e con l'art. 27 della Costituzione, che prevede una riserva di legge per le sanzioni penali: in questo caso invece la sanzione deriva dal fatto che la parte non avrebbe aderito ad una proposta di conciliazione.

Peraltro, se si considera che la mediazione dovrebbe consentire alle parti di rappresentare i loro interessi in modo da addivenire ad una soluzione volontaria, non è chiaro come possa verificarsi una coincidenza tra la proposta di conciliazione e la successiva sentenza: il mediatore, invero, dovrebbe aiutare le parti a trovare una conciliazione e non è chiamato ad esprimere valutazioni giuridiche sull'esito del giudizio.

Il mediatore non svolge neppure attività istruttoria diretta a verificare quanto esposto dalle parti nel corso del procedimento e potrebbe non avere alcuna nozione giuridica.

In questo stato di cose, appare evidente che la sentenza avrà contenuto identico alla proposta, ciò sarà dovuto ad una mera casualità e la sanzione a carico della parti appare quindi odiosa ed irragionevole[41].

L'esame della disciplina positiva introdotta dal decreto legislativo n. 28 del 2010 porta ad affermare che la mediazione secondo il legislatore italiano non soltanto è una condizione di procedibilità, ma mira a coartare la volontà, e quindi la libertà di determinazione delle parti: a

[41] Non si può tacere che dalla complessiva lettura del decreto legislativo n. 28/2010, si ha la sensazione che il legislatore abbia voluto effettivamente affidare al mediatore funzioni giurisdizionali ed abbia considerato la fase davanti all'organismo di mediazione una vera e propria fase giurisdizionale, tale da potere produrre conseguenze nelle (successive fasi del) processo davanti giudice ordinario. Va però ricordato che gli organi giurisdizionali devono essere istituiti nel rispetto dell'art. 102 Cost. e nel rispetto delle altre norme costituzionali che regolano il diritto di azione, da un lato, e la magistratura, dall'altro lato.

questo serve l'apparato sanzionatorio a loro carico.

Ora, se effettivamente il legislatore avesse voluto introdurre un procedimento diretto ad agevolare la conciliazione delle parti, non avrebbe dovuto introdurre sanzioni o altre forme di coazione della volontà delle parti.

Le nuove norme inducono pure a dubitare che il mediatore possa operare con imparzialità.

Un mediatore, consapevole di potere influenzare la volontà delle parti per ricevere un beneficio economico diretto (l'aumento del compenso, che è previsto sia nel caso in cui le parti conciliano la controversia, sia nel caso in cui il mediatore formula una proposta che non viene accettata), non è e non può essere considerato "*imparziale*": egli ha uno specifico "*interesse nella causa*".

Il mediatore è indotto a formulare la proposta e ad attivarsi affinché la conciliazione venga raggiunta, a qualunque costo.

In contrasto con la Direttiva e con il Codice Europeo di Condotta del mediatore[42], le parti non hanno neppure il potere di porre fine al procedimento di mediazione: anche se le parti vogliono concludere il procedimento, il mediatore conserva il potere di prorogare la sua funzione e può formulare la proposta di ufficio.

Nella disamina dei poteri del mediatore va ancora sottolineato che il legislatore sembra ipotizzare una scissione tra la prima fase del procedimento, in cui il mediatore svolge una funzione "facilitativa", e una seconda fase, in cui il mediatore si trasforma in un "aggiudicatore" e formula la proposta[43].

[42] Si vedano il "Considerando" n. 13 della Direttiva e l'art. 3.3. del Codice Europeo di Condotta del mediatore.

[43] L'art. 1 del decreto legislativo n. 28 del 2010 definisce mediazione l'attività *"finalizzata ad assistere due o più soggetti sia nella ricerca di un accordo amichevole per la composizione di una controversia, sia nella formulazione di una proposta per la risoluzione della stessa*", ricomprendendo sotto un ampio ombrello due fattispecie diverse: la mediazione facilitativa e la formulazione di una proposta che deve avere la forma scritta (art. 11, comma 2), pregiudica la libera determinazione delle parti e produce effetti anche nel successivo processo. Per un richiamo alle critiche alle precedenti disposizioni in materia di conciliaizone societaria, che consentivano l'esercizio di poteri valutativi nel caso di mancato raggiungimento dell'accordo, si veda SANTAGADA, F., *La conciliazione delle controversie civili*, cit., 295.

Ma, a ben guardare, si tratta di una finzione.

Questo soggetto, che il legislatore ha voluto chiamare mediatore in omaggio alla terminologia che viene usata in paesi stranieri, sin dall'inizio del procedimento è munito del potere di coartare la volontà delle parti per scoraggiare l'accesso alla giustizia e in questo caso ottiene un maggiore compenso.

Le parti sin dall'inizio del procedimento saranno indotte a litigare ed a depositare difese scritte, al fine di convincere il mediatore a formulare una proposta, che possa risultare vantaggiosa[44].

E il "mediatore" sarà pure indotto a formulare proposte di decisione della futura controversia: questo lo ha voluto il legislatore, quando ha introdotto il collegamento tra il contenuto della proposta e la sanzione sulle spese.

Questo sistema suscita dubbi di legittimità costituzionale.

Minacciare sanzioni e condanne alle spese la parte vittoriosa, per il solo fatto che la stessa parte abbia rifiutato la proposta conciliativa poi recepita dal giudice dello Stato nella successiva sentenza, conferisce al mediatore poteri giurisdizionali e non ha altra funzione che ostacolare l'accesso alla giustizia con strumenti di coazione indiretta. Manca il divieto diretto ed immediato di adire il giudice, ma vi è una costrizione morale che porta allo stesso risultato.

Se le considerazioni appena svolte sono fondate, sembrano anche violati gli artt. 24 e 102 della Costituzione, perché il c.d. mediatore assume la veste di un giudice e viene istituita una forma giurisdizione speciale, gestita da soggetti estranei all'ordinamento giudiziario.

6. Cenni su alcuni dubbi di legittimità costituzionale e sul possibile contrasto tra le nuove disposizioni e la Convenzione Europea per la salvaguardia dei diritti dell'uomo e delle libertà fondamentali (art. 6) e la Carta dei diritti fondamentali dell'Unione Europea (art. 47). – Molti

[44] La raccomandazione della Commissione del 30 marzo 1998, sopra richiamata, aveva messo la diversa natura delle procedure di ADR nelle quali il terzo "*propone o impone una soluzione*": in questi procedimenti trovare piena applicazione il principio del contraddittorio e deve svolgersi un procedimento disciplinato da regole certe.

commentatori hanno sollevato dubbi di legittimità costituzionale della nuova disciplina, per eccesso di delega.

Al riguardo è stato osservato che, secondo la legge delega, la mediazione doveva essere introdotta "*senza precludere l'accesso alla giustizia*"; inoltre la delega doveva essere esercitata "*nel rispetto e in coerenza con la normativa comunitaria*" (art. 60, comma 2, della legge n.69 del 2009).

La normativa comunitaria, richiamata tra i criteri della legge delega, prevede che la mediazione è facoltativa e mette l'accento sulla volontarietà del procedimento.

Il decreto legislativo n. 28 del 2010 ha invece stabilito che il tentativo di conciliazione è condizione di procedibilità in numerose materie che sono state individuate dal Governo in assoluta autonomia, senza alcun criterio direttivo da parte del Parlamento[45].

La introduzione di una nuova condizione di procedibilità appare contraria alla legge delega, secondo la quale la mediazione non poteva "*precludere l'accesso alla giustizia*".

Questo dubbio di legittimità costituzionale ha indotto il Tribunale Amministrativo del Lazio a sollevare questione di legittimità costituzionale dell'art. 5 del d. lgs. n. 28 del 2010, comma 1, per eccesso di delega, nella parte in cui introduce l'obbligo del previo esperimento del procedimento di mediazione.

I dubbi di legittimità costituzionale derivano sia da un eccesso di delega sia dal contrasto delle nuove disposizioni con l'art. 24 della Costituzione, nella misura in cui esse determinano un concreto pregiudizio all'azionabilità in giudizio di diritti soggettivi.

Il Tribunal Amministrativo Regionale dubita pure della legittimità costituzionale dell'art. 16 del d. lgs. n. 28 del 2010, comma 1, laddove dispone che "*gli enti pubblici e privati, che diano garanzie di serietà ed efficienza*" sono abilitati a costituire organismi deputati a gestire il

[45] Si ricorda che ai sensi dell'art. 5, comma 1, del d.lgs. n. 28 del 2010 il tentativo di conciliazione è condizione di procedibilità nelle controversie "*in materia di condominio, diritti reali, divisione, successioni ereditarie, patti di famiglia, locazione, comodato, affitto di aziende, risarcimento del danno derivante dalla circolazione di veicoli e natanti, da responsabilità medica e da diffamazione con il mezzo della stampa o con altro mezzo di pubblicità, contratti assicurativi, bancari e finanziari*". Per una disamina dei dubbi di costituzionalità, SCARSELLI, G., *L'incostituzionalità della mediazione di cui al d.leg. 28/2010*, in *Foro it.*, 2011, V, 54.

procedimento di mediazione: secondo i Giudici Amministrativi questa previsione è generica, non trova riscontro nella legge delega e non garantisce, mediante un'adeguata conformazione della figura del mediatore, che i privati non subiscano pregiudizi a causa dell'operato del mediatore e, soprattutto, a causa della mancata accettazione della proposta conciliativa [46].

Va ancora segnalato che in tempi recenti la Corte di Giustizia dell'Unione Europea, con sentenza 18 marzo 2010, ha fissato alcuni limiti al potere dei singoli Stati di imporre alle parti di esperire tentativi preventivi di conciliazione[47].

La Corte di Giustizia era stata chiamata a stabilire se la previsione di un tentativo obbligatorio di conciliazione sia compatibile con il principio della tutela giurisdizionale effettiva.

In particolare, la Corte si è pronunciata sulla compatibilità tra la normativa dell'Unione Europea e il tentativo obbligatorio di conciliazione nelle controversie in materia di telecomunicazioni introdotto dallo stato Italiano dall'art. 1 comma 11 della legge 31 luglio 1997, n. 249.

In forza del "*Regolamento in materia di procedure di risoluzione delle controversie tra operatori di comunicazioni elettroniche ed utenti, approvato con Delibera 173/07/CONS*" approvato dall'Autorità per le garanzie nelle comunicazioni, il procedimento di conciliazione previsto dalla legge 31 luglio 1997, n. 249, deve concludersi entro trenta giorni (art. 3) ed è gratuito quando si svolge presso i Comitati regionali per le comunicazioni (CO.RE.COM.), che operano come organi funzionali dell'Autorità per le garanzie nelle comunicazioni.

Ora, la Corte di Giustizia ha stabilito che uno Stato membro possa introdurre un tentativo obbligatorio di conciliazione extragiudiziale come condizione per la ricevibilità dei ricorsi giurisdizionali *"a condizione che tale procedura non conduca ad una decisione vincolante per le parti, non comporti un ritardo sostanziale per la proposizione di un ricorso giurisdizionale, sospenda la prescrizione dei diritti in questione e non generi costi, ovvero generi costi non*

[46] L'ordinanza di rimessione del 12 aprile 2011 è pubblicata in *Guida al diritto,* 23 aprile 2011, pag. 15.
[47] La sentenza della Corte Giustizia Unione Europea, 18 marzo 2010, n. 317-320/08, emessa nelle cause riunite n. 317/08, 318/08, 319/08, 320/08: Rosalba Alassini contro Telecom Italia S.p.A. è pubblicata in *Foro it.*, 2010, IV, 361, con nota di ARMONE, G. - PORRECA, P., *La mediazione civile nel sistema costituzional-comunitario*.

ingenti, per le parti, e purché la via elettronica non costituisca l'unica modalità di accesso a detta procedura di conciliazione e sia possibile disporre provvedimenti provvisori nei casi eccezionali in cui l'urgenza della situazione lo impone".

In motivazione si legge che una disciplina contraria a questi principi sarebbe in contrasto con l'art. 6 della Convenzione Europea dei diritti dell'uomo e con l'art. 47 della Carta dei diritti fondamentali dell'Unione Europea[48].

La Corte ritiene inoltre che un ritardo di trenta giorni per l'esperimento del tentativo di conciliazione non appare in contrasto con il diritto ad un processo equo in un termine ragionevole.

Le condizioni indicate dalla Corte di Giustizia per la legittimità del tentativo obbligatorio di conciliazione sono le seguenti:

a) "*la procedura non conduca ad una decisione vincolante per le parti";*

b) *"non comporti un ritardo sostanziale per la proposizione di un ricorso giurisdizionale";*

c) *"sospenda la prescrizione dei diritti in questione"*;

d) *"non generi costi, ovvero generi costi non ingenti, per le parti*" (nel testo inglese si legge: "*it does not give rise to costs – or gives rise to very low costs*": la traduzione più corretta è: "*non comporta costi o comporta costi molto bassi*");

e) *"la via elettronica non costituisca l'unica modalità di accesso a detta procedura di conciliazione"*;

f) *"sia possibile disporre provvedimenti provvisori nei casi eccezionali in cui l'urgenza della situazione lo impone".*

[48] In forza dell'articolo 6 del Trattato sull'Unione Europea, come modificato dal Trattato di Lisbona, "*L'Unione riconosce i diritti, le libertà e i principi sanciti nella Carta dei diritti fondamentali dell'Unione europea del 7 dicembre 2000, adattata il 12 dicembre 2007 a Strasburgo, che ha lo stesso valore giuridico dei trattati*". Lo stesso articolo, nel comma 3, stabilisce che "*I diritti fondamentali, garantiti dalla Convenzione europea per la salvaguardia dei diritti dell'uomo e delle libertà fondamentali e risultanti dalle tradizioni costituzionali comuni agli Stati membri, fanno parte del diritto dell'Unione in quanto principi generali*". Con queste disposizioni il Trattato recepisce al suo interno la Carta dei diritti fondamentali, nonché i diritti garantiti dalla Convenzione Europea per la salvaguardia dei diritti dell'uomo e delle libertà fondamentali.

Il procedimento di mediazione regolato dal decreto legislativo n. 28 del 2010 non sembra rispettare tutti i parametri fissati dalla Corte di Giustizia: segnatamente, le nuove disposizioni appaiono in contrasto con i parametri indicati con le lettere *a*), *b*) e *d*).

Innanzitutto perché la procedura può terminare con la proposta, che produce effetti vincolanti per le parti: non si tratta della decisone della lite, ma di conseguenze che possono comunque cagionare pregiudizi alla parte che non accetti la proposta di conciliazione o che decide di non partecipare al procedimento di mediazione.

La nuova disciplina appare pure in contrasto con il requisito che abbiamo indicato con la lettera *b*), relativo alla congruità del differimento dell'esercizio del diritto di azione.

Il termine di durata del procedimento di mediazione è di quattro mesi, secondo previsto dall'art. art. 6, del decreto legislativo n. 28 del 2010[49].

Questo lasso di tempo a nostro avviso comporta un "*ritardo sostanziale*" ("*a substantial delay*" secondo le parole della Corte di Giustizia) nella proposizione di un ricorso giurisdizionale: se si considera che secondo la Corte Europea dei Diritti dell'Uomo il termine ragionevole di durata dell'intero processo di primo grado è di tre anni, un ritardo di ben quattro mesi per l'esperimento del tentativo di conciliazione assume una concreta rilevanza e posticipa in modo significativo la instaurazione del processo.

Anche l'aspetto dei costi suscita notevoli perplessità.

La Corte ha stabilito che il procedimento non deve comportare costi o, se proprio necessario, "*costi molto bassi*".

Il decreto legislativo n. 28 del 2010, ha stabilito che le tariffe sarebbero state fissate con decreto ministeriale ed ha pure previsto una forma di corrispettività: gli organismi di

[49] "*1. Il procedimento di mediazione ha una durata non superiore a quattro mesi.*
2. Il termine di cui al comma 1 decorre dalla data di deposito della domanda di mediazione, ovvero dalla scadenza di quello fissato dal giudice per il deposito della stessa e, anche nei casi in cui il giudice dispone il rinvio della causa ai sensi del quarto o del quinto periodo del comma 1 dell'art. 5, non è soggetto a sospensione feriale".

mediazione vengono remunerati attraverso le somme pagate dalle parti[50].

Il Decreto Ministeriale 18 ottobre 2010, n. 180 ha fissato tariffe molto elevate, che sono dovute da tutte le parti del procedimento, compresi i convenuti che si limitano a resistere alle pretese dell'attore.

Le tariffe richiedono un primo versamento di 40 euro per spese di segreteria e il successivo versamento di una indennità che arriva fino ad euro 9.600,00 per ciascuna delle parti (nel caso di pluralità di convenuti, l'importo dovrà essere versato da ciascun convenuto) e sono soggette a maggiorazioni, nei casi previsti dallo stesso decreto[51].

Non sembra che questi importi possano essere considerati "*molto bassi*": anche sotto questo profilo la nuova disciplina appare in contrasto alle indicazioni provenienti dalla Corte di Giustizia.

[50] Questi introiti devono pure garantire l'accesso alla mediazione in favore dei soggetti che si trovano nelle condizioni per l'ammissione al patrocinio a spese dello Stato: si veda al riguardo l'articolo 17, comma 5, del decreto legislativo 4 marzo 2010 n. 28. Non soltanto il costo della singola mediazione, ma anche il costo del patrocinio a spese dello Stato viene così caricato sulla parte, che vuole agire o resistere in giudizio.

[51] Ulteriori perplessità derivano dalla previsione di tariffe minime obbligatorie, fissate dal Ministero della Giustizia nel caso di organismi di mediazione istituiti da enti pubblici e sottoposte alla approvazione dello stesso Ministero nel caso di enti privati (art. 2 lett. E, ed art. 5, comma 1, del D.M. n.180/2010).
Invero, gli organismi di mediazione forniscono una prestazione di natura privatistica e dovrebbero operare in regime di libera concorrenza.
L'art. 2 del d.l. 4 luglio 2006, n. 223, convertito della legge 4 agosto 2006 n. 248 (c.d. decreto Bersani) ha abolito le tariffe minime nel settore dei servizi professionali. In particolare, "*In conformità al principio comunitario di libera concorrenza ed a quello di libertà di circolazione delle persone e dei servizi, nonché al fine di assicurare agli utenti un'effettiva facoltà di scelta nell'esercizio dei propri diritti e di comparazione delle prestazioni offerte sul mercato, dalla data di entrata in vigore del presente decreto sono abrogate le disposizioni legislative e regolamentari che prevedono con riferimento alle attività libero professionali e intellettuali: a) l'obbligatorietà di tariffe fisse o minime".*
A fronte di questa disciplina generale, la previsione di tariffe ministeriali per gli organismi di mediazione introduce un regime speciale, senza alcuna ragionevole giustificazione: da qui plausibili dubbi di legittimità costituzionale per violazione dell'art. 3 della Costituzione. Va pure considerato che la previsione di tariffe minime rende più difficile l'accesso alla giustizia senza alcuna ragionevole giustificazione, con conseguente violazione dell'art. 24 della Costituzione.
Si consideri inoltre che le legge non conteneva i criteri per la determinazione delle tariffe, che sono frutto di una scelta arbitraria dell'amministrazione.
Il D.M. 180/2010, anche se sul punto non era stata data alcuna delega, ha addirittura introdotto una solidarietà nei confronti dell'organismo di tutte le parti che hanno aderito al procedimento: art. 16, comma 11. In questo modo un convenuto in mala fede e impossidente (o che ha sottratto il patrimonio al rischio di azioni esecutive) può aderire al procedimento al solo fine di recare pregiudizi all'attore.

7. Conclusioni. - L'analisi dei rapporti tra il processo giurisdizionale e il procedimento di mediazione regolato dal decreto legislativo 4 marzo 2010, n. 28 richiede ancora un cenno alla nostra storia.

Non si può fare a meno di ricordare che la introduzione del tentativo obbligatorio di conciliazione è un ritorno all'antico.

Nei secoli passati i legislatori hanno più volte introdotto tentativi obbligatori di conciliazione. Ma una lunga esperienza pratica ha insegnato che questo istituto non ha mai sortito l'effetto di agevolare la tutela delle parti, di sfoltire i ruoli giudiziari o di ridurre il numero delle liti: "*il tentativo forzato, appunto perché forzato, degenera, siccome l'esperienza ha luminosamente dimostrato, in vana formalità, spesso inutile, talora dannosa*"[52].

La migliore riprova della inutilità del tentativo obbligatorio di conciliazione è costituita dalla recente abrogazione del tentativo obbligatorio di conciliazione nelle controversie individuali di lavoro, che non aveva portato alcun beneficio alle parti ed al processo, ma era stato soltanto fonte di inutili complicazioni e di formalismi[53].

Le nuove disposizioni sulla mediazione presentano ulteriori inconvenienti anche perché hanno attribuito al mediatore poteri, che possono pregiudicare i diritti delle parti e influenzare

[52] MATTIROLO, L., *Trattato di diritto giudiziario civile*, vol. I, Torino, 1892, p. 145. Nello stesso senso, già prima PISANELLI, G., *Relazione ministeriale sul libro primo del progetto di codice di procedura civile*, cit., pag. 5 ss., ove si legge che "*la conciliazione delle parti è un'idea che ha molte attrattive, ma conviene di non esagerarla, e molto più ancora di non forzarla: allora perde ogni pregio e si corre il pericolo di riuscire ad un fine opposto. Quando lo sperimento della conciliazione si volle rendere obbligatorio, come preliminare necessario del giudizio, non corrispose alle aspettative e degenerò in una vana formalità*".

[53] Come è noto la legge 4 novembre 2010, n. 183 ha abrogato le disposizioni che regolavano il tentativo di conciliazione come condizione di procedibilità delle controversie di lavoro. Era notorio che i tentativi di conciliazione avevano esito infruttuoso. Va segnalato che le statistiche riportavano una qualche percentuale di conciliazioni innanzi le Direzioni Provinciali del Lavoro: si trattava dei casi in cui il datore di lavoro, dopo avere raggiunto un accordo con il lavoratore, chiedeva al lavoratore di formalizzare la transazione davanti la Direzione Provinciale del Lavoro per evitare che il lavoratore potesse impugnare l'accordo ai sensi dell'art. 2113 c.c., il quale stabilisce che "*Le rinunzie e le transazioni, che hanno per oggetto diritti del prestatore di lavoro (...) non sono valide*" e "*possono essere impugnate entro sei mesi dal lavoratore, con qualsiasi atto, anche stragiudiziale*", salvo che si tratti di conciliazioni stipulate innanzi le Direzioni Provinciali del Lavoro, ovvero in sede sindacale o davanti al Giudice del Lavoro. Le statistiche hanno sempre trattato questi procedimenti come i normali procedimenti contenziosi che venivano instaurati tra lavoratore e datore di lavoro per assolvere all'onere di esperire il tentativo di conciliazione come condizione di procedibilità della domanda giudiziale.

la loro volontà.

Il vizio di fondo della nuova disciplina deriva dal fatto che le nuove norme sono dirette ad ostacolare l'accesso alla giustizia[54]: tutto il contrario di quello che dovrebbe essere lo scopo della mediazione.

La nuova disciplina fa leva sul termine "mediazione" e sull'idea di "conciliazione" ed evoca alla mente un rimedio semplice, che dovrebbe svolgersi innanzi ad un soggetto esperto, che risolve agevolmente le liti, seduto sotto una palma, come la profetessa Dèbora nel libro Giudici [55].

Ma la realtà è diversa: il procedimento di mediazione disciplinato dal decreto legislativo n. 28 del 2010 ha stravolto il ruolo e la funzione del mediatore, che non si limita ad aiutare le parti a raggiungere una intesa.

Il procedimento si presenta complesso ed articolato, comporta l'obbligo di pagare cospicui compensi agli organismi di mediazione e può determinare gravi conseguenze negative a carico delle parti.

In definitiva la "mediazione" italiana è un procedimento giurisdizionale di tipo contenzioso, rimesso ad organismi privati, che può concludersi con una proposta vincolante per il giudice dello Stato, ai fini della liquidazione delle spese e della irrogazione di una multa in favore dell'Erario[56].

[54] È noto che la nuova disciplina sulla mediazione è stata introdotta come strumento per ridurre il numero delle cause, attraverso la creazione di ostacoli alla instaurazione del processo innanzi al Giudice dello Stato. La relazione illustrativa alla prima edizione del decreto legislativo è esplicita sul punto: si legge espressamente che la introduzione della mediazione come condizione di procedibilità mira a "*garantire alla nuova disciplina una reale spinta deflattiva*". Anche il Primo Presidente della Corte di Cassazione, in occasione della inaugurazione dell'anno giudiziario, ha messo in evidenza che scopo delle recenti disposizioni è la "*deflazione del contenzioso*" (si veda pag. 41 della *Relazione sull'Amministrazione della Giustizia nell'anno 2010* del Primo Presidente della Corte di Cassazione Ernesto Lupo, disponibile sul sito www.cortedicassazione.it). In nessun passaggio della Relazione del Primo Presidente si fa cenno alla mediazione come strumento diretto a favorire l'accesso alla giustizia, secondo il modello previsto dalla Direttiva n. 52/2008.

[55] Capitolo 4, versetti 4 e 5: "*In quel tempo era giudice d'Israele una donna, una profetessa, Dèbora, moglie di Lappidòt. Ella sedeva sotto la palma di Dèbora, tra Rama e Betel, sulle montagne di Èfraim, e gli Israeliti salivano da lei per ottenere giustizia*".

[56] La interferenza tra le nuove disposizioni e le norme costituzionali sull'esercizio della funzione giurisdizionale traspare dalla motivazione della ordinanza del TAR Lazio del 12 aprile 2011, *cit.*, che considera "*aperto*

In questo modo la funzione giurisdizionale si viene a trovare in una posizione subalterna rispetto all'attività dei mediatori e viene violato l'art. 102 della Costituzione, secondo il quale i giudici sono soggetti soltanto alla legge.

Le nuove disposizioni appaiono pure in contrasto con l'art. 111 della Costituzione, perché il procedimento non è regolato dalla legge, ma dai regolamenti adottati dagli organismi di mediazione e non vi è alcuna garanzia del contraddittorio.

E non va trascurato che secondo i principi sanciti dalla Costituzione ogni persona ha il diritto di agire in giudizio innanzi al giudice ordinario e lo Stato deve sostenere le spese pubbliche per il funzionamento degli organi giurisdizionali attraverso le imposte, che devono rispettare il principio di capacità contributiva (stabilito dall'art. 53 della Costituzione[57]), salvo il pagamento di eventuali concorsi economici a carico della parte che propone la domanda giudiziale[58].

La giurisdizione è una funzione essenziale dello stato di diritto ed è un servizio di interesse collettivo: sarebbe contrario alla natura pubblica della funzione giurisdizionale un sistema basato su "sportule", che abbiano lo scopo di remunerare, come "corrispettivo", gli organi giurisdizionali.

La azione giudiziale non può rimanere subordinata a preventive autorizzazioni da parte degli organismi di mediazione o al pagamento di compensi a soggetti privati, fissati dal Ministero con un provvedimento non motivato.

E la funzione giurisdizionale è esercitata da magistrati ordinari, nominati per concorso

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l'interrogativo di quale sia il ruolo che l'ordinamento giuridico nazionale intende effettivamente affidare alla mediazione.
Laddove, invece, è proprio la puntuale individuazione di tale ruolo ad essere imprescindibilmente pregiudiziale all'apprezzamento dei requisiti che, in via attuativa-amministrativa, è legittimo richiedere al mediatore ovvero da cui è legittimamente consentito prescindere".

[57] "*Tutti sono tenuti a concorrere alle spese pubbliche in ragione della loro capacità contributiva. Il sistema tributario è informato a criteri di progressività*".

[58] La dottrina ha più volte sottolineato che "*In linea di principio (...) la giustizia non dovrebbe esser gravata da imposizioni tributarie e non dovrebbe costare niente ai litiganti*": cfr. per tutti SCARSELLI, G. *Contro i tributi giudiziari*, in *Foro it.* 2001, I, 1807 ss., ed ivi richiami. La legittima aspirazione non appare compatibile con lo stato delle risorse pubbliche, ma appare evidente che la funzione giurisdizionale assolve ad interessi di tipo generale e il costo del processo non può essere interamente addossato alle parti.

(artt. 102 e 106 della Costituzione), non da organismi privati.

Le nuove disposizioni sembrano avere dimenticato queste fondamentali regole costituzionali.

L'interprete deve, dunque, auspicare che intervengano al più presto i necessari correttivi.

Civil Procedure Review
AB OMNIBUS PRO OMNIBUS

Why is the Highway Closed? The Unreasonable Restriction Imposed on the Legal Services Corporation Regarding Class Action Suits

(¿Por qué Está Cerrada la Autopista? La Irrazonable Restricción Impuesta sobre la Corporación de Servicios Legales con Relación al Uso de Acciones de Clase)

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Abstract: In the paper I discuss the prohibition imposed by the US Congress on the Legal Services Corporation regarding the use of class action suits to provide free legal assistance to the poor. I deal with the creation of the Legal Services Corporation in the US, the scope and advantages of class actions suits (particularly in terms of access to justice), and the role this kind of procedure can play in a context of a deep economic crisis that have deepened the gap in access to the civil justice system. I argue that the aforementioned prohibition to use class actions is unreasonable *per se*, and that this character is even more remarkable during the current post economic scenario. Therefore, I suggest that the prohibition should be eliminated as soon as possible if there is a real interest in providing free legal services to the poor.

Key words: Class Actions – Legal Services for the Poor – Access to Justice – Legal Services Corporation – Economic and Cultural Barriers

Introduction

The purpose of this paper is to discuss the restriction imposed by the US Congress on the Legal Services Corporation regarding the use of class action suits.[1] I will show that the limitation is unreasonable *per se*, and that this character is even more remarkable during the current post economic crisis scenario. The basic premise of the analysis, which should be clear from the outset, is that access to justice is a basic human right within any democratic society.[2]

The paper is organized in four parts. In Part II I briefly describe the origins of legal aid in the US, the institutional mission of the Legal Services Corporation (LSC) and the restrictions imposed on it by Congress in 1996. Part III is dedicated to an overview of the barriers people find when trying to get access to the civil justice system. In Part IV I work specifically on the class action procedural device, explaining the origins, purposes and advantages of this mechanism in terms of access to justice, efficiency and deterrence effect.

By the end of Part IV it should be clear that class actions are an extremely relevant procedural tool for delivering legal aid services to the extent that they allow an efficient and economic way -both to the providers and the State- to get over the barriers faced by individuals in this field. By showing that, I will demonstrate that the restriction regarding class actions is unreasonable *per se*.

Once this preliminary conclusion is established, in Part V I deal with the impact of the 2008 economic crisis, both on the gap in the access to the civil justice system and in the funding of the LSC and legal aid providers. My aim is to show that, while the restriction under discussion can be

[1] This paper is the result of a research performed during the Fall semester of 2010 in the context of the Seminar *"Access to the Civil Justice System and Delivering Civil Legal Services to the Poor: Policies, Practices and Current Challenges"* (NYU School of Law) under the supervision of Prof. Helaine M. Barnett. I am deeply grateful for her insight, comments on previous drafts and support to the project. A Spanish version of the work, with some modifications and a different title, will be published in the *Revista de Derecho Procesal*, Rubinzal Culzoni Ed., Argentina.

[2] Not only because without it no other right could be secure, but also because of the effects which follow from its enforcement to the democratic system as a whole. See Faisal Bhabha *"Institutionalizing Access-to-Justice: Judicial, Legislative and Grassroots Dimensions"*, 33 Queen's L.J. 139, 173 (2007) (arguing that the consequences of the exclusion of the poor and other disadvantaged people from the justice system are not only suffered by those individuals: that exclusion *"can exacerbate and entrench their already marginal position in the political, social and economic structures of society"*, and it can also *"destabilize the political system and engender disillusionment with democratic institutions*).

considered unreasonable as a matter of principle, its adverse consequences on the whole system are even worse in the specific context of a post economic crisis scenario.

I close the paper by presenting a self-evident suggestion: assuming that there is no enough money to allocate in the legal aid arena in order to close the access to justice gap through the provision of adequate individual counsel and representation, the restriction on the LSC regarding class action suits should be eliminated as soon as possible.

I. The Legal Services Corporation

a. Origins of legal aid in the US, the enactment of the LSC and the recurrent problem of lack of resources

Legal aid work has always existed in the US, but in its origins it was informal, unorganized and individual. The history of organized legal aid services started in New York City in 1876, with the protection provided by the "German Society" to immigrants arrived to the US from that country. This private society changed drastically its name and the scope of its services (for the second time) in 1896 with the aim of start helping American citizens as well. That is how the "Legal Aid Society" appeared into scene. By 1910 organized legal aid work was *"reasonably well established in all of the larger cities of the east"* , following the trend initiated in New York.[3] By 1965, virtually every major city in the US had *"some kind of legal aid program"* which shared many common characteristics (the most important of them was, not surprisingly, the lack of adequate resources to accomplish their mission).[4]

The first time that Congress allocated federal funds for that kind of activities was during the era of the Office of Economic Opportunity (OEO). This public office was in charge of administering the governmental anti-poverty programs grounded on the Economic Opportunity Act of 1964.[5] As many

[3] Reginald Heber Smith *"Justice and the Poor",* The Carnegie Foundation for the Advancement of Teaching, Bulletin N° 13, 1919, pp. 133, 134, 139-140.
[4] Alan W. Houseman and Linda E. Perle *"Securing Equal Justice for All: A Brief History of Civil Legal Assistance in the United States"*, CLASP, 2007, p.3.
[5] Alan W. Houseman and Linda E. Perle *"Securing Equal Justice for All: A Brief History of Civil Legal Assistance in the United States"*, CLASP, 2007, p. 7. See also Helaine M. Barnett *"Justice for All: Are we Fullfiling the Pledge?"*, 41 Idaho L. Rev. 403, 407 (explaining that in the early years *"legal aid organizations were founded solely by private donations and operated independelty from each other"*). It is important to take into account that the original Act

were expecting, opposition from within the legal profession started as soon as the programs funded by the OEO began to provide (with success) free legal services for the poor.[6]

Facing that opposition, by 1971 the idea of an independent legal service entity began to sound loud within the organized bar, the legal services community (quite well established by then), Congress and the Nixon administration. That was how, after vetoing the first legislation passed by Congress in 1971 and just less than a month before resigned from office, Nixon signed the bill enacting the Legal Services Corporation Act of 1974.[7] The institutional mission of the LSC is, since its inception, to provide *"financial support for legal assistance in noncriminal proceedings or matters to persons financially unable to afford legal assistance"*.[8]

Before the creation of the LSC, the amount of money allocated by the federal government for the provision of legal services was negligible. The situation has changed since then, but not too much. According to some scholars, the reality is that there has been a *"consistent failure of Congress"* to increase LSC funding accordingly with the needs of eligible clients.[9]

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did not contain anything related to access to justice. The programs in this area started developing once the Act was amended in 1966.

[6] According to Houseman and Perle, the concerns of private attorneys by then fell into three categories: (i) competition for clients; (ii) impact of the free representation in their clients; and (iii) a perceived threat of the expansion of public financial support for, and governmental regulation of, the legal profession (Alan W. Houseman and Linda E. Perle *"Securing Equal Justice for All: A Brief History of Civil Legal Assistance in the United States"*, CLASP, 2007, p. 10).

[7] See Alan W. Houseman and Linda E. Perle *"Securing Equal Justice for All: A Brief History of Civil Legal Assistance in the United States"*, CLASP, 2007, pp.19-22.

[8] Public Law 93-355, 93rd Congress, H.R. 7824, July 25, 1974, Sec. 1003(a). Reinforcing this short but crystal clear institutional task, in Sec 1001(1), 1001(2) and 1001(3) the Congress declared that *"(1) there is a need to provide equal access to the system of justice in our Nation for individuals who seek redress of grievances; (2) there is a need to provide high quality legal assistance to those who would be otherwise unable to afford adequate legal counsel and to continue the present vital legal services program; (3) providing legal assistance to those who face an economic barrier to adequate counsel will serve best the ends of justice and assist in improving opportunities for low-income persons consistent with the purposes of this Act"*.

[9] Michael J. Belaen *"Change we Need: Why Enacting The Civil Access to Justice Act of 2009 is Necessary to Expand Legal Aid For The Poor"*, 31 Hamline J. Pub. L. & Pol'y 329, 334-335 (showing that appearances can be deceiving because the numbers do not reflect the inflation: in 2008 *"Congress appropriated roughly $350 million to fund LSC. This appropriation likewise represented a decrease in funding by roughly 53 percent considering inflation since 1980"*).

b. The severe restrictions imposed on the LSC in 1996

After evading repeated efforts directed toward its elimination during President Reagan's administration, during the decade of 1990 LSC suffered not only deep cuts in its funding but also severe restrictions regarding the kind of services that its grantees were allowed to deliver with federal funding.[10]

The most relevant provisions restricting the LSC freedom to accomplish its institutional task can be found in the Omnibus Consolidated Rescissions and Appropriations Act of 1996.[11] Through the enactment of this regulation, Congress prohibited LSC's grantees to provide free legal services to *"incarcerated people, undocumented immigrants and certain documented immigrants, and individuals facing eviction from public housing projects who are charged with a drug offense"*. According to the Act, LSC's grantees were also forbidden to collect attorney's fees and participating in class actions. In order to make the situation even worse for the provision of legal aid services, the Act established that those restrictions applied to all the grantee's activities (whether funded with federal money provided by LSC or not).[12]

The latter provision, known as the "poison pill",[13] led the LSC to adopt different "program integrity" regulations with the objective of ensuring that programs partially funded by LSC still have the ability to engage in activities restricted under the 1996 law by using money obtained from

[10] See Marie A. Fallinger and Larry May *"Litigating Against Poverty: Legal Services and Group Representation"*, 45 Ohio St. L.J. 1, 2, 7 (arguing that by then *"Public debate over the fate of the Legal Services Corporation (LSC) has grown increasingly political, with Reagan Administration officials continuing to call for the total elimination of this poverty law program"* and that *"President Reagan has tried to use his executive powers to dismantle LSC altogether"*). See also Michael J. Belaen *"Change we Need: Why Enacting The Civil Access to Justice Act of 2009 is Necessary to Expand Legal Aid For The Poor"*, 31 Hamline J. Pub. L. & Pol'y 329, 336-337; and Alexander D. Forger *"Address: The Future of Legal Services",* 25 Fordham Urb. L.J. 333, 341 (1998) (explaining that the restrictions are *"in most instances inappropriate and unduly burdensome. But Congress can give and Congress can take away. As I said earlier, it wasn't that we sat down to bargain, because we never know what's coming out until it's printed"*). Forger was, by the time when the restrictions were imposed, the President of the LSC.

[11] Public Law 104-134, Omnibus Consolidated Rescissions and Appropriations Act of 1996 by the 104th Congress of the United States.

[12] See Andrew Haber *"Rethinking the Legal Services Corporation's Program Integrity Rules"*, 17 Va. J. Soc. Pol'y & L. 404, 451 (concluding that *"The current restrictions on Legal Services Corporation grantees find their roots in the political clashes that began at the foundation of the program"*).

[13] Michael J. Belaen *"Change we Need: Why Enacting The Civil Access to Justice Act of 2009 is Necessary to Expand Legal Aid For The Poor"*, 31 Hamline J. Pub. L. & Pol'y 329, 357.

other sources.[14] Under this program, those organizations receiving federal funding through the LSC which want to engage in prohibited activities must demonstrate that they can maintain "objective integrity and independence" between both kind of activities (i.e. those funded with federal money and those funded with other sources).[15] That requirement of independence placed a huge burden on the grantees, because it entailed not only the obligation of avoiding transfers of money from the LSC's funded program toward the program engaged in the restricted activities, but also the necessity of having a completely separated entity (from a legal point of view) with separate facilities and personnel.[16]

Specifically regarding the prohibition of initiating and participating in class actions, we have to bear in mind two things. First, that the availability of this sort of procedural device is critical for obtaining relief from widespread illegal practices (particularly critical for poor people).[17] Second, that the restriction was not something that came out of the blue, but instead can be considered as the closing stage of a long struggle initiated by LSC's opponents against the capacity of the organization to engage in this kind of collective litigation.[18]

Which are the arguments invoked in Congress to explain that restriction? They are difficult to find,[19] and even more difficult to agree with. According to Senator Pete Domenici, the main reason for the prohibition is that the LSC was intended "*to represent individual poor people in individual cases, not to represent a class of poor people suing a welfare agency, suing a legislature or suing the*

[14] Michael J. Belaen *"Change we Need: Why Enacting The Civil Access to Justice Act of 2009 is Necessary to Expand Legal Aid For The Poor"*, 31 Hamline J. Pub. L. & Pol'y 329, 338.
[15] See Andrew Haber *"Rethinking the Legal Services Corporation's Program Integrity Rules"*, 17 Va. J. Soc. Pol'y & L. 404, 433-438.
[16] Michael J. Belaen *"Change we Need: Why Enacting The Civil Access to Justice Act of 2009 is Necessary to Expand Legal Aid For The Poor"*, 31 Hamline J. Pub. L. & Pol'y 329, 338.
[17] See Rebekah Diller and Emily Savner *"A Call to End Federal Restrictions on Legal Aid for the Poor"*, Brennan Center for Justice, 2009, p. 9, available at http://www.brennancenter.org/content/resource/a_call_to_end_federal_restrictions_on_legal_aid_for_the_poor/).
[18] See Marie A. Fallinger and Larry May *"Litigating Against Poverty: Legal Services and Group Representation"*, 45 Ohio St. L.J. 1, 51 (stating that *"Since the formation of LSC, its opponents have attempted to restrict the filing of class actions on behalf of the poor, especially those directed against government agencies*"). For a sample of the attacks to the LSC, see Rael Jean Isaac *"War on the Poor"*, National Review, May 15, 1995 (arguing, for example, that the poor are not the beneficiaries but the *"chief victims"* of the LSC).
[19] See Alexander D. Forger *"Address: The Future of Legal Services",* 25 Fordham Urb. L.J. 333, 339 (1998) (arguing that in this field *"There is so much smoke blown in the legislative process, together with the anecdotal rhetoric, that you reach the point where you can't really believe. Do not ever breathe in what's out there, and you shouldn't believe what you see"*).

farmers as a class".[20] When the issue was discussed in the House, the Committee held that although *"advocacy on behalf of poor individuals for social and political change is an important function in a democratic society"*, it did not believe that *"such advocacy is an appropriate use of federal funds"*.[21] Notwithstanding what was said within Congress, maybe a more genuine and plausible explanation can be found in the success of LSC in advancing that kind of advocacy, and –of course- the resulting irritation of the groups of power directly affected by that success.[22]

One last remark before going on: even though almost all aspects of the whole "restriction package" have been challenged through different lawsuits (basically relying on two grounds: freedom of speech under the First Amendment and breach of LSC lawyers' ethical obligations to their clients), up to today the prohibition regarding class actions remains.[23] A prohibition that clearly *"runs*

[20] See Department of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1996, Domenici amendment No 2819, 104th Cong, 1st Sess (Sept 29, 1995), remarks of Senator Pete V. Domenici, in 141 Cong Rec § 14573, 14608. The mention of farmers in this context is not casual at all, see Alexander D. Forger *"Address: The Future of Legal Services"*, 25 Fordham Urb. L.J. 333, 339 -340 (1998) (arguing that *"The Farm Bureau is by far the most powerful influence … in its zeal to discredit LSC, alleges lawyer misconduct such as extortion, blackmail, and the like. It does so because LSC is extremely unpopular in its efforts to enforce employment, housing, and environmental requirements to which the growers are subject"*). In the same line, see *"Life After Legal Services"*, Wash Post A18 (Sept 18, 1995) (explaining in an editorial that the problem with the LSC is that *"its mission has been confused. It was sold as a system of torefront offices to which the poor could individually bring their landlord-tenant disputes and their problems with abusive employers or cheating merchants. That model was simple, modest and had broad support. But at least some legislators saw something much more ambitious: a powerful network of poverty lawyers funded by Washington and backed up by university-based centers of expertise, that would help not just individual clients but "the poor" as a whole"*).

[21] H.R. Rep. No. 104-196 (1995), 120.

[22] See Helaine M. Barnett *"Justice for All: Are we Fullfiling the Pledge?"*, 41 Idaho L. Rev. 403, 416-419 (explaining the accomplishments of the LSC since its inception). See also Jessica A. Roth *"It is Lawyers We are Funding: A Constitutional Challenge to the 1996 Restrictions on the Legal Services Corporation*", 33 Harv CR-CL L Rev 107, 156 (1998) (concluding that the restrictions *"generally have been enacted to placate opponents of the LSC who, if they cannot defeat the Corporation entirely, are mollified by the knowledge that it will undertake only 'ham and eggs' work for poor people"*).

[23] Perhaps the most recent opinion is the one issued by the United States Court of Appeals of the 9th Circuit *in re "Legal Aid Services of Oregon v. Legal Services Corp."*, 608 F.3d 1084 (2010) (holding that the restriction on the use of class actions does not violate the First Amendment: *"In prohibiting grantees from soliciting clients, lobbying, and participating in class actions, Congress did not discriminate against any particular viewpoint or motivating ideology, much less did it aim to suppress 'ideas … inimical to the Government's own interest'. The Restrictions simply limit specific procedural tools and strategies that grantee attorneys may utilize in the course of carrying out their legal advocacy. As such, they are permissible under Velazquez III"*. For a discussion of the challenges against the LSC's Program Integrity Rules, see Andrew Haber *"Rethinking the Legal Services Corporation's Program Integrity Rules"*, 17 Va. J. Soc. Pol'y & L. 404, 423-431. For further references about the topic, and regarding specifically the restrictions on class actions, see Ilisabeth Smith Bornstein "*From the Viewpoint of the Poor: An Analysis of the Constitutionality of the Restriction on Class Action Involvement by Legal Services Attorneys"*, 2003 U. Chi. Legal F. 693 (2003).

contrary to the mandate of the LSC" because it guarantees that many rights *"will not be heard in the legal marketplace".*[24]

II. Barriers affecting the right of access to the civil justice system

Many studies have shown that there are two factors which predominate in order to block the access of individuals to the civil justice system. The first and more relevant is the lack of financial resources to afford the costs of litigation, while the second is represented by lack of ability to understand and use the legal system.[25]

a. Economic barriers and the costs of litigation

The most relevant economic barriers to access to justice are those imposed by the high cost of lawyers, experts witnesses (when necessary for the correct adjudication of the dispute) and, at least in some jurisdictions, the high costs imposed by courts as a condition of filing lawsuits.[26]

As Smith put it many years ago, it is not possible to identify a principle governing the issue of litigation costs: *"they are too low to deter the rich, but high enough to prohibit the poor"*.[27] The features and names of the different kind of expenses and fees have certainly change since then, as well as some of the rules governing the allocation of those costs. However, two relevant facts remain

[24] Ilisabeth Smith Bornstein "*From the Viewpoint of the Poor: An Analysis of the Constitutionality of the Restriction on Class Action Involvement by Legal Services Attorneys*", 2003 U. Chi. Legal F. 693, 715-716 (2003).
[25] See Michael R. Anderson *"Access to Justice and Legal Process: Making Legal Institutions Responsive to Poor People in LDCs"*, p. 18, available at http://siteresources.worldbank.org/INTPOVERTY/Resources/WDR/DfiD-Project-Papers/anderson.pdf
[26] John E. Bonine *"Best Practices – Access to Justice (Agenda for Public Interest Law Reform"*, p. 2, available at http://www.accessinitiative.org/resource/best-practices%E2%80%94access-justice%EF%80%AA.
[27] Reginald Heber Smith *"Justice and the Poor",* The Carnegie Foundation for the Advancement of Teaching, Bulletin N° 13, 1919, p. 23.

unaltered: on the one hand, the fundamental difficulty posed over litigants by the high costs of counsel; and on the other, the relevance of counsel in order to have an adequate defense within the case.[28]

b. Cultural barriers and the complexity of modern law

A recent report produced by an state Access to Justice Commission highlight the fact that the lives of poor people *"are highly regulated and the intersection between statutes, regulations and decisional laws is not obvious to those without experience"*.[29] Indeed, the real problems faced every day by this disadvantaged group of people are intimately related to issues of legal language, access to information about rights and other cultural factors that converge to deny equal access to justice.[30] These difficulties, in turn, are even more severe with regard to some particular groups of poor people; the best example being that integrated by immigrants.[31]

Which are the sources of those problems? Maybe the main cause is the extreme complexity of contemporary legal systems (not only for lay people, but also for lawyers themselves).[32]

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[28] See Reginald Heber Smith *"Justice and the Poor",* The Carnegie Foundation for the Advancement of Teaching, Bulletin N° 13, 1919, p. 31 (arguing that *"The expense of counsel is a fundamental difficulty because the attorney is an integral part of the administration of justice"*).

[29] See *"Rationing Justice: the Effect of the Recession on Access to Justice in the District of Columbia"*, Joint Report of the District of Columbia Access to Justice Commission and the D.C. Consortium of Legal Services Providers, November 2009, p. 4, available at http://www.legalaiddc.org/documents/RationingJusticeReport..pdf.

[30] See the Amicus Brief in support of the University of Michigan presented before the Supreme Court in the case *"Grutter v. Bollinger and Gratz v. Bollinger"* by the Hispanic National Bar Association and the Hispanic Association of Colleges and Universities [14 Berkeley La Raza L.J. 69, 83 (2003)]; Robert R. Kuehn *"Undermining Justice: The Legal Profession's Role in Restricting Access to Legal Representation"*, 2006 Utah L. Rev. 1039, 1040 (2006) (arguing that *"lower-income persons likely encounter greater geographical, literacy, cultural, and language barriers just to access the justice system, much less to use the system successfully"*).

[31] See Roland T. Y. Moon *"Access to Civil Justice: Is There a Solution?*", 88 Judicature 155 (noting that *"for the increasing number of immigrants who have come to the U.S. in recent years, the problem of access to justice has been compounded by issues pertaining to language barriers, cultural differences, and difficulties associated with assimilating into the mainstream of American life"*). The same kind of problems affect this group in other areas as well, see Jon C. Dubin *"Clinical Design for Social Justice Imperatives",* 51 SMU L. Rev. 1461, 1485 (1998) (arguing that language and cultural barriers also place obstacles to immigrants in their search of employment).

[32] See Nicole Black *"Lawyers Should not be Wary of Cloud Computing"*, 72 Tex. B.J. 746 (arguing that "***T****he complexities of modern law practice are such that managing a law office in the absence of practice management software programs is nothing short of impossible"*); Kevin Mazza *"Divorce Mediation. Perhaps not the Remedy it was Once Considered"*, 14-SPG Fam. Advoc. 40, 42 (arguing that *"Given the complexities of modern law, both statutory and case law, and its continuing evolution, nonlawyers are ill-equipped to give advice on legal issue*s"); James M. Fischer *"External Control Over the American Bar"*, 19 Geo. J. Legal Ethics 59, 67 (arguing that this complexity has led to a trend among lawyers *"toward specialization"*); in the same line, Steven K. Berenson *"A*

This phenomenon affects almost any area of law, is not new and, of course, is not exclusive of the US.[33] For the purpose of this paper, what matters the most is that, as Jennings stated in 1932, *"so great is the complexity of modern law that the citizen is unable to determine his rights and duties in any situation which is even a little out of his normal course of life"*.[34]

Even though achieving the elimination of the complexities of substantive and procedural law is a kind of utopia,[35] it has been argued that the legal system *"may be amenable to simplification"*.[36] Different proposals have been presented in order to accomplish that objective (e.g. reduce legal technicalities and simplify legal language,[37] altering the lawyer's monopoly on the justice system and demystifying the law so that lay people can understand it,[38] etc.). However, an overview of contemporary legal systems shows that we are far away from that.

c. A dangerous combination

Both economic and cultural barriers bring about severe obstacles to access to the civil justice system. While this is true in general terms and can be predicated in relation to any middle class

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Family Law Residency Program?: A Modest Proposal in Response to the Burdens Created by Self-represented Litigants in Family Court", 33 Rutgers L.J. 105, 160 (2001) (arguing that *"The economics and complexities of modern law practice have only served to increase the forces pushing in the direction of further specialization"*); Howard G. Pollack *"The Admissibility and Utility of Expert Legal Testimony in Patent Litigation"*, 32 IDEA 361 (noting the complexity of modern law as one of the factors which *"may have changed the prevailing judicial attitude toward the utilization of legal experts"*).

[33] See Thomas Schmitz *"Matthias Ruffert (ed.). The Transformation of Administrative Law in Europe"*, Book Review, 19 Eur. J. Int'l L. 625, 625 (2008) ("*She points to the high degree of complexity of modern administrative law, which has made it 'unteachable'"*).

[34] W. Ivor Jennings *"Declaratory Judgments Against Public Authorities in England"*, 41 Yale L.J. 407 (1932). See also Reginald Heber Smith *"Justice and the Poor",* The Carnegie Foundation for the Advancement of Teaching, Bulletin N° 13, 1919, p. 31 (arguing that *"With a vast body of ever changing law, which a man after a lifetime of devotion is only beginning to master, it is apparent that the layman, in order to understand his rights, what can and cannot do, must have the assistance of counsel"*)

[35] History seems to show that the trend is going exactly in the opposite way. See Max Weber *"Economy and Society"*, Berkeley, California, London, p. 895 (arguing that *"Whatever form law and legal practice may come to assume … it will be inevitable that, as a result of technical and economic developments, the legal ignorance of the layman will increase").*

[36] Denise R. Johnson*"The Legal Needs of the Poor as a Starting Point for Systemic Reform"*, 17 Yale L. & Pol'y Rev. 479, 486 (1998).

[37] See Michael R. Anderson *"Access to Justice and Legal Process: Making Legal Institutions Responsive to Poor People in LDCs"*, p. 25, available at http://siteresources.worldbank.org/INTPOVERTY/Resources/WDR/DfiD-Project-Papers/anderson.pdf).

[38] Denise R. Johnson*"The Legal Needs of the Poor as a Starting Point for Systemic Reform"*, 17 Yale L. & Pol'y Rev. 479, 484 (1998).

citizen, it is worthwhile to highlight that the concern is even deeper when assessed in relation to poor people. Undeniably, the combination of both barriers is almost always a fact every time that a poor individual is in need of legal advice.[39]

III. The class actions

According to some scholars, the origins of class actions can be traced to certain specific medieval group proceedings in England.[40] For the sake of this paper we do not need to come back so far, because what really matters is what they have become after its last comprehensive reform operated in 1966: a mechanism to adjudicate similar claims of big groups of people in a single judicial proceeding, providing finality for the controversy with complete independence of the result of the discussion.[41]

Since their inception, but particularly since that reform, class actions have been the focus of great controversy. What makes the topic fascinating is that most of the controversy has little to do with technical or legal aspects of the procedural device. Instead, the great attention which has been directed toward class actions is frequently grounded on the social and political implications they entail in a democratic society.[42] These implications, in turn, are the result of three particular advantages offered by the mechanism.

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[39] As a recent report shows, "*It is the experience of long-time legal services lawyers that many potential clients fail to seek services because they lack information about their rights, they cannot afford transportation or they are discouraged by prior experiences of not receiving services at an office that was too busy to help*" (*"Rationing Justice: the Effect of the Recession on Access to Justice in the District of Columbia"*, Joint Report of the District of Columbia Access to Justice Commission and the D.C. Consortium of Legal Services Providers, November 2009, p. 2, available at http://www.legalaiddc.org/documents/RationingJusticeReport..pdf).

[40] Stephen C. Yeazell *"Collective Litigation as Collective Action"*, 1989 U. Ill. L. Rev. 43. For an in-depth study see Stephen C. Yeazell *"From Medieval Group Litigation to the Modern Class Actions"*, New Haven: Yale Univ. Press, 1987.

[41] Federal Rule of Civil Procedure 23.

[42] In this sense, for example, it has been argued that the controversy over damage class actions is not about the mechanism itself. Instead, it is *"a dispute about what kinds of lawsuits and what kinds of resolutions of lawsuits the legal system should enable"* (RAND Institute for Civil Justice *"Class Actions Dilemmas: Pursuing Public Goals for Private Gain"*, 2000, p. 50). See also Judith Resnik *"Lessons in Federalism from the 1960s Class Action Rule and the 2005 Class Action Fairness Act: 'The Political Safeguards' Of Aggregate Translocal Actions"* 156 U. Pa. L. Rev. 1929, 1952 (2008) (underlying the political facet of class actions while arguing that *"CAFA's intent to cut back on class actions--and thereby to limit the way in which aggregate litigation can be used to respond to the economic barriers to litigation that I raised at the outset--should also be put in the context of the lack of congressional interest in finding other ways to subsidize litigation. As in the 1960s, when Rule 23 was in sync with the creation of*

In the following lines, I present an overview of the benefits provided by class actions suits in terms of access to justice, deterrence effect and efficiency. The analysis displayed here has no specific relation to any kind of context. However, as I hope will be apparent, the advantages provided by this sort of procedural device match almost perfectly with the LSC's institutional mission, and demonstrate that class actions are a remarkable weapon to be used in the fight against the barriers identified in Part III of this paper.[43]

a. Access to Justice

Since the 1966 reform, class actions have a potential *"broadly to affect access to court".* In fact, that appears to have been one of the goals of the reform.[44] According to Kaplan (the person primarily responsible for drafting the reform), that kind of procedure works plainly as *"something like the function of an administrative proceeding where scattered individual interests are represented by the Government*". This is especially true when the rights at stake are not relevant and the people entitled to them are more likely to forget or abandon their claims due to different sort of reasons (like ignorance, economic limitations, timidity or unfamiliarity with business or legal matters).[45]

How do class actions provide a plausible channel to access to the civil justice system? The answer can be found in the fact that they eliminate (or at least diminish) the power disproportion

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the Legal Services Corporation, CAFA coheres with the 1996 restrictions on LSC lawyers and congressional prohibitions on LSC-funded lawyers bringing class actions").

[43] The benefits provided by class actions can be invoked to support a group-impact approach to poverty law. Approach which, as Fallinger and May explain, does not necessarily work *"to the disadvantage of the individual poor persons who seeks legal assistance".* For the distinction among the different models for providing legal services for the poor which have emerged since the 60´s see Marie A. Fallinger and Larry May *"Litigating Against Poverty: Legal Services and Group Representation"*, 45 Ohio St. L.J. 1, 14, 17-18 (explaining that *"the law reform model and the equal access model. The first model views legal services as one of many tools to be used to combat the institutional problems of poverty, so that preference or interest satisfaction can be maximized within society. Proponents of the second model argue that poverty law programs are a means for placing individual poor clients on an equal legal footing with the non-poor, so that justice, which depends on this formal equality, can be advanced, resulting in the optimal protection of the legal rights of all citizens*"; and arguing that that *"Not every calculation in terms of group impact is an unjustifiable denial of the access rights of poor persons who are turned away by such procedures. It is not inconsistent for Legal Services lawyers to claim to be serving the interests of the poor as a group as well as the interests of individual poor clients when these lawyers engage in group litigation"*).

[44] See Stephen B. Burbank & Linda J. Silberman *"Civil Procedure Reform in Comparative Context: The United States of America"*, 45 Am. J. Comp. L. 675, 684 (1997).

[45] Benjamin Kaplan *"Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)",* 81 Harv. L. Rev. 356, 398 (1967).

which exists between the group of affected people and the defendant. The clearest example of this feature can be seen in relation to "small claims" (i.e. claims which costs of litigation do not justify the effort of discussing about them in a court of justice because those costs have no reasonable relation with the best result that can be achieved in case of winning the case). The possibility of pooling those small claims in a class action suit increases the defendant potential liability and ensures that they enter the judicial system by attracting lawyers to litigate the case in a contingency fee basis.[46]

It is useful to underline that class actions do not only play a role in relation to claims that otherwise would not be litigated on grounds of economic reasons. From the same access to justice perspective, they represent a particularly interesting device when it comes to deal with other barriers to the courts: the cultural and educational ones. In this sense, class actions can also enable litigation by bringing into the legal system claims which individuals are unaware of.[47]

b. Efficiency

Class actions efficiency arises from its very collective nature. I mean, from the possibility of aggregating multiple common claims and discussing them within only one procedure.[48] On the one hand, this allows the government to save resources; on the other, very often that advantage also plays a relevant role benefiting the defendants because they are able to spend less money in legal

[46] See Katie Melnick *"In Defense of the Class Action Lawsuit: An Examination of the Implicit Advantages and a Response to Common Criticisms"*, 22 St. John's J. Legal Comment. 755, 790 (2008). But, see also Charles Silver *"'We're Scared to Death': Class Certification and Blackmail"*, 78 N.Y.U. L. Rev. 1357, 1373 (2003) (arguing that defendants tend to settle the case for substantial amounts once the class actions is certified because the suit creates remote risks of financial ruin).

[47] See RAND Institute for Civil Justice "Class Actions Dilemmas: Pursuing Public Goals for Private Gain", 2000, p. 49 (arguing that class actions require telling people that *"they may have a claim of which they were previously unaware, but does not require them to take any initial actionto join the litigation"*).

[48] See Edward F. Sherman "*Aggregate Disposition of related cases: The Policy Issues"*, 10 Rev. of Litigation 231, 237 (1991) (arguing that *"Aggregation of cases promises savings by eliminating duplication and providing economies of scale"*); Elizabeth J. Cabraser *"The Class Action Counterreformation"*, 57 Stan. L. Rev. 1475, 1479 (2005) (underlying the utility of class actions to provide a fair, efficient and cost-effective procedural device to adjudicate common questions of law and fact).

counsel and representation (the possibility of litigating once and for all the common questions of law or fact allows them to prepare only one defense).[49]

c. Deterrence effect

We have already seen that class actions allow people to bring small claims into the legal system. If it were not for that procedural device, those claims would remain outside the stream of justice. As anyone can easily guess, this is one of the main reasons why class actions have been so strongly criticized: they enable litigation that otherwise would never exist.[50]

The problem with the critics is that they forget one of the most relevant practical effects of class actions, i.e. deterrence of illicit collective conducts through effective enforcement.[51] In fact, without the availability of an aggregate device "*many businesses would arguably be able to escape answering for their wrong-doings until they injured someone so substantially that it became cost effective for the injured victim to pursue the claim individually*".[52] So relevant is this facet of class actions

[49] See David Rosenberg *"Mass Tort Class Actions: What Defendants Have and Plaintiffs Don't*", 37 Harv. J. on Legis. 393, 393-94 (2000). Even though the argument is presented in this article specifically with regard to mass torts class actions, it can also be stated regarding those actions involving small claims and injunctive relief.

[50] Among the critics, see Edward H. Cooper *"The (Cloudy) Future of Class Actions",* 40 Ariz. L. Rev. 923 (1998).

[51] See Kenneth E. Scott "*Two Models of the Civil Process"*, 27 Stan. L. Rev 937 (1975), cited by Stephen C. Yeazell *"Collective Litigation as Collective Action"*, 1989 U. Ill. L. Rev. 43, 56. In this sense, the deterrence function of class actions has given birth to the figure of the "private attorney general" within the field, which entails recognition that the mechanism serves *"to afford remedies for injuries unremedied by the regulatory action of government"* [see *Newberg on Class Actions*, CLASSACT § 1:6 and the opinions of the Supreme Court cited there in support of this particular function: *"Deposit Guaranty Nat. Bank, Jackson, Miss. v. Roper"*, 445 U.S. 326 (*"The aggregation of individual claims in the context of a classwide suit is an evolutionary response to the existence of injuries unremedied by the regulatory action of government"*) and *"Phillips Petroleum Co. v. Shutts"*, 472 U.S. 797 (*"As commentators have noted, from the plaintiff's point of view a class action resembles a 'quasi administrative proceeding conducted by a judge'"*)]. See also Ilana T. Buschkin *"The Viability of Class Action Lawsuits in a Globalized Economy --Permitting Foreign Claimants to be Members of Class Action Lawsuits in the U.S. Federal Courts"*, 90 Cornell L. Rev. 1563, 1588 (2005) (arguing that the through the possibility of pooling not only claims but also resources *"the class action lawsuit lessens the burden on individual claimants, making it more attractive to bring suits in the public interest"*)

[52] Katie Melnick *"In Defense of the Class Action Lawsuit: An Examination of the Implicit Advantages and a Response to Common Criticisms"*, 22 St. John's J. Legal Comment. 755, 791 (2008). See also Andrei Greenawalt *"Limiting Coercive Speech in Class Actions"*, 114 Yale L. J. 1953, 1971 (2005) (noting the capacity of the mechanism to modify the defendant's behavior).

that, according to many commentators, deterrence (and not compensation) is the principal rationale of the mechanism.[53]

d. Preliminary conclusion

The class actions represent an efficient procedural mechanism which defining features resemble a mirror image of the barriers faced by individuals to access to the civil justice system. As we saw, the Federal Rule of Civil Procedure 23 was originally enacted and amended in 1966 with two main purposes in mind: (i) enable litigation of claims that otherwise would be left outside the system; and (ii) provide an efficient and economic means to solve huge numbers of similar claims once and for all in a single procedure.

If we have in mind these purposes, it is evident that class actions are one of the most relevant resources available in the US to provide legal counsel and representation to big number of individuals, and to do it at a low cost. Its employment would advance the institutional mission of the LSC and would multiply the (always) scarce resources of providers.

It makes no sense at all to deprive LSC's grantees from that kind of instrument. The restriction is completely unreasonable *per se.*

IV. A new light for the analysis: the post economic crisis scenario

Several researches have been conducted in order to assess the impact of the 2008 crisis on the US society. Some of them are related specifically to the legal problems which poor people is

[53] See John C. Coffee Jr. *"Litigation Governance: Taking Accountability Seriously"*, 110 Colum. L. Rev. 288, 343 (2010) and *"Rescuing the Private Attorney General: Why the Model of the Lawyer as Bounty Hunter Is Not Working*", 42 Md. L. Rev. 215 (1983); Myriam Gilles and Gary B. Friedman *"Exploding the Class Action Agency Costs Myth: The Social Utility of Entrepreneurial Lawyers"*, 155 U. Pa. L. Rev. 103, 162 (2006) (concluding that *"the vast contemporary literature of class actions (and, for that matter, the work of Congress and the courts) fails entirely to appreciate the concrete public policy implications of the one true normative polestar here: the forced internalization of social costs*"). But, see John H. Beisner, Matthew Shores and Jessica Davidson Miller *"Class Action 'Cops': Public Servants or Private Entrepreneurs?"*, 57 Stan. L. Rev. 1441, 1451-62 (2005) (criticizing the model of law enforcement through class actions and the idea of a "private attorney general").

dealing with in the aftermath of that crisis. The results of those specific studies are logical and, to some extent, obvious: many individuals are facing new legal problems caused by the recession and the old problems remained in the same place as before (most of the times aggravated). The demand of legal aid has increased accordingly.[54]

But the problem is even deeper because, once again, we are facing in this context a dangerous combination. The economic crisis was not only suffered by the US population, but also by the federal state itself, the local states and, as a consequence, by the organizations in charge of providing legal services for the poor. As it is shown by a recent report, the deep recession *"has increased the number of children and adults living in poverty"* while at the same time *"funding for civil legal services has declined dramatically"*.[55]

Furthermore, direct funding through legislative allocation is not the only source which has been affected by the crisis. Indeed, the IOLTA programs ("IOLA" in New York) have received the most severe strike. The final report of The Task Force to Expand Access to Civil Legal Services in New York explains a widespread phenomenon, shared by every single local state in the US: since 2007 up to today (and particularly since the 2008 crisis) interest rates have dropped abruptly. The cumulative effect of that drop amounts to an overall decline of 88%, which has produced *"a devastating impact on the funds available to IOLA for grants to civil legal services providers across the State"*.[56]

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[54] See *"Rationing Justice: the Effect of the Recession on Access to Justice in the District of Columbia"*, Joint Report of the District of Columbia Access to Justice Commission and the D.C. Consortium of Legal Services Providers, November 2009, p. 2, available at http://www.legalaiddc.org/documents/RationingJusticeReport..pdf (reporting that *"Legal services lawyers estimate a 20% increase in demand for help"* and recognizing that this number *"probably underestimates the actual need"*).

[55] See The Task Force to Expand Access to Civil Legal Services in New York, *Report to the Chief Judge of the State of New York*, p. 8 (available at http://www.courts.state.ny.us/ip/access-civil-legal-services/PDF/CLS-TaskForceREPORT.pdf)

[56] See The Task Force to Expand Access to Civil Legal Services in New York, *Report to the Chief Judge of the State of New York*, p. 34 (available at http://www.courts.state.ny.us/ip/access-civil-legal-services/PDF/CLS-TaskForceREPORT.pdf) (*"During 2007 the IOLA Fund generated slightly more than $24 million"*, while the projection for 2011 shows that *"less than $6 million"* are expected to be available for distribution). A similar situation is being faced by all local states, see Janet Stidman Eveleth *"Court Reforms to Enhance Access To Justice System"*, 43-JUN Md. B.J. 58, 59-60 [explaining that "*IOLTA (Interest on Lawyer Trust Accounts), the state's primary funding mechanism supporting Maryland Legal Services Corporation's 35 legal services providers, dropped by a record 70 percent, forcing major cutbacks in services to the poor. Compounding this was the severe cut in state funding for legal services due to the serious State of Maryland budget crisis"*].

V. Why is the highway closed?

If the restriction imposed on the LSC regarding class action suits is unreasonable as a matter of principle, it assumes some level of absurdity when assessed in a post economic crisis context where the access to justice gap has increased dramatically and, at the same time, the sources of funding for legal aid services have decreased in the same manner.

In order to illustrate the nonsense of the restriction, it is useful to bring into play a hypothetical scenario. Let us think about a highway which connects Rich City (RC) with Poor City (PC) within a State. A huge and safe highway, constructed long time ago and managed by the State, without any toll station and very well known due to its modern design. At the same time, there is another road which also connects both cities. A narrow, hidden, old and damaged one, for which use travelers must pay costly tolls.

Now let us suppose that tens of millions of PC inhabitants need to travel regularly to RC in order to reach their jobs. The economy in PC is worse than ever, and because of that the State had created a governmental entity specifically in charge of helping people from PC to get on time to their jobs in the other city.

The restriction imposed by Congress on the LSC regarding class action suits is almost the same as a governmental decision of closing the highway which connects both cities in our hypothetical scenario. Even more difficult to understand, it is like a decision which closes the highway only in the direction PC-RC (i.e. affecting the people who need the most a safe, free and well designed corridor). Finally, and completely illogical (at least for a foreign observer), that governmental decision is taken: (i) without eliminating the public authority created by the same State specifically to help PC inhabitants to reach their place of work; and (ii) with sufficient knowledge of the negative impact of such a decision over the people of PC.

I have been told that there is not enough money to allocate in the field of legal aid. It is reasonable, it happens almost anywhere. What I cannot understand without further explanations is the firm reluctance to use the available money in the most efficient way. What I cannot understand is why the highway is closed in the US.

FULL BIBILOGRAPHY

Alan W. Houseman and Linda E. Perle *"Securing Equal Justice for All: A Brief History of Civil Legal Assistance in the United States"*, CLASP, 2007.

Alexander D. Forger *"Address: The Future of Legal Services",* 25 Fordham Urb. L.J. 333 (1998).

Andrei Greenawalt *"Limiting Coercive Speech in Class Actions"*, 114 Yale L. J. 1953, (2005).

Andrew Haber *"Rethinking the Legal Services Corporation's Program Integrity Rules"*, 17 Va. J. Soc. Pol'y & L. 404.

Benjamin Kaplan *"Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)"*, 81 Harv. L. Rev. 356 (1967).

Charles Silver *"'We're Scared to Death': Class Certification and Blackmail"*, 78 N.Y.U. L. Rev. 1357 (2003).

David Rosenberg *"Mass Tort Class Actions: What Defendants Have and Plaintiffs Don't*", 37 Harv. J. on Legis. 393 (2000).

Denise R. Johnson *"The Legal Needs of the Poor as a Starting Point for Systemic Reform"*, 17 Yale L. & Pol'y Rev. 479 (1998).

District of Columbia Access to Justice Commission and the D.C. Consortium of Legal Services Providers, Joint Report *"Rationing Justice: the Effect of the Recession on Access to Justice in the District of Columbia"*, November 2009, available at http://www.legalaiddc.org/documents/RationingJusticeReport.pdf.

Edward F. Sherman "*Aggregate Disposition of related cases: The Policy Issues"*, 10 Rev. of Litigation 231 (1991).

Edward H. Cooper *"The (Cloudy) Future of Class Actions",* 40 Ariz. L. Rev. 923 (1998).

Elizabeth J. Cabraser *"The Class Action Counterreformation"*, 57 Stan. L. Rev. 1475 (2005).

Faisal Bhabha *"Institutionalizing Access-to-Justice: Judicial, Legislative and Grassroots Dimensions"*, 33 Queen's L.J. 139 (2007).

Heber Smith *"Justice and the Poor",* The Carnegie Foundation for the Advancement of Teaching, Bulletin N° 13, 1919.

Helaine M. Barnett *"Justice for All: Are we Fullfiling the Pledge?"*, 41 Idaho L. Rev. 403.

Howard G. Pollack *"The Admissibility and Utility of Expert Legal Testimony in Patent Litigation",* 32 IDEA 361.

Ilana T. Buschkin *"The Viability of Class Action Lawsuits in a Globalized Economy --Permitting Foreign Claimants to be Members of Class Action Lawsuits in the U.S. Federal Courts"*, 90 Cornell L. Rev. 1563 (2005).

Ilisabeth Smith Bornstein "*From the Viewpoint of the Poor: An Analysis of the Constitutionality of the Restriction on Class Action Involvement by Legal Services Attorneys"*, 2003 U. Chi. Legal F. 693 (2003).

James M. Fischer *"External Control Over the American Bar"*, 19 Geo. J. Legal Ethics 59.

Janet Stidman Eveleth *"Court Reforms to Enhance Access To Justice System"*, 43-JUN Md. B.J. 58.

Jessica A. Roth *"It is Lawyers We are Funding: A Constitutional Challenge to the 1996 Restrictions on the Legal Services Corporation*", 33 Harv CR-CL L Rev 107 (1998).

John C. Coffee Jr. *"Litigation Governance: Taking Accountability Seriously"*, 110 Colum. L. Rev. 288 (2010).

John C. Coffee Jr. *"Rescuing the Private Attorney General: Why the Model of the Lawyer as Bounty Hunter Is Not Working*", 42 Md. L. Rev. 215 (1983).

John E. Bonine *"Best Practices – Access to Justice (Agenda for Public Interest Law Reform"*, available at http://www.accessinitiative.org/resource/best-practices%E2%80%94access-justice%EF%80%AA.

John H. Beisner, Matthew Shores and Jessica Davidson Miller *"Class Action 'Cops': Public Servants or Private Entrepreneurs?"*, 57 Stan. L. Rev. 1441 (2005).

Jon C. Dubin *"Clinical Design for Social Justice Imperatives",* 51 SMU L. Rev. 1461 (1998).

Judith Resnik *"Lessons in Federalism from the 1960s Class Action Rule and the 2005 Class Action Fairness Act: 'The Political Safeguards' Of Aggregate Translocal Actions"* 156 U. Pa. L. Rev. 1929 (2008).

Katie Melnick *"In Defense of the Class Action Lawsuit: An Examination of the Implicit Advantages and a Response to Common Criticisms"*, 22 St. John's J. Legal Comment. 755 (2008).

Kenneth E. Scott "*Two Models of the Civil Process"*, 27 Stan. L. Rev 937 (1975).

Kevin Mazza *"Divorce Mediation. Perhaps not the Remedy it was Once Considered"*, 14-SPG Fam. Advoc. 40.

Marie A. Fallinger and Larry May *"Litigating Against Poverty: Legal Services and Group Representation"*, 45 Ohio St. L.J. 1.

Max Weber *"Economy and Society"*, Berkeley, California, London.

Michael J. Belaen *"Change we Need: Why Enacting The Civil Access to Justice Act of 2009 is Necessary to Expand Legal Aid For The Poor"*, 31 Hamline J. Pub. L. & Pol'y 329.

Michael R. Anderson *"Access to Justice and Legal Process: Making Legal Institutions Responsive to Poor People in LDCs"*, available at http://siteresources.worldbank.org/INTPOVERTY/Resources/WDR/DfiD-Project-Papers/anderson.pdf).

Myriam Gilles and Gary B. Friedman *"Exploding the Class Action Agency Costs Myth: The Social Utility of Entrepreneurial Lawyers"*, 155 U. Pa. L. Rev. 103 (2006)

Newberg on Class Actions, CLASSACT § 1:6.

Nicole Black *"Lawyers Should not be Wary of Cloud Computing*", 72 Tex. B.J. 746.

Rael Jean Isaac *"War on the Poor"*, National Review, May 15, 1995

RAND Institute for Civil Justice *"Class Actions Dilemmas: Pursuing Public Goals for Private Gain"*, 2000.

Rebekah Diller and Emily Savner *"A Call to End Federal Restrictions on Legal Aid for the Poor"*, Brennan Center for Justice, 2009, available at http://www.brennancenter.org/content/resource/a_call_to_end_federal_restrictions_on_legal_aid_for_the_poor/).

Reginald Heber Smith *"Justice and the Poor",* The Carnegie Foundation for the Advancement of Teaching, Bulletin N° 13, 1919.

Robert R. Kuehn *"Undermining Justice: The Legal Profession's Role in Restricting Access to Legal Representation"*, 2006 Utah L. Rev. 1039 (2006).

Roland T. Y. Moon *"Access to Civil Justice: Is There a Solution?",* 88 Judicature 155

Stephen B. Burbank & Linda J. Silberman *"Civil Procedure Reform in Comparative Context: The United States of America"*, 45 Am. J. Comp. L. 675 (1997).

Stephen C. Yeazell *"Collective Litigation as Collective Action"*, 1989 U. Ill. L. Rev. 43.

Stephen C. Yeazell *"From Medieval Group Litigation to the Modern Class Actions"*, New Haven, Yale Univ. Press, 1987.

Steven K. Berenson *"A Family Law Residency Program?: A Modest Proposal in Response to the Burdens Created by Self-represented Litigants in Family Court",* 33 Rutgers L.J. 105 (2001).

The Task Force to Expand Access to Civil Legal Services in New York, *Report to the Chief Judge of the State of New York*, (available at http://www.courts.state.ny.us/ip/access-civil-legal-services/PDF/CLS-TaskForceREPORT.pdf).

Thomas Schmitz *"Matthias Ruffert (ed.). The Transformation of Administrative Law in Europe"*, Book Review, 19 Eur. J. Int'l L. 625 (2008)

W. Ivor Jennings *"Declaratory Judgments Against Public Authorities in England"*, 41 Yale L.J. 407 (1932).

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Shooting Down Moths – How Foreign Plaintiffs are denied access in U.S. Courts*

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Keywords: Pleading Standards, Forum Non Conveniens, United States, Personal Jurisdiction.

Abstract: This author considers the recent trend of preventing foreigners from accessing United States federal courts through the heightening of pleading standards and the reinvigorated use of the forum non conveniens doctrine. The landmark Supreme Court case of *Bell Atlantic v Twombly* has raised the requirements for a plaintiff to survive a 12(b)(6) motion to dismiss for failure to state a claim. This is particularly troublesome for foreign plaintiffs who will have to gather sufficient information to satisfy the standard before having the benefit of discovery. *Sinochem International v Malaysia International Shipping* strengthened the application of the forum non conveniens doctrine by permitting federal courts to dismiss cases before considering issues of personal or subject matter jurisdiction. On the other hand, the two recent judgments of the Supreme Court, *Nicastro v McIntyre* and *Goodyear v Brown* restricted general and specific jurisdiction over foreign plaintiffs. The unexpected consequence of restricting foreign access to US courts and limiting suits against foreign defendants might homologize the US judicial system and demagnetize its appeal for foreign litigants.

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> "As a moth is drawn to the light, so is a litigant drawn to the United States. If he can only get his case into their courts, he stands to win a fortune."[1]

A. Introduction

As Lord Denning opined, the US federal court system has long been an attractive venue for foreign litigants. It is perceived as offering a foreign plaintiff significant procedural and substantive advantages. These include: the availability of contingent fee lawyers,[2] the American Rule for litigation costs,[3] the presence of causes of action that are unique to the United States,[4] the readiness to accept class action suits (thus permitting litigation in cases where the individual damages are likely to be small but the aggregate amount would be significant),[5] permissive rules of discovery,[6] the more extensive role of the jury,[7] the frequency with which punitive or multiple damages are awarded[8] and a perception that US Courts might be "more efficient, less biased, and better insulated from corruption" than other alternative forums.[9]

[1] *Smith Kline & French Laboratories Ltd v Bloch* [1983] 1 WLR 730, 733 (Lord Denning).
[2] *Piper Aircraft v Reyno* 454 US 235, 252 n18 (1981); Cassandra Burke Robertson, 'Transnational Litigation and Institutional Choice' (2010) 51 BCLR 1081, 1087.
[3] *Piper Aircraft* (n 2) 252 n18; R. Schlesinger, Comparative Law: Cases, Text, Materials 275-277 (3d ed.1970).
[4] Like RICO (Racketeering Influenced and Corrupt Organizations) or other particular securities laws. John Fellas, 'Strategy in International Litigation' (2009) 14 ILSAJICL 317, 320.
[5] Fellas, '*Strategy in International Litigation'* (n 4) 320; Burke Robertson, '*Transnational Litigation and Institutional Choice*' (n 2) 1087.
[6] *Piper Aircraft* (n 2) 252 n18; Stephen B. Burbank and Linda J. Silberman, 'Civil Procedure Reform in Comparative Context: The United States of America' (1997) 15 AM J COMP L 675, 678: "Both inside and outside the United States, American pretrial has been criticized for encouraging 'easy' pleadings."
[7] *Piper Aircraft* (n 2) 252 n18.
[8] The quantum of ordinatory, compensatory damages in America is also greater than in other countries. Russell J. Weintraub, 'International Litigation and Forum Non Conveniens' (1994) 29 TEX INT'L LJ 321, 323; Beth Stephens. 'Translating Filártiga: A Comparative and International Law Analysis of Domestic Remedies for International Human Rights Violations' (2002) 27 YALE J INT'L L 1, 31.
[9] Alan O. Sykes, 'Transnational Forum Shopping As A Trade and Investment Issue' (2008) 37 JLEGST 339, 342.

"Simply put, compared with foreign courts, United States forums offer both lower costs and higher recovery".[10]

As a consequence, national defendants would often "go to great lengths to avoid suits in the US".[11] This essay seeks to clarify how recent decisions of the US Supreme Court have done much to favour national defendants and "demagnetize" American federal courts.[12]

B. Traditional Structure of Litigation in the US Courts

When the Federal Rules of Civil Procedure regulating procedure in federal courts were introduced in 1938 the drafters sought to subvert the formalized system of writs and single pleading and introduce a liberal model inspired by the flexibility of equity.[13] The philosophical premise was "equality of treatment of all parties and claims in the civil adjudication process".[14]

When compared with the former system, the Rules provided expansive means of discovery,[15] and encouraged parties to assert even unrelated claims so as to resolve the dispute in a "just, speedy and inexpensive" manner.[16] In particular the liberality of pleadings was hailed

[10] Weintraub, '*International Litigation*' (n 8) 323.
[11] Fellas, '*Strategy in International Litigation*' (n 4) 320.
[12] "Demagnetization" was expressly advocated by Professor Weintraub. Russell J. Weintraub, 'The United States as a Magnet Forum and What, if Anything, to Do About It' in Jack L. Goldsmith (ed), *International Dispute Resolution: the Regulation of Forum Selection* (Transnational Publishers 1997) 213; Weintraub, '*International Litigation*' (n 8) 352.
[13] The 1848 Field Code for example required the plaintiff to plead "ultimate facts" as opposed to evidence or "evidentiary facts." Scott Dodson, 'Comparative Convergences in Pleading Standards' (2010) 158 UPALR 441. Christopher M. Fairman, 'Heightened Pleading' (2002) 81 TEX L REV 551, 554–57: "The Federal Rules remove these 'procedural booby traps' [referring to the procedural obstacles caused by the former Codes." See also Charles E. Clark, 'Pleading Under the Federal Rules' (1958) 12 WYO L J 177, 188, 190; Stephen N. Subrin, 'How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective' (1987) 135 U PA L REV 909, 943–975.
[14] Arthur R. Miller, 'A Double Play on the Federal Rules' (2010) 60 Duke Law Journal 1, 5.
[15] Clark, '*Pleading Under the Federal Rules*' (n 13) 190.
[16] Federal Rules of Civil Procedure 13, 14, 15, 18, 20 (for the liberal rules on joinder of parties, claims, counterclaims, and amendments) Rules 26-37 (for the rules on discovery and disclosure) and Rule 1 for the canon of construction.

as the countermark of the new system.[17] Given the elasticity of the procedural requirements and the overarching "liberal ethos", cases were unlikely to be dismissed at the pleading stage.[18] Discernment of meritorious claims would occur only after discovery had commenced, at summary judgment stage.[19]

A foreign plaintiff bringing suit in America would benefit from this structural permissiveness in his litigation. Like all plaintiffs he must satisfy the requirements of personal and subject matter jurisdiction and venue. Yet, as the plaintiff can choose the forum, and as an American defendant will invariably be subject to a federal court's jurisdiction in one of the states, these are but "minimal obstacles".[20]

This article suggests that in the past decade by reinterpreting the Federal Rules of Civil Procedure and altering common law doctrines, the Supreme Court has quickened discernment of claims and restricted a foreign plaintiff's access to a full scale trial.

C. Heightened Pleading Requirement under Rule 12(b)(6)

i. Supreme Court Pleading Standards

Historically the standard to dismiss a claim for insufficient pleadings was set comparatively low.[21] The text of FRCP Rule 8 only requires a claim for relief to contain "a short

[17] Fairman, '*Heightened Pleading*' (n 13) 551.
[18] Richard L. Marcus, 'The Revival of Fact Pleading under the Federal Rules of Civil Procedure' (1986) 86 COLUM L REV 433, 439: "The preferred disposition is on the merits, by jury trial, after full disclosure through discovery." Charles E. Clark, 'The Handmaid of Justice' (1938) 23 WASH U LQ 297, 318-19: "To attempt to make the pleading serve as such substitute [as a trial], is in very truth to make technical terms the mistress and not the handmaid of justice."
[19] Miller, '*A Double Play on the Federal Rules*' (n 14) 5: "...discovery and summary judgment were designed to expose and separate the meritorious from the meritless."
[20] Sykes, *'Transnational Forum Shopping As A Trade And Investment Issue'* (n 9) 342.
[21] Dodson, *'Comparative Convergences in Pleading Standards'* (n 13) 443 with reference to civil law countries.

and plain statement of the ground for the court's jurisdiction"[22] and even permits claims in the alternative, "regardless of consistency".[23]

Charles E. Clark, one of the drafters of the Rules, repeatedly emphasized how "the notice in mind [for Rule 8 is]... that of the general nature of the case and the circumstances or events upon which it is based... to inform the opponent of the affair or transaction to be litigated... and to tell the court of the broad outlines of the case".[24] Sitting as Circuit Judge for the Second Circuit Judge Clark coined the famous "day in court" maxim to entitle Mr Dioguardi access to justice regardless of the imperfections in his complaint.[25] The Supreme Court then lowered the standard in *Conley v Gibson.*[26] Justice Hugo Black asserted that "the Federal Rules of Civil Procedure do not require a claimant to set out in detail the facts upon which he bases his claim" but only required "simplified notice pleading".[27] Therefore, a motion to dismiss a case for failure to state a claim will only succeed "if it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief".[28]

Despite attempts by the lower federal courts to raise the requirements for pleadings in civil rights cases[29] and antitrust cases[30] the standard applied relatively uniformly until the landmark *Bell Atlantic v Twombly* Supreme Court judgment of 2007.[31] The Court held that

[22] Federal Rules of Civil Procedure Rule 8(a)(1). The pleading also requires Rule 8(a)(2) "short and plain statement of the claim showing that the pleader is entitled to relief" and Rule 8(a)(3) "a demand for the relief sought, which may include relief in the alternative or different types of relief."
[23] Federal Rules of Civil Procedure Rule 8(d)(3).
[24] Charles E. Clark, 'Simplified Pleading' in '*Opinions Decisions and Rulings Involving the Federal rules of Civil Procedure*', vol 2 (West Publishing 1943) 456, 460-61.
[25] *Dioguardi v Durning* 139 F.2d 774, 775 (2d Cir. 1944); Charles Alan Wright and Arthur R. Miller, *Federal Practice and Procedure: Civil,* vol 5 (3rd edn) para 1220 (stating how Dioguardi is illustrative of the pleading philosophy created by the Federal Rules of Civil Procedure); Miller, '*A Double Play on the Federal Rules*' (n 14) 6: "[Dioguardi] best represents the access-minded and merit-oriented ethos at the heart of the original Federal Rules."
[26] Conley v Gibson 355 US 41 (1957).
[27] *Conley* (n 26) 47.
[28] *Conley* (n 26) 47-48.
[29] *Leatherman v Tarrant Country Narcotics Intelligence and Coordination Unit* 954 F.2d 1054 (5th Cir. 1992); *Elliot v Perez* 751 F.2d 1472 (5th Cir. 1985).
[30] Harvey Kurzweil, Eamon O'Kelly and Susannah P. Torpey, 'Twombly: Another Swing of the Pleading Pendulum' (2008) 9 Sedona Conf J 115, 118.
[31] *Bell Atlantic Corp v Twombly* 550 US 544 (2007).With the exception of limited statute based heightened pleading standards in the Private Securities Litigation Reform Act of 1995, and the Y2K Act. See also Dodson, '*Comparative Convergences in Pleading Standards*' (n 13) 455-456.

plaintiffs now had to prove by non-conclusory allegations the plausibility of their claim.[32] The complaint must contain "direct or inferential allegations respecting all the material elements"[33] with enough facts to raise "a reasonable expectation that discovery will reveal evidence [of the alleged misconduct giving rise to the cause of action.]"[34]

The *Twombly* standard was confirmed two years later by the Supreme Court in *Ashcroft v Iqbal.*[35] The Court clarified how plausibility is a factual sufficiency standard that applies "independently of notice"[36] and tran-substantively.[37]

Procedurally, the *Iqbal* standard requires federal district court judges to first distinguish "factual allegations from legal conclusions, since only the former need be accepted as true".[38] Second, judges must conclude whether a claim for relief that is plausible has been presented based on the factual allegations presented, "their judicial experience and common sense".[39]

ii. *Twombly/Iqbal* Implications on Foreign Plaintiffs

The Supreme Court did not acknowledge raising the pleading standards for a plaintiff's complaint. [40] Previous case law was not overruled,[41] and the loosely-worded Official Form 9

[32] *Bell Atlantic Corp* (n 31) 570: "enough facts to state a claim to relief that is plausible on its face." Kevin M. Clermont, 'Three Myths About Twombly-Iqbal' [2010] Wake Forest Law Review 101, 102; Miller, '*A Double Play on the Federal Rules*' (n 14) 14.
[33] *Bell Atlantic Corp* (n 31) 562.
[34] *Bell Atlantic Corp* (n 31) 556.
[35] *Ashcroft v Iqbal* 129 S. Ct. 1937 (2009). Miller, '*A Double Play on the Federal Rules*' (n 14) 27 suggests Iqbal might establish "a more demanding pleading standard than Twombly" as it requires more than mere plausibility but even a reasonable inference of plausibility, and it favours a somewhat "sterilized evaluation of the complaint" by focusing solely on "purely factual allegations."
[36] Dodson, *'Comparative Convergences in Pleading Standards'* (n 13) 461 suggesting that the Ashcroft court did not even consider elements of "notice" in its new standard of pleading.
[37] Twombly is not restricted to the anti-trust setting but applies to "all civil actions."*Ashcroft* (n 35) 1953; Miller, '*A Double Play on the Federal Rules*' (n 14) 36.
[38] Miller, '*A Double Play on the Federal Rules*' (n 14) 23-24.
[39] *Ashcroft* (n 35) 1950; Miller, '*A Double Play on the Federal Rules*' (n 14) 29 criticizes the "palpably subjective factors of judicial experience, and common sense."
[40] *Bell Atlantic Corp* (n 31) 570: "Here... we do not require heightened fact pleading of specifics..."
[41] *Bell Atlantic Corp* (n 31) 569-570 the Supreme Court cited but did not claim to overrule its own precedent in *Swierkiewicz v Sorema* 122 S.Ct. 992 (2002).

(now Official Form 11) complaint for negligence was reaffirmed.[42] In practice, the recent Court's judgments will have adverse implications on a plaintiff's access to evidence through the discovery process.[43] In fact, the Court was firm in concluding that Rule 8, as now understood, only permits discovery to begin once the plausibility standard has been met.[44] As such, it adopted a draconian stance and in fear of excessive discovery costs[45] ignored case management and other forms of judicial involvement to permit limited pre-trial discovery.[46] Professor Miller is critical of the way what is termed "abusive", "excessive" or "frivolous" discovery is used to justify the need for earlier dismissal of cases without addressing these perceived wrongs with the appropriate "sanction structure, the discovery regime or more effective judicial oversight".[47]

The difficulties a plaintiff faces in meeting the new standard are particularly evident when his foreign status complicates the gathering of even the simplest facts without the compulsive powers of the discovery rules.[48] As a consequence, it is foreseeable to expect that

[42] *Bell Atlantic Corp* (n 31) 565 n10; Miller, '*A Double Play on the Federal Rules*' (n 14) 40: "the Twombly Court was careful to assert the continuing validity of Form 11". Federal Rules of Civil Procedure, Official Form 11, reads "On <Date>, at <Place> the defendant negligently drove a motor vehicle against the plaintiff."

[43] Miller, '*A Double Play on the Federal Rules*' (n 14) 43; "It is uncertain how plaintiffs with potentially meritorious claims are expected to plead with factual sufficiency without the benefit of some discovery, especially when they are limited in terms of time or money, or have no access to important information that often is in the possession of the defendant, especially when the defendant denies access."

[44] *Ashcroft* (n 35) 1950-1954: "Rule 8 marks a notable and generous departure from the hyper-technical, code-pleading regime of a prior era, but it does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions...Because respondent's complaint is deficient under Rule 8, he is not entitled to discovery, cabined or otherwise."

[45] *Bell Atlantic Corp* (n 31) 559 "the threat of discovery expense will push cost-conscious defendants to settle even anemic cases."

[46] cf *Ashcroft* (n 35) 1961-1962 (Bryer J dissenting): "a trial court, responsible for managing a case and mindful of the need to vindicate the purpose of the qualified immunity defense, can structure discovery in ways that diminish the risk of imposing unwarranted burdens upon public officials." Miller, '*A Double Play on the Federal Rules*' (n 14) 60 Professor Miller considers the Court's dismissal of case management techniques "dubious" as "none of the then-sitting Justices had been a federal district court judge and therefore they collectively lacked federal civil trial experience."

[47] Miller, '*A Double Play on the Federal Rules*' (n 14) 61, 68, 81-82 Professor Miller suggests the Supreme Court's negative view of case management is a "reminder of how much is not known about litigation cost and delay" as it is a "one-sided" appraisal which ignores how costs have been shifted to the other party, "in the form of imposing higher costs for entering and surviving in the system."

[48] Stephen B. Burbank, 'Pleading and the Dilemmas of General Rules' [2009] WIS L REV 535, 561: "Perhaps the most troublesome possible consequence of Twombly is that it will deny court access to those who, although they have meritorious claims, cannot satisfy its requirements either because they lack the resources to engage in extensive prefiling investigation or because of informational asymmetries." cf Paul R. Dubinsky, 'Is Transnational

the new standards "will chill a potential plaintiff's or lawyer's willingness to institute an action".[49]

Professor Miller suggests that the Supreme Court's concerns of excessive discovery could have been solved in other ways. In fact, he proposes the following remedies to confront the informational asymmetry which now plagues the plaintiff/defendant balance: 1)some form of limited pre-institution discovery to provide access to critical information,[50] 2) a limited "pinpoint" or flash discovery ordered once the defendant files a motion to dismiss,[51] 3) lowering the *Twombly* plausibility requirement where the plaintiff can demonstrably allege "the inaccessibility of critical information and articulates a reasonable basis for the information's existence and the defendant's control over it",[52] or 4)dramatically modifying the American litigation system introducing a tracking system based on the quantum of the case, operating like the English system.[53]

Litigation A Distinct Field? The Persistence of Exceptionalism in American Procedural Law' (2008) 44 STJIL 301, 338: "Undesirable results may follow from U.S. courts routinely granting foreign litigants access to information on the same scale as that which prevails under U.S. domestic discovery norms."

[49] Miller, '*A Double Play on the Federal Rules*' (n 14) 71.

[50] Lonny S. Hoffman, 'Using Presuit Discovery to Overcome Barriers to the Courthouse' (2008) 34 LITIGATION 31-35. See also Miller, '*A Double Play on the Federal Rules*' (n 14) 106, 113 quoting as an illustrative example of the possible amendment the Texas Rules of Civil Procedure 202.1(b), a rule which permits the court to order discovery to "investigate a potential claim or suit," or alternatively, expanding the role of Federal Rules of Civil Procedure Rule 26(a)(1) on mandatory disclosures.

[51] Miller, '*A Double Play on the Federal Rules*' (n 14) 107, 108: "discovery would focus solely on what is necessary to meet the plausibility requirement."

[52] Miller, '*A Double Play on the Federal Rules*' (n 14) 110 proposing that if this procedural change were adopted, and the burden met by the plaintiff, then the burden would shift on the defendant to provide the plaintiff with the relevant information.

[53] Miller, '*A Double Play on the Federal Rules*' (n 14) 119-124 this tracking system would then tailor particular discovery rules depending upon the harm extensive discovery could cause in each particular case.

D. Forum Non Conveniens Repercussions for Foreign Plaintiffs

i. *Sinochem International Consequences*

As well as the new standards for "plausibility" of pleadings the Supreme Court has recently addressed the doctrine of *forum non conveniens* enlarging its scope and favouring early dismissal of foreign suits.

Forum non conveniens originated as a Scottish common law principle[54] providing judges with the discretionary power to decline jurisdiction where they reasonably believed that another forum was more appropriate.[55] Yet, the doctrine received minimal attention until the Supreme Court determined the claims of Scottish plaintiffs in the *Piper Reyno* aircraft litigation.[56] Applying a series of private and public interest factors,[57] the Court dismissed the case finding Scotland the appropriate forum.

[54] Robert Braucher, 'The Inconvenient Federal Forum' (1947) 60 HARV L REV 908, 909; Alexander Reus, 'Judicial Discretion: A Comparative View of the Doctrine of Forum Non Conveniens in the United States, The United Kingdom, and Germany' (1994) 16 LOY L A INT'L & COMP L J 455, 459.

[55] J. Stanton Hill, 'Towards Global Convenience, Fairness, And Judicial Economy: an Argument in Support of Conditional Forum Non Conveniens Dismissals Before Determining Jurisdiction in United States Federal District Courts' (2008) 41 VNJTL 1177, 1182: "Scottish courts held, independent of the issue of whether the court had jurisdiction, that the convenience and expediency of the forum should be satisfied to the discretion of the court before passing judgment."

[56] *Piper Aircraft* (n 2)*;* Michael Greenberg, 'The Forum Non Conveniens Motion And The Death Of The Moth: A Defense Perspective In The Post-Sinochem Era' (2009) 72 ALBLR 321, 328: "Seemingly dead in the domestic litigation context, the federal doctrine of forum non conveniens received minimal attention by the Supreme Court... [until Piper Aircraft v Reyno]."

[57] Charles Alan Wright, Arthur R. Miller and Edward H. Cooper, *Federal Practice and Procedure: Jurisdiction and Related Matters,* vol 14D (3rd edn) para 3828.4. The private interest factors were summarised by the Supreme Court as "Important considerations are the relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; possibility of view of premises, if view would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious and inexpensive. There may also be questions as to the enforcibility of a judgment if one is obtained." *Gulf Oil Corp v Gilbert* 330 US 501, 508 (1947). The private factors are considered first, and in case they strongly favour dismissal the action is dismissed. If the private factors are "nearly equivalent", then the court must inquire into the public factors. *Brokerwood Int'l Inc v Cuisine Crotone Inc* 104 Fed.Appx. 376, 383 (5th Cir. 2004); Greg Vanden-Eykel, 'Civil Procedure--Convenience For Whom? When Does Appellate Discretion Supercede A Plaintiff's Choice Of Forum?--Aldana V. Del Monte Fresh Produce' (2010) 15 SFKJTAA 307, 314. The public interest factors were considered by the Supreme Court as: "Administrative difficulties follow for courts when litigation is piled up in congested centers instead of being handled at its origin. Jury duty is a burden that ought not to be imposed upon the people of a community which has no relation to the litigation. In cases which touch the affairs of many persons, there is reason for holding the trial in their view and reach rather than in remote parts of the country where they can learn of it by report only. There is a local interest in having localized controversies decided at home. There is an appropriateness, too, in having the trial of a diversity case in a forum that is at home with the

While deferring to the plaintiff's forum choice, courts have held that the plaintiff's preference in a forum is not dispositive;[58] and can be displaced on a case by case basis depending on the underlying principles of "convenience, fairness and judicial economy".[59] However, the forum where the defendant seeks to relocate the trial must be both available and adequate.[60]

The Supreme Court has significantly strengthened the reach of the doctrine in its recent case law. *Sinochem International v Malaysia International Shipping*[61] established how a court

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state law that must govern the case, rather than having a court in some other forum untangle problems in conflict of laws, and in law foreign to itself." *Gulf Oil Corp v* Gilbert 330 US 501, 508-509 (1947).

[58] *Gulf Oil* (n 57) 508: "Unless the balance is strongly in favour of the defendant" and another foreign forum is available, the "plaintiffs choice of forum should rarely be disturbed."

[59] Stanton Hill, *'Towards Global Convenience*' (n 55) 1195: "Convenience, fairness, and judicial economy are recurring themes in the Supreme Court's forum non conveniens jurisprudence from Gilbert to Sinochem."

[60] This is a two prong test, where both adequacy and availability must be satisfied. *McLennan v Am Eurocopter Corp* 245 F.3d 403, 424 (5th Cir. 2001); *Norex Petroleum Ltd v Access Indus* 416 F.3d 146, 157-60 (2d Cir. 2005): "An alternative forum is adequate if the defendants are amenable to service of process there, and if it permits litigation of the subject matter of the dispute." *Piper Aircraft (n 2)* 254 n 22; Walter W. Heiser, 'Forum Non Conveniens and Retaliatory Legislation: The Impact on the Available Alternative Forum Inquiry and on the Desirability of Forum Non Conveniens as a Defense Tactic' (2008) 56 UKSLR 609, 612, 614 Availability means that the "defendant is subject to personal jurisdiction... and no other procedural bar, such as the statute of limitation, prevents resolution of the merits in the alternative forum." John Bies, 'Conditioning Forum Non Conveniens' (2000) 67 U CHI L REV 489, 501 nn 54-57 suggests, that this is rarely a problem as the relocation of cases under the doctrine is usually conditional on the defendant waiving all procedural defences. An alternative forum is adequate, unless there are "clearly inadequate and unsatisfactory" circumstances in the presumptive forum, such as specific evidence of danger to the plaintiffs, or no "remedy at all" is offered to the plaintiffs. *Piper Aircraft* (n 2) 254. Arguments that the alternative forum is inadequate because of "procedural deficiencies" are rarely successful, as "Courts in the United States are hesitant to label the court system of another country procedurally inadequate." Walter W. Heiser, 'Forum Non Conveniens and Retaliatory Legislation: The Impact on the Available Alternative Forum Inquiry and on the Desirability of Forum Non Conveniens as a Defense Tactic' (2008) 56 UKSLR 609, 616; *Chesley v Union Carbide Corp* 927 F.2d 60, 66 (2d Cir. 1991) :"'[i]t is not the business of our courts to assume the responsibility for supervising the integrity of the judicial system of another sovereign nation."' "But even from an early time, the forum non conveniens doctrine has not been limited to these prudential goals [of judicial efficiency]; instead, it also captures broader policy considerations that could be affected by court access." Burke Robertson, '*Transnational Litigation And Institutional Choice'* (n 2) 1096. Professor Cassandra Burke Robertson suggests that these policy considerations include the relevance of the litigation to the taxpaying community that funds the courthouse operations, substantive economic goals, as well as personal assessments such as distaste for "contingent fee lawyers for foreign plaintiffs who seek higher damage awards than their own countries would be willing to award." See also Alexandra Wilson Albright, 'In Personam Jurisdiction: A Confused and Inappropriate Substitute for Forum Non Conveniens' (1992) 71 TEX L REV 351, 398:"In making decisions about forum non conveniens, the state is making public policy decisions that affect the state's economy as well as the influence that the state's laws may have in foreign countries."

[61] *Sinochem Int'l Co v Malay Int'l Shipping Corp* 127 S. Ct. 1184 (2007).

may dismiss a case under *forum non conveniens* as a preliminary step even before addressing questions of personal or subject matter jurisdiction.[62]

The Supreme Court judgment resolves a split in former appellate case law,[63] and clarifies how dismissal for *forum non conveniens* is a not a dismissal on the merits as it is just a "brush with factual and legal issues of the underlying dispute" insufficiently superficial to be an assessment of the underlying merits.[64] In essence, the Justices of the Supreme Court were concerned that preliminary discovery and research to ascertain personal or subject matter jurisdiction, could burden the defendant with "expense and delay"[65] and therefore efforts should be "limited... solely to proving the requisite adequacy of the alternative forum and compliance with the private and public interest factors".[66]

Yet, if the court can dismiss the case before ascertaining whether the alternative forum has jurisdiction over the case in the "worst-case scenario [the foreign plaintiff] may well be left in a ... jurisdictional limbo".[67]The plaintiff's case worsens where he loses the opportunity to sue in the alternative forum because of a statute of limitations, or because of other procedural implications.[68] The likely result of these early dismissals will be that many foreign plaintiffs will

[62] *Sinochem Int'l Co* (n 61) 1187-1188: "a forum non conveniences motion does not entail any assumption by the court of substantive law-declaring power [and therefore] a federal district court has discretion to respond at once to a defendant's forum non conveniens plea, and need not take p first any other threshold objection;" Wright, Miller and Cooper, *Federal Practice and Procedure: Jurisdiction and Related Matters* (n 57) para 3828.

[63] Wright, Miller and Cooper, *Federal Practice and Procedure: Jurisdiction and Related Matters* (n 57) para 3828. Stanton Hill, *'Towards Global Convenience, Fairness'* (n 55) 1181.

[64] *Sinochem Int'l Co* (n 61) 1187-1188; Stanton Hill, *'Towards Global Convenience'* (n 55) 1192.

[65] *Sinochem Int'l Co* (n 61) 1194.

[66] Desmond T. Barry, 'Foreign Corporations: Forum Non Conveniens and Change of Venue' (1994) 61 DEF COUNS J 543, 551; Greenberg, *'The Forum Non Conveniens Motion'* (n 56) 335.

[67] Nathan Viavant, 'Sinochem International Co v Malaysia International Shipping Corp: The United States Supreme Court Puts Forum Non Conveniens First' (2008) 16 TLNJICL 557, 570.

[68] Such as if the plaintiff is precluded from bringing a case in his home state if he chose to initially pursue the action in a foreign forum.

settle or abandon cases rather than resort to alternative courts.[69] In these cases, the greater efficiency of the federal courts comes at the expense of the foreign plaintiff's rights. [70]

ii. Other Relevant Forum Non Conveniens Judicial Practices

The higher tiers of the federal courts have also endorsed another practice to extend and anticipate *forum non conveniens* dismissals. Under the traditional doctrine, an alternative forum was considered inadequate where that court lacked jurisdiction or in other ways prohibited the plaintiff's access or where the court was perceived as biased or corrupt.[71]

However, recent case law confirmed how federal courts can dismiss cases under the doctrine without an alternative forum, if the "foreign forum is unavailable as a result of plaintiffs' early choices in litigation".[72] Such an expansion of the doctrine seems to undermine the history, the theory and the policy underpinning dismissals under the *forum non conveniens.*

In addition, federal courts take a restrictive view of what counts as an inadequate forum.[73] The burden plaintiffs must discharge "is difficult to overcome"[74] often serving the convenience of the courts rather than necessarily the interests of the parties.

[69] Laurel E. Miller, 'Forum Non Conveniens and State Control of Foreign Plaintiff Access to U.S. Courts in International Tort Actions' (1991) 58 U CHI L REV 1369, 1388: "few cases dismissed... on forum non conveniens grounds ever reach trial abroad"; David W. Robertson, 'Forum Non Conveniens in America and England: "A Rather Fantastic Fiction"' (1987) 103 LQR 398, 418-20; Weintraub, '*International Litigation*' (n 8) 335: "faced with higher costs and lower returns abroad... the vast majority of foreign plaintiffs decide not to sue or settle for a fraction of the claim's 'estimated value."

[70] Viavant, *'Sinochem International*' (n 67) 570.

[71] Wright, Miller and Cooper, *Federal Practice and Procedure: Jurisdiction and Related Matters* (n 57) para 3828.3.

[72] *Veba-Chemie AG v M/V Getafix* 711 F.2d 1243, 1248 n10 (5th Cir. 1983):" Perhaps if the plaintiffs plight is of his own making--for instance, if the alternative forum was no longer available at the time of dismissal as a result of the deliberate choice of an inconvenient forum--the court would be permitted to disregard [the available forum requirement] and dismiss. As we have pointed out, forum non conveniens is sensitive to plaintiffs motive for choosing his forum, at least in the extreme case where his selection is designed to 'vex, harass, or oppress the defendant"; Burke Robertson, '*Transnational Litigation And Institutional Choice'* (n 2) 1103.

[73] *Eastman Kodak Co v Kavlin* 978 F. Supp. 1078, 1084 (S.D. Fla. 1997): "The "alternative forum is too corrupt to be adequate" argument does not enjoy a particularly impressive track record. The Court has been unable to locate any published opinion fully accepting such an argument;" Virginia A. Fitt, 'The Tragedy of Comity: Questioning The American Treatment Of Inadequate Foreign Courts' (2010) 50 VAJIL 1021, 1029.

[74] Fitt, '*The Tragedy Of Comity*' (n 73) 1028.

In response to the greater number of dismissals under the *forum non conveniens* doctrine several nations have enacted blocking statutes, or statutes which bar resort to national courts if any "action by one of their residents ... was previously commenced in another country and later dismissed based on forum non conveniens".[75] These statutes serve to render the court of the foreign national permanently inadequate under the *forum non conveniens* analysis and, until the aforementioned recent developments, would have impeded all dismissals.[76]

Alternatively, countries have reacted by authorizing national courts to apply the procedural rules of the country in which the case was first filed and later dismissed under *forum non conveniens.*[77] This means applying American tort liability and damages for cases dismissed by federal courts.[78]

These legislative responses emphasize the serious concerns felt for the unprecedented expansion of the *forum non conveniens* doctrine.[79] It is likely that the greater the number of cases federal courts will dismiss the stronger the remedies foreign legislatures will adopt to not disfavour their own nationals.[80] Probably, the underlying fallacy in the Court's enhancement of the *forum non conveniens* doctrine has been to consider the foreign plaintiff's choice of forum invariably motivated by forum shopping. [81] In fact, courts should realise that when defendants

[75] Heiser, '*Forum Non Conveniens and Retaliatory Legislation*' (n 60) 610; Henry Saint Dahl, 'Forum Non Conveniens, Latin America and Blocking Statutes' (2004) 35 U MIAMI INTER-AMERI L REV 21, 22-24, 47-63 highlighting examples of blocking statutes.

[76] See n 72.

[77] Heiser, *'Forum Non Conveniens and Retaliatory Legislation'*(n 60) 610-611.

[78] Heiser, *'Forum Non Conveniens and Retaliatory Legislation'* (n 60) 622: "The intent behind these statutes is to make tort litigation in the courts of these countries no more attractive to U.S. defendants than tort litigation in U.S. courts." See also Paul Santoyo, 'Bananas of Wrath: How Nicaragua May Have Dealt Forum Non Conveniens a Fatal Blow Removing the Doctrine as an Obstacle to Achieving Corporate Accountability' (2005) 27 HOUS J INT'l L 703, 727-29; Burke Robertson, '*Transnational Litigation And Institutional Choice'* (n 2) 1083 quoting the Model Law on International Jurisdiction and Applicable Law to Tort Liability and suggesting that they operate to permit national courts to grant damages comparable to what a plaintiff would receive in the US.

[79] Burke Robertson, '*Transnational Litigation And Institutional Choice'* (n 2) 1083.

[80] See for example the facts of Chevron's Environmental lawsuit in Ecuador, (following the forum non conveniens dismissal in America in *Aguinda v Texaco Inc* 142 F. Supp. 2d 534, 554 (S.D.N.Y. 2001); summarised in Burke Robertson, '*Transnational Litigation And Institutional Choice'* (n 2) 1082-1084.

[81]*Piper Aircraft* (n 2) 256: "...[b]ecause the central purpose of any forum non conveniens inquiry is to ensure that the trial is convenient, a foreign plaintiff's choice deserves less deference." Stanton Hill, *'Towards Global Convenience'*(n 55) 1185: "these statements create a suspicion--if not presumption--that the foreign plaintiff comes to the federal forum for vexatious purposes." Heiser, *'Forum Non Conveniens and Retaliatory Legislation'* (n

file for relocation of lawsuits they will be pursuing a forum which they perceive as favourable, clearly operating as "reverse forum shopping" and thus of equal reprehensibility.[82]

E. Jurisdiction over Foreign Defendants

Until June 2011 a trend to extend jurisdiction over foreign defendants in domestic law suits brought by US plaintiffs was evident. The highest courts of the states of New Jersey and North Carolina had validated state jurisdiction over foreign defendants and the *certiorari* granted by the Supreme Court was expected to address only nuanced doctrinal elements of the applicable tests.[83]

Yet, the Supreme Court's judgments stood traditional principles of constitutional and civil procedure law "on its head."[84] The Supreme Court "performed miserably"[85] as it attempted to "roll back the clock by a century and re-ground personal jurisdiction in a dubious sovereignty theory that the Court had apparently rejected several times before."[86]

Historically a federal court's personal jurisdiction was limited by territoriality and service of process[87] but throughout the twentieth century it gradually extended to "vague concepts labelled with precise sounding names" [88] such as the minimum contacts analysis, the "test being

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60) 613-614: "consequently, a foreign plaintiff's choice of a U.S. forum is rarely a significant factor in favor of retaining jurisdiction."

[82] *Stangvik v Shiley Incorporated* 819 P.2d 14, 25 (CA 1991); Heiser, *'Forum Non Conveniens and Retaliatory Legislation'* (n 60) 609-613. Linda J. Silberman, 'Developments in Jurisdiction and Forum Non Conveniens in International Litigation: Thoughts on Reform and a Proposal for a Uniform Standard' (1993) 28 TEX INT'L L J 501, 525; Martin Davies, 'Time to Change the Federal Forum Non Conveniens Analysis' (2002) 77 TUL L REV 309, 315-16; David Boyce, 'Foreign Plaintiffs and Forum Non Conveniens: Going Beyond Reyno' (1985) 64 TEX L REV 193, 215-16.

[83] *Robert Nicastro v McIntyre Machinery America Ltd* 987 A.2d 575 (NJ 2010); and certiorari granted 131 S.Ct. 62 (2010); *Brown v Meter and others* 681 S.E.2d 382 (NC Court of Appeals 2009); leave to appeal denied 695 S.E.2d 756 (NC 2010); certiorari granted 131 S.Ct. 63 as *Goodyear Luxembourg Tires v Brown.*

[84] Patrick J. Borchers, *J.McIntyre Machinery, Goodyear, and the Incoherence of the Minimum Contacts Test,* (2011) 44 CREIGHTON LAW REV. 1245, 1264.

[85] Borchers, *J.McIntyre Machinery, Goodyear,* (n 84) at 1245.

[86] Borchers, *J.McIntyre Machinery, Goodyear,* (n 84) at 1245.

[87] *International Shoe v State of Washington* 66 S.Ct. 154, 158 (1945): "Historically the jurisdiction of courts to render judgment in personam is grounded on their de facto power over the defendant's person. Hence his presence within the territorial jurisdiction of court was prerequisite to its rendition of a judgment personally binding him."

[88] Mark P. Chalos, 'Successfully Suing Foreign Manufacturers' (2008) 44 NOV JTLATRIAL 32, 33.

whether, under those facts, the forum state has a sufficient *relationship with the defendant and the litigation* to make it *reasonable* ("fair play") to require him or her to defend the action in a federal court located in that state."[89] In other words, for an out-of-state defendant to be liable to suit, he must "purposefully avail himself" of the privilege of doing business in the forum state.[90]

The current position of the law was stated in a case concerning liabilities between a Japanese valve producer and a Taiwanese tyre manufacturer: *Asahi Metal Industries v Superior Court of California.*[91] The court *prima facie* found sufficient minimum contacts under the 'stream of commerce' inquiry although the fairness factors ultimately prevented the State of California from asserting personal jurisdiction.[92]

The recent Supreme Court judgment in *Nicastro v McIntyre Machinery* addressed the *Asahi* stream of commerce terminology. The appellee, Mr Roberto Nicastro was severely injured by the malfunctioning of a recycling machine with which he was working. The machinery had been manufactured in the United Kingdom by the appellants, and had been sold in America exclusively through its United States distributor, McIntyre Machinery America. Justice Albin for the Supreme Court of New Jersey had concluded (rather ominously) that "[a] manufacturer that wants to avoid being haled into a New Jersey court need only make clear that it is not marketing its products in this State".[93] The New Jersey Court found sufficient minimum contacts in McIntyre's targeting of the US market through its US based subsidiary, and in McIntyre's awareness that the distribution system extended to New Jersey. This awareness matured after the officials of the company attended scrap metal conventions in America where they saw their products advertised.[94]

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[89] Hon. William W Schwarzer, Hon. A. Wallace Tashima and James M. Wagstaffe, *Practice Guide: Federal Civil Procedure Before Trial – National Edition,* (2009) Chapter 3:77:2.

[90] *International Shoe* (n 83) 158 establishing the "minimum contacts" test; *Hanson v Denckla* 357 US 235, 253: holding that to warrant exercise of personal jurisdiction, there must be "some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum state."

[91] *Asahi Metal Indus Co v Superior Court of California* 480 U.S. 102 (1987).

[92] *Asahi Metal* (n 87) 114-116; Weintraub, *The United States as a Magnet Forum* (n 12) 229 suggests the reasons given by Justice O'Connor to determine the unconstitutionality of subjecting Asahi to federal jurisdiction "echo the public and private interest factors of forum non conveniens."

[93] *Robert Nicastro* (n 89) 987 A.2d 575, 591.

[94] *Robert Nicastro* (n 89) 987 A.2d 575, 592.

The Supreme Court judgment in *McIntyre* is a plurality opinion which adds little certainty to this area of the law. Justice Kennedy voiced the plurality's opinion and held specific jurisdiction only legitimate where the defendant "purposefully avails itself of the privilege of conducting activities within the forum state."[95] Furthermore, a judgment is only "lawful [if the] sovereignty has authority to render it."[96]

Goodyear v Brown examined whether a foreign corporation can be subject to general personal jurisdiction because of its extensive contacts with the US. General jurisdiction means the defendant can be sued for activities which are unrelated to its specific contacts with the forum state. The appellees were the co-administrators of the estates of two young American boys who died in a road accident in Paris after one of the Goodyear tyres of the bus in which they were travelling burst.[97] The North Carolina Court of Appeals held that the appellants had "purposefully injected [their] product into the stream of commerce without any indication that [they] desired to limit the area of distribution of [their] product so as to exclude North Carolina"[98] and upheld the trial court's finding that the cause of action was "closely related to the contacts with the defendants" and in the "substantial interest" of North Carolina to pursue in order to provide a forum for its citizens to redress their grievances.[99]

The Supreme Court disagreed on the facts and established a new quantum of sufficient contacts: a test of whether the defendant be "essentially at home" in the forum.[100]

Needless to say, under these heightened standards both suits against foreign defendants were dismissed leading to fears that US plaintiffs may be left "without recourse to a

[95] *J. McIntyre Machinery Ltd v Nicastro,* 131 S.Ct. 2780, 2787, 2879 (2011).
[96] *J. McIntyre Machinery Ltd v Nicastro,* 131 S.Ct. 2780, 2879 (2011).
[97] *Brown v Meter and others* (n 90) 681 S.E.2d 382, 384.
[98] *Brown v Meter and others* (n 90) 681 S.E.2d 382, 395.
[99] *Brown v Meter and others* (n 90) 681 S.E.2d 382, 395: "The trial court's findings are supported by competent evidence, and the findings in turn support the conclusion that the exercise of general personal jurisdiction over Goodyear Luxembourg, Goodyear Turkey, and Goodyear France was appropriate pursuant to N.C. Gen.Stat. § 1-75.4(1)(d) [the North Carolina long-arm statute] and the due process clause."
[100] *Goodyear Dunlop Tires, S.A. v Brown,* 131 S.Ct. 2846, 2851 (2011).

U.S. forum against product manufacturers who target and benefit greatly from serving the U.S. market."[101]

Conclusion

So what can these latest judgments of the Supreme Court mean? What underlying policy justifies the restrictions on foreign plaintiffs when a substantial limitation on foreign defendants is also introduced?

On the one hand, the federal courts might be seeking to avoid the inconvenience and expense of multinational suits thereby preferring to dismiss claims regardless of the claimant's nationality. This would respond to policy calls to demagnetize American courts in order that "forums that are more appropriate for adjudicating the matters in dispute" are selected.[102] However can the *ad hoc* set of disparate standards really serve this policy objective well? At least in terms of foreign claimants, will this choice not antagonize foreign legislatures, and "backfire as foreign courts... [adapt themselves to American judicial standards, for example by awarding] large judgment against U.S. defendants?"[103]

On the other hand, these procedural changes can be seen as an attempt to standardize American procedural practice to the rules adopted in most other countries, and are aims that could be legitimately pursued by increasing the pleading requirements or thinning the docket with common law doctrines such as *forum non conveniens.*[104] However, if so radical a change is undertaken with so little notice, it cannot but cause injustice to individual plaintiffs which will see their forum of preference unexpectedly different.

[101] Borchers, *J.McIntyre Machinery, Goodyear,* (n 84) at 1275. To the same extent, according to Professor Borchers these two judgments might "frustrate the efforts of victims of human rights violations of terrorism at the hands of foreign defendants to seek redress in the United States." *Id,* at 1246.
[102] Russell J. Weintraub, International Litigation And Arbitration: Practice And Planning 224 (5th ed. 2006).
[103] Burke Robertson, '*Transnational Litigation And Institutional Choice'* (n 2) 1085.
[104] Dodson, *'Comparative Convergences in Pleading Standards'* (n 13) 442-443.

In conclusion, when focusing on the greater picture of federal civil procedure, it is clear courts have favoured early disposition of cases and restrictions on plaintiff's access. Yet, as Professor Miller emphasizes while these changes ensure a more "speedy" and "inexpensive" resolution of cases, they should not be at the expense of the third founding principle of the Rules of Civil Procedure: justice.[105]

[105] Federal Rules of Civil Procedure, Rule 1 "These rules govern the procedure in all civil actions and proceedings in the United States district courts... They should be construed and administered to secure the just, speedy, and inexpensive determination of every action and proceeding."