

ORAL AND WRITTEN ELEMENTS WITHIN THE INTRODUCTORY PHASE OF CIVIL PROCEDURE

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I. SOME REMARKS CONCERNING THE SUBJECT OF THIS REPORT

The main theme of this international conference is "Oral and Written Proceedings: Efficiency in Civil Procedure". I consider the subject of my paper as a part of the general theme. Therefore in the following analysis of the first phase of a civil lawsuit one main question is whether the various actions of the litigants during the lawsuit have to be delivered in writing or in an oral manner. At the same time I am attempting to compare the different structure of the introductory phase in various civil justice systems.

The formulation of the theme which was offered to me especially mentioned the "procedural contracting". At the beginning I had some doubts about the meaning of this concept. In Germany we use the expression procedural contracts ("Prozessverträge") for agreements of the parties about procedural items. Examples are agreements about jurisdiction or about settlement of the case. However I was told (after asking) that this is not the significance of the "procedural contracting" in the specific context of the conference. The intended meaning is agreements between the litigants and the court about the development and conduct of the procedure. As in German law the expression "procedural contracting" in this sense is not common and as also in the national reports which I could collect this terminology does not appear I prefer to speak of case management. This means orders of the court or arrangements of the court and the parties about how to conduct the law suit. For me "case management" seems to be a concept which allows to include different forms of determining the schedule of the procedure in advance.

The report had to be prepared on rather short notice and other obligations and commitments I had to honour were also taking up a lot of my time. So I have to apologize for giving an overview which does not cover all relevant details. For the same reasons the German Law¹ and the German attempts in improving the initial phase of the civil procedure play an important role in my paper. Fortunately I had the opportunity to ask at least some colleagues from countries all over the world to deliver a short national report about the subject of this paper. I am very grateful to the authors of these national reports about the civil procedure in China, England, Greece, Japan, Korea, Latin America, Spain and the USA. It was impossible for me to initiate world wide national reports. I concede that the basis of this paper is more or less accidental. But nevertheless the national reports are good examples for the great variety of procedural forms as well as for certain important common elements of civil procedure.

The following national reports were submitted:

¹ For details of preparatory stages of a lawsuit in German Law see MURRAY, P.L./STÜRNER, R., *German Civil Justice*, Durham, 2004, chapter 7, pp. 191-248.

China (Hongliang Wang)
England (Stefan Einhaus)
Griechenland (Dimitris N. Maniotis)
Japan (Manabu Honma)
Korea (Jung Hoo Oh)
Latin-America (Pia Tavolari Goycoolea)
Spain (Alicia Armengot Vilaplana)
USA (Jakob Reinhard)

As these very interesting reports are also published in the materials of the conference it is not necessary to repeat their contents within this paper in a broad manner. I thought about a sort of statistical evaluation of the national reports. But whereas some items would be rather trivial (e.g. the necessity of written claim as a rule in all countries) other institutions (e.g. the pre-action-procedures) are too different to be compared in a merely statistical presentation. Therefore in my paper I mention only some highlights from the national reports without evaluating the whole content. For the complete information I strongly recommend to read the national reports.

In addition to the mentioned national civil procedure rules it seems interesting to me to have a look at one of the latest European contributions to make the civil procedure more effective. This is the European Regulation establishing a European Small Claims procedure (2007).

The structure of this paper follows the timetable of the civil procedure in its initiating phase. Finally I try to formulate some summarizing thoughts about orality and written proceedings in connection with those topics which are the most important ones in the modern discussion. One of them is mediation instead of judicial and juridical decision. Another fundamental question presently under discussion is the access to factual information for the litigants in civil procedure. And these two topics we can already find within the first stage of a conflict on its way to the court, the pre-action-procedure.

II. PRE-ACTION-PROCEDURE

Before the start of a civil procedure, that is to say before filing a complaint with the court, there is no place for the application of civil procedural rules - until some years ago this would have been true without any doubt. But one of the most interesting and surprising developments in the recent years is, that the law of procedure also extends to the phase before beginning of a law suit, that is to say the phase of thinking about a possible future law suit and of preparing for it. The best example of this development are the pre-action-protocols of modern English civil procedure rules. The last world congress of procedural law in 2007 dealt with this subject in a broad manner². But also in the context of this paper it is necessary

² From the German point of view see BREYER, M., "New-Trends in Pre-Action - Neuere Entwicklungen im vorprozessualen Bereich", in GILLES, P./PFEIFFER, TH. (Ed.), *Neue Tendenzen im Prozessrecht (New Trends in Procedural Law)*, *Deutsche Landesberichte und weitere deutsche Beiträge zur Weltkonferenz für Prozessrecht in Salvador/Bahia, Brasilien 2007 (German*

to have a look at these new fields of procedural rules. Another very interesting example of pre-action-procedure are the preparing orders and obligations of Spain law (*diligencias preliminares*). In Japan the most recent reform law introduced the possibility of pre-filing party inquiry.

1. Pre-action-protocols in English law

With the pre-action-protocols the English law³ pursues various goals. The first goal of these practice directions is to improve the exchange of information between the parties. The relevant rules are intended to deliver early and complete information about the facts and circumstances which are relevant for a possible law suit. Thus the parties are supposed to be enabled to avoid litigation by agreeing a settlement of the claim before the commencement of the procedure. Also the parties should consider whether some form of alternative dispute resolution procedure (for example neutral evaluation by an independent third party or mediation) would be more suitable than litigation. The view is that litigation should be a last resort. Where litigation cannot be avoided the objective of the pre-action-protocols is to support the efficient management of the procedure. If the pre-action exchange of information is working the litigants are able to present the material in complete form already at the beginning of the lawsuit.

The court is not involved in the preparatory procedure. But if a lawsuit is filed the court has to examine if the parties have complied in substance with the terms of the protocol. The Civil Procedure Rules enable the court to take into account compliance or non-compliance with an applicable protocol when giving directions for the management of proceedings and when making orders for costs. If non compliance has led to proceedings which might otherwise not have needed to be commenced the court may order that the party at fault pay the costs of the proceedings of the other party. If the party at fault is a successful claimant the court may make an order depriving that party of interest and so on.

At first sight the cost sanctions against the claimant seem to be similar to the German rule (§ 93 ZPO) that the claimant despite winning the case has to pay the costs if the defendant immediately declares admission of the claim and his behaviour did not give reason to initiate the lawsuit. The consequence is that usually the prospective claimant has to urge the other party to pay his debt before filing a suit. But the provisions of the pre-action-protocols go far beyond this rule and contain very detailed requests for the pre-action-behaviour of both parties. The approved pre-action-protocols have the aim to establish suitable provisions for different types of claims. At present there are nine specific pre-action-protocols. The field of application covers engineering and construction, personal injury, defamation, clinical negligence (medical malpractice), housing disrepair and others. Besides there are general provisions for the cases not covered by any approved protocol. Generally the court expects the parties to act reasonably in exchanging information and documents relevant to the claim in trying to avoid the necessity of filing a complaint. These general recommendations and even

National Reports and Further German Contributions for the World Conference on Procedural Law in Salvador/Bahia, Brazil 2007), Baden-Baden, 2008, pp. 179 ff.

³ For details see ANDREWS, N., *The modern Civil Process*, Tübingen, 2008, mn. 2.27 f., 3.01 ff, 6.07 ff.

more the approved pre-action-protocols comprise many pages of text and contain a surprising amount of details. The claimant has to announce the prospective claim in a letter of claim which should give concise details, enclose copies of documents, ask for a prompt acknowledgement of the letter, followed by a written response within a reasonable stated period, identify and ask for copies of essential documents not in his possession and so on. The defendant has to deliver a complete written response. Frequently the protocols contain rules about the communication concerning possible alternative dispute resolution and about the appropriate steps to obtain expert evidence. In principle all these steps have to be done in writing and the parties will be highly interested in a careful documentation as to provide sanctions for wrong behaviour. I do not know how these practice-directions really work. It seems possible that this written procedure before the procedure produces significant delay and costs. Certainly these provisions do not improve the access to justice - the aim is, as mentioned, to avoid litigation. In most cases the parties will need professional assistance to fulfil the pre-action-obligations. In the protocol for housing disrepair cases one can read that the authors of the protocol made an attempt to draft the protocol in plain English and to keep the contents straightforward in order to make the protocol accessible and easy to use by all, including those representing themselves. But reading the protocols (also this one on housing disrepair cases) it seems very questionable if this is a realistic view.

Most of the protocols do not refer to oral elements in the pre-action-phase. But it is interesting that the protocol for construction and engineering disputes prescribes (in a very detailed manner) a pre-action-meeting which shall take place within 28 days after receipt of the defendant's letter of response by the claimant. The advantages of oral discussion are intended to be used to identify the root cause of disagreement in respect of each issue, to consider whether the issues might be resolved without recourse to litigation, and, if a lawsuit is unavoidable, to agree how expert evidence is to be dealt with, to agree the extent of disclosure of documents, the conduct of the litigation with the aim of minimising costs and delay. I don't know for what reasons the other protocols don't prescribe such a pre-action-meeting. The advantages of oral discussion could be useful in other cases as well.

In summary the English practice directions on pre-action-behaviour anticipate the main functions of the judicial procedure in its initial phase which consist (as we will see later on) in the clarification and completion of the pleadings, in the attempt to support all forms of settlement and - if this does not work - in the gathering of proofs for the main hearing. If the English way really works it may save state expenses for courts and litigation - but the increase of party expenses and the restriction of access to justice might be a high price.

2. Pre-filing party inquiry in Japanese law

One of the two main topics of modern civil procedure reform, exchange of information and evidence gathering between the parties, can also be found in modern Japanese law. The other one - promotion of settlement, also by mediation and so on - has less significance to law reform in Japan because as it is well known in Japan traditionally the use of mediation and conciliation is widespread and works in a very efficient manner often admired by western observers.

Initially a procedure for gathering information and evidence was introduced into the Japanese Civil procedure Code in 1996 after the beginning of the civil procedure. But as Manabu Honma explains in his report these provisions proved to be not fully sufficient to reduce the time to solve the average case. In 2003 by amendment of the Code a pre-filing party inquiry (evidence gathering procedure based on pre-filing notice) was added. The prospective claimant can ask for information from the presumed defendant. To initiate this procedure the prospective plaintiff has to send a written notice to the defendant. After that the defendant has the same right to ask for information from the claimant. The court may, upon a motion of a party, make pre-filing dispositions to gather evidence. This is a remarkable difference in comparison with the English pre-action-protocols where the court is not involved. The provisions on pre-action information and evidence gathering do not contain specific sanctions for non-compliance. But probably at least the non compliance of a court order has negative consequences within the procedure for example preclusion for delay or importance within the evaluation of evidence. It would be interesting to know how these rather new rules are working in practice. The aim to avoid litigation seems not so predominant as in English law and also the danger of deteriorating the access to justice is less obvious.

3. The diligencias preliminares in Spanish Law

As Alicia Armengot describes in her national report the diligencias preliminares - that is (the translation is difficult) the preparing acts and duties in Spanish civil procedural law - have the objective to help the party which intends to commence a law suit to get information about the relevant facts and manners of proof. It is interesting that the Spanish Law provides this instrument not in a general manner but only at few specific areas where there is usually a lack of information on the side of the prospective claimant. These fields are the protection of collective interest of consumers and the protection of intellectual property. The court can give order to produce information or documents and these orders are enforceable by execution. In Germany for quite some years a discussion is going on over the question whether it is a function of procedural law to give the right on information by the adversary or if establishing such obligations is a legitimate task of substantive civil law. Pre-action obligations and corresponding court orders could be a solution perhaps even a compromise between procedural or substantive classification of the problem. But the practical importance of the diligencias preliminares in Spanish law is rather low and therefore it seems questionable if these rules can serve as a model at least in the moment.

In conclusion the pre-action-procedures clearly underline the importance of two topics in modern civil procedure: avoiding litigation (promoting of settlement) and opening the access to full information of facts and evidence which the claimant himself does not possess.

III. COMPLAINT

1. Written Complaint

Generally the complaint must be in writing. The obligatory content of the complaint includes a specific remedy and the specification of the cause of the action. In some countries, for instance in England, it is also necessary to provide a concise statement of the nature of the claim as tort or breach of contract and so on. In Germany (and as well e.g. in Greece) the claimant is not obliged to deliver

juridical arguments within the complaint but nevertheless this is common practice as in most of the cases the complaint is written by a lawyer.

In Spanish law there are two different forms of complaint: the complete claim initiating the ordinary proceeding and the short complaint in the verbal proceeding. But in both cases written complaint is obligatory.

As J. Reinhard mentions in his report for the US-American procedural law it is a fundamental decision to provide easy access to the courts and therefore there are rather low standards of pleading. Within the concept of notice pleading it is sufficient to present a fair notice for the defendant about the contents and the grounds of the claim whereas the details can be delivered during the following phase of pleadings and motions. In comparison e.g. German law, Spanish law (with different requirements in complete complaint and in short complaint), Latin-America (model code and national codes as well as Pia Tavolari Goycoolea explains in her report in detail) and Japanese law are examples of fact pleading requiring rather detailed allegation of facts and presentation of means of evidence already within the written complaint. Greek law (for details see the report written by Dimitris N. Maniotis) also requires a clear report of the facts which support the action.

The necessity of a written complaint does not contradict the principle of orality. The meaning of this principle is not that within a lawsuit there are no written components at all. But the principle of orality requires - at least in its traditional form - not only that there is an oral hearing, conference or trial but that this hearing has central importance for the statements of the parties. But it can cause essential delay of the procedure if the parties present the facts and the means of evidence for the first time within the hearing. Thus in many countries the claimant has to state in the written claim not only the cause of the action in a more general manner but also the facts in detail as well as the means of evidence he wants to offer to the court. This is the case e.g. in German law and even more firmly in Spanish law where the claimant has the burden to present documents of procedural or substantive importance already together with the written claim. If the claimant does not fulfil this request he may risk preclusion in the further proceeding. By such provisions the importance of the oral hearing is significantly diminished and the phrase that only the statements within the hearing are effective becomes more and more theoretical or antiquated.

In England the claimant or his legal representative has to sign a statement of truth with the following text: "I believe (or: the Claimant believes) that the facts stated in these particulars of claim are true." In USA the signature under the claim and under any pleading has a similar meaning. The German law does not know a formal requirement as in England though the German civil procedure code expressly establishes the obligation of truth for the parties (ZPO § 138 (1)). The English rule may be useful to remember the claimant (and as we will see the defendant as well) to this obligation. And the violation of the statement of truth does not remain without sanctions: A false statement made in a document may lead to a liability for contempt of court.

2. Claim forms

Sometimes the rules of procedural law do not only require a written complaint but make it obligatory to use specific claim forms. One example of this interesting development is the English law. The Claim form makes it easier for the

parties not to forget necessary parts of the claim. There is also space for the particulars of the claim (in the claim form for standard procedure) or for the details of claim (in the claim form for simplified procedure). A claim form may be useful especially for parties without business experience who do not want to hire a lawyer for conducting the lawsuit. But as the English claim forms do not ask for details the support seems to be rather limited.

A very interesting example for the obligatory use of claim forms is the new European Small Claims procedure. In order to facilitate the commencement of the procedure the claimant has to make an application by filling in a standard claim form which can be found as annex I of the European regulation. The claim form will be available at all courts and tribunals at which the European Small Claims Procedure can be commenced. The claim form contains detailed explanations which also refer to the reasons for the claim and the evidence the claimant wants to put forward to support his claim. As the European Small Claim procedure is in principle a written procedure the claim form apparently has the aim to help the claimant and also to enable him to file the claim without legal help. As Art. 10 prescribes representation by a lawyer or another legal professional shall not be mandatory

3. Oral forms of complaint

Besides the written complaint many procedural laws also allow oral forms of complaint. The purpose is to facilitate the initiating of a lawsuit for less educated or experienced people without the support by a lawyer. Therefore the oral complaint is frequently admissible at the courts for small claims, in Germany at the Amtsgericht (ZPO § 496). The claimant can go to the administrative office of the court and his declarations and statements are taken down by the court clerk and thus converted into a written claim. Similar rules in Greece allow an oral commenced action before the clerk of the Justice of the Peace. Korean law (for details see the report by Jung Ho Oh) allows such commencement of lawsuit if the value of the claim is not more than 12 000 €. The oral complaint is also allowed by Chinese law if the plaintiff has difficulty in presenting the statement of complaint in writing.

Another form of oral complaint permits the party to appear immediately before the court during its session. From central European point of view this form of action and - if the defendant also appears - the following procedure may look archaic and for example in German law this possibility was abandoned in 1976 as it had lost the importance in practice. But one should not ignore that in many countries around the world there are huge differences in the development of the big cities on one hand and the rural districts on the other side. So it is quite understandable that in Chinese law the oral complaint in the described form plays an important role. To grant access to justice and to encourage the people to litigate in court the court has to hold hearings outside the court's seat. This may be an important contribution to achieve full effectiveness of the law. In Korea the just mentioned form of complaint also exists but without practical importance.

In conclusion nowadays the commencement of procedure is dominated by written claim. But the obligation to file the claim in written form may cause problems with access to justice. So systems which also allow an oral claim at least in small claims procedures are preferable on the national level. It is clear however that this alternative does not make sense in international cases of small claims

procedure because usually it would not be convenient for the party to go to the Court in another country (at the place of the defendant). In this situation Claim forms (including explanations to the party) as prescribed by the European Law can be helpful to avoid the disadvantages of written complaint.

4. Electronic complaint

In many countries the use of electronic tools (E-Mail, On-line) for complaint (and also for defence) is permitted under certain technical conditions. Some details can be found in the national reports. In the context of this paper electronic proceedings are comparable with written proceedings. It is quite clear that the easiness and the cost-reduction effect of electronic communication enforces the trend towards written procedure. The specific problems connected with electronic proceedings, e.g. the necessity to secure the authenticity of electronic messages and the relation between electronic data and printed version, are quite different from the problems which are to be discussed regarding the principle of orality. Besides the electronic procedure was one of the main subjects of the international congress on civil procedure in Brazil in 2007⁴. For these reasons electronic procedure remains outside the focus of this paper.

IV. SERVICE OF THE COMPLAINT; REVIEW BY THE COURT AND COURT ORDERS BEFORE SERVICE

After the written complaint reaches the court it has to be served on the defendant. The procedure of service is not to be discussed within this paper. If the full effects of filing a suit (*lis pendens* - *Rechtshängigkeit*) are produced by service on the defendant or already when the written complaint arrives at court is different according to the national systems of civil procedure. This problem (very important especially in trans-border-litigation) also remains outside of the focus of this paper.

But from the point of view of written or oral elements of procedure it is interesting whether the court has to examine certain requirements of the claim already in the phase before service. The answer given by the national rules of procedure varies. In Germany the court has only to examine if the complaint is signed by the party or (as far as there is mandatory representation) by a lawyer and if there is an obvious lack of German jurisdiction. All other questions including the procedural requirements are to be discussed within the procedure after service of the claim. In Korea the presiding judge has to examine if the procedural prerequisites of the complaint are fulfilled. In China we find a system of accepting a case by examination. Service follows only after acceptance of the case by court. If the complaint does not meet the requirements of a civil lawsuit the court will reject the claim. As the content of the examination is not clear these rules may cause restrictions of the right to be heard of parties.

The possibility to reject a claim already in this preliminary phase without hearing is economic and accelerating but not without danger for the rights of the parties. In this context the rules about judicial review after filing the written complaint in the European regulation on small claims procedure also raise some

⁴ See the German National Reports on this subject by FISCHER, N. and GILLES, P. in GILLES, P./PFEIFFER, TH. (Ed.), "*Neue Tendenzen im Prozessrecht*", cit., pp. 83 ff., 153 ff.

doubts. The court has to examine if the claim form is filled properly and if this is not the case it has to give the claimant the opportunity to complete or rectify its claim (Art. 5 paragraph 4). But surprisingly this is not applicable if the claim appears to be clearly unfounded. In this case the application shall be dismissed apparently without information to the claimant about the opinion of the court. But following the German interpretation of the right of the parties to be heard such an order of court would be an inadmissible surprise decision. So I think that the mentioned rules have to be interpreted in the sense that before dismissing the claim the plaintiff must be informed about the opinion of the court that the claim is clearly unfounded and must have the right to amend the claim in the same manner as regarding procedural requirements.

As we will see later on some national laws know different ways of preparatory procedure. The question arises in what stage of the procedure and on which basis the court has to make its choice of the different possibilities. This includes the aspect if the parties can influence this choice or at least have the possibility to state their opinion. In Germany there are two different forms of preparatory procedure: early first hearing on the one side and written preparation procedure on the other side. The decision about the adequate track is made by the court already after receiving the written claim. The parties are not heard before this order and have no direct influence on the choice. As within the two kinds of preparatory procedure the parties have full opportunity to make their statements in oral or written form so this is no violation of the right to be heard. Another question is if it would be advantageous to aim at an arrangement for the proceeding between court and parties as other judicial systems do (cf. *infra*).

In other systems the order about the form of preparatory system is not issued before the service of the claim and the written answer by the defendant. This is the case in English law concerning the choice between the different tracks and in Japanese law concerning the various branches of the issue-evidence management procedure. Following this way the court has a much better knowledge of the particulars of the lawsuit and can make a better choice of the appropriate kind of process.

V. DEFENCE

1. Written defence

Usually the provisions about form and content of the answer of the defendant, i.e. of the defence, are the same as for the claim. The defence has to be sent to the court in written form. It has to contain the pleading of the defendant and the grounds he wants to rely on. Allegation of facts and means of evidence must be presented with the defence in corresponding manner as regarding to the claim. In Spanish law we find the exigency of written defence with the just mentioned contents in the ordinary procedure whereas in the oral (verbal) procedure the defendant presents his defence in the first oral hearing (*acto de la vista*).

2. Answer forms

In English law and within the European regulation on small claims procedure there are forms not only for the claim but also for the defence. But the defendant is not obliged to use these answer forms. He can write the defence also in another appropriate way.

3. Oral answer

In the same way as the claim also the defence may be declared orally to the protocol of a court clerk. And if the procedure law allows the parties to appear immediately in a court session the defendant may produce his pleading in oral form as well as the claimant.

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4. Time limit

To accelerate the procedure there is a time limit for the defendant in many laws. Its length can be defined by a statutory provision. The European regulation on small claims procedure prescribes a time limit of 30 days after the claim has been served. In other procedural laws, for example in German law, it is a question of the discretion of the court to determine the time limit. In German law the non-compliance of the fixed period may have the consequence of preclusion of facts and evidence. Such provisions underline the significance of the written elements in this stage of the procedure.

VI. CLASSES OF ACTIONS; TRACK ALLOCATION

It is one of the most important fundamental questions for every civil procedural law if there shall exist only one procedure for all kinds of law suits or if a variety of procedures is provided. Frequently we find a different procedure for small claims. The procedural way is often combined with the jurisdiction of the courts. In Germany there are special provisions concerning the procedure at the local courts (Amtsgerichte). But the number and the importance of these provisions which are different from the provisions applicable at the district courts (Landgerichte) was continually reduced within the hundred thirty years since the drafting of the civil procedure code. Today the procedure before local courts and district courts are almost identical. But if the value of the claim is low the judge at the local court is allowed to design his proceeding following his discretion (ZPO § 495a). This rule is applicable if the value of the object of litigation does not exceed 600 €. The most important divergence from the ordinary proceeding the judge can choose is to order written proceedings. In practice this occurs very frequently.

In this context the Spanish code is of special interest. As Alicia Armengot points out there are two kinds of actions or procedure: the ordinary procedure (juicio ordinario) and the verbal procedure (juicio verbal). The classification depends from the subject of the lawsuit as prescribed in the law and if such special provisions are not applicable from the value of the claim: juicio verbal up to 3 000 €, juicio ordinario for higher value. The juicio verbal emphasizes the oral elements of proceedings. The center of this procedure consists in the "acto de la vista" as first and (as a rule) only oral conference comprising taking of evidence and delivering the basis for judgment.

It is interesting that the opinion about the use of oral or written procedure in small or at least not very high value are different. Whereas German law in effect prefers written proceeding (if the judge orders such proceeding) just on the

contrary Spanish law underlines the advantages of oral hearing for claims with low value.

In which cases the one or the other form of proceeding is applicable is usually governed by statutory law in an abstract and general manner. In England we find another system which is rather new and very interesting. As far as I know it was an invention of Lord Woolf, the great reformer of English civil procedure, to provide different tracks for the proceeding. These are the small claim track, the multi-track and the fast track. Upon issuing the claim form the case is assigned to a master as the procedural judge. The procedural judge has to decide the track allocation. To receive the relevant information allocation questionnaires are served on each party. The tracks show significant differences in the use of oral hearing. On the small claims track and the fast track normally trial will be the first oral hearing, whereas on the multi-track preparatory hearings are the rule.

VII. PREPARATORY PHASE

1. The differentiation between preparatory phase and plenary phase

It seems to be a common characteristic of modern civil procedure that the law suit has two main phases, a preparatory stage and a main or plenary phase including the main oral argument or the trial. Frequently the preparatory stage is a written procedure. But there are also provisions which underline the advantages of oral hearing already in this phase of the law suit. Also the extent of differentiation between the two stages is rather different. Within the preparatory phase the claim may already be dismissed in case of default or there may be judgment by admission without a preceding oral hearing. In German law the court can order the preparation of the case by early oral hearing. But this hearing has the full content of a trial. It has to be prepared by the court and evidence can be taken already within this first hearing. On this basis the court may render a final judgment without necessity of a further hearing or trial.

In stark contrast in English and US-American law the difference between pre-trial procedure and trial is fundamental. Though during the preparatory phase there is place for oral hearings or conferences (with different purposes) their legal significance is strictly different from that of the trial.

Besides it is perhaps too superficial to speak about two phases of civil procedure regarding to the US-American process. Because as we can read in the national report we find a rather clear differentiation between the phase of pleadings and motions following after the filing of the claim and service of process on the defendant and the phase of discovery which only takes place if the defendant did not obtain an early dismissal of the lawsuit. The Principles of Transnational Civil Procedure also distinguish between three phases, the written pleadings, an intermediate phase and the final part of the procedure⁵.

2. Dominant activity of the court or of the parties

⁵ "ALI/UNIDROIT-Principles of Transnational Civil Procedure", *ZZPInt* (Zeitschrift für Zivilprozess International) Vol. 11 (2006), 403, 406 (principle 9); for details s. STÜRNER, R., "Die "Principles of Transnational Civil Procedure", *ZZP Int* 11 (2006), 381, 390-392.

The variety of the preparatory process models continues if we look at the role of the court and the parties in this stage. In continental procedure systems the management of the proceeding is in the hands of the court from the beginning. This is the case in German law where the same judge presides in the preparatory and the plenary stage of the lawsuit. Also in Japanese Law - originally under the predominant influence of German law but nowadays presenting its own face especially in the preparatory phase - the judge is the dominant actor from the beginning of the process. On the other end of the spectrum in the law of the USA during the well known and frequently discussed stage of discovery the parties are in control. They have to collect the facts and the means of evidence. But the judge also maintains an important role especially as the parties can file motions to limit the access of the opposing party to evidence or to access documents the opposing party refuses to provide. Also in English law the parties are the primary actors of discovery procedure. But since the fundamental reforms at the end of the last century the role of the judge was significantly strengthened as the reform created the managerial judge (and the former discovery is now called disclosure). In a certain sense the English model can be considered as a compromise between the continental type of preparatory procedure and the traditional pure discovery system.

3. Examples of the variety of preparatory procedures within national codes (or practice)

A) German law

As already mentioned the German code of civil procedure provides two different tracks of the preparatory proceeding⁶. The court may order a written preliminary proceeding (schriftliches Vorverfahren). In this case the defendant has to notify the court within two weeks after service of the claim if he wants to defend against the claim. If the defendant does not deliver this declaration the court can render a judgment by default. After sending the declaration of defence to the court the defendant has to file a written defence brief within a timetable set by the court (at least two weeks but longer if the lawsuit is complicated). If the judge considers that the written preparation is sufficient he has to schedule the date for the main hearing. Whereas in this variant there are no oral elements within the preparatory procedure the other track - early oral hearing (früher erster Termin) tries to use the advantages of an oral conference before the court rather soon after beginning of the lawsuit. But the differences between the two ways of preparation and the emphasis on orality in the model of early oral hearing are not so fundamental as it seems at first glance. The court can order that the parties (primarily the defendant, but in response to the defence brief also the claimant) have to prepare the first hearing by written statements within fixed periods. Besides the procedural code does not prescribe a time limit within which the first hearing is to be held. In practice it is often difficult for the court to schedule an early date for an oral hearing as the number of claims reaching the court is high. Therefore many judges generally prefer the model of written preparation, especially at the district courts. The basic idea of the code that the choice should be made looking at the special circumstances of the case seems to be rather ineffective. In reality written elements are dominating the preparatory procedure.

⁶ For details see STEIN/JONAS/LEIPOLD, *ZPO*, Vol. 4, Tübingen 2008, § 272 mn. 7 ff.

B) Japanese Law

The law of Japan offers an even greater variety of methods to prepare the main oral hearing than the German law. These completely new rules were introduced by the Reform of 1998. The aim of the preparing procedures is described as procedure to put in order the issue and the means of evidence. The translation given by M. Honma in its national report is "issue-evidence management procedure". There are three kinds of procedure and the judge has to choose between them if clarification of issue and evidence is necessary. The preliminary oral proceeding is intended to use the advantages of an early oral hearing. On the other hand within the documents-based preparatory proceedings there is no oral element. These two tracks are similar to the German ways of early oral hearing and written preliminary procedure. In the same way as the German law the Japanese provisions also make an attempt to use the specific advantages of oral or written procedure taking in consideration the specific circumstances of the case. The third way - preparatory proceedings for oral proceedings - is not so easy to understand. The parties present their allegation orally and produce documentary evidence. But this is no formal oral proceeding. As a consequence the hearing is not realized in open court. As the Japanese constitution provides access for the public for court session this procedure is only admissible by distinguishing the preliminary hearing from an ordinary oral conference. As this third track is the most popular in practice there seems to be a strong interest in informal hearing without the presence of the public. If the judge wants to choose this way or the documents-based preparatory proceedings the parties have the possibility to express their view before the order is rendered. Thus the parties have some influence on the structure of the preparatory proceedings.

C) Korean law

In Korea the preparatory phase of a civil procedure usually is a written proceeding. The court sets a time-limit for the written pleadings of the parties preparing the oral hearing. But the court has also the right to fix a date for an oral hearing in the preparatory phase similar as in German law.

D) English law

Though the collection of facts and evidence remains in the hands of the parties there is also important influence of the court in the form of preparatory hearings. As Stefan Einhaus describes in his report on the multi track preparatory hearings are the rule. There are different types of procedural hearing including case management conferences, pre-trial reviews and pre-trial directions hearings. As far as court orders are in question obviously an oral hearing has to precede. Thus the oral elements and as a consequence the possibilities of the parties to present their opinion on the case management seem to be more important than in other systems. At the same time the difference between preparatory hearings and the trial is more fundamental than for example in German law.

E) Chinese law

Similar to English law there is a difference between case-filing tribunal and trial tribunal in Chinese civil procedure. In which degree the case-filing tribunal is involved in pre-trial preparation seems to be very different in practice. In his national report about Chinese law and practice Wang Hongliang describes five different models including one mode establishing a specific preparation

tribunal. The Chinese law seems to be in a phase of experiments and shows increasing influence of US-American law although the basis has been German law. It will be very interesting which way the Chinese civil procedure will develop in the future. The present situation underlines that the appropriate organization of the preparatory phase actually is a very important problem of civil procedure.

F) Spanish law

In Spanish law the difference between a preparatory phase and the main hearing can be found in the ordinary proceeding. After preparation in writing there is a first oral hearing (*audiencia previa al juicio*) which is clearly different from the main hearing. The first oral hearing can lead to a settlement between the parties. If the lawsuit cannot be terminated by agreement the purpose of the first oral hearing is to prepare the main hearing and the taking of evidence.

In the verbal procedure (*juicio verbal*) there is no first hearing. The early hearing in this kind of procedure (*acto de la vista*) has not only preparatory functions but serves as main hearing as well.

G) Latin-American law

The report submitted by Pia Tavorari delivers very interesting details about the solutions which can be found in Latin-America within the model code, the existing national codes and the project-code of Chile. With differences in detail we find the fundamental idea of a preliminary hearing as the centre of the preparatory proceeding. The purpose of this hearing is to try to get to an agreement and if this is not attainable to clear up the allegations of facts and the means of evidence in preparation of the main hearing. That the Latin-American codes emphasize the advantages of orality in the preparatory phase in this way presents a remarkable difference compared with other national systems which prefer written proceedings or let it to the choice of the court if oral or written preparation is adequate.

VIII. CASE MANAGEMENT CONFERENCES; SCHEDULES OF PROCEEDINGS

From the point of view of German law special conferences or hearings with the aim only to discuss the future conducting of the lawsuit - the case management - are rather surprising. In German civil procedure the judge is the case manager from the beginning of the lawsuit and he has to shape the procedure following the rules of the procedural code, in many questions also at his discretion. As already pointed out also the first oral hearing before court is not limited in its content and significance; it may provide the basis for a contentious judgment. In conclusion it seems unnecessary to hold a meeting only with the purpose to rule the case management. On the contrary such procedure could be the cause of delay.

Probably the institution of case management conferences has its origin in procedural systems which traditionally let the parties arrange the collecting and clarification of facts and means of evidence. Perhaps within these systems the case management conferences are a sort of compromise preserving some party influence and promoting an agreement between court and parties. Another reason may be that the rules governing American discovery and partly also about English disclosure give the parties far-reaching rights to demand information, access to documents and so on. The case-management conference can make it easier to

avoid excessive and unnecessary use of discovery in accordance between the parties. So we find case management conferences not only in US-American procedure but also in the reformed English civil procedure. The pre-trial conferences in US-American law are described in the national report as an important method for the judge to maintain control of the case and set out a schedule to further a speedy solution. A very interesting detail of US-American rules is that at first the parties have to arrange a meeting outside of the court and after this inter-party conference they have to submit a report to the court outlining a discovery plan.

Perhaps another reason for the necessity or at least usefulness of case management conferences can be found in the rules about expert evidence. If the expert principally is considered in the same way as an ordinary witness and if it is the right (and duty) of the parties to nominate the expert witnesses then in many cases there may be dissent about what kind of expert is necessary and which persons are sufficiently qualified to serve as expert witnesses. It is clear that in many civil cases evidence by experts plays a central role. And it is also without doubt that expert evidence often produces high costs and considerable delay. So it is a very important task for the procedural provisions to arrange the expert evidence in an appropriate way. In German law there are fundamental differences between the provisions on witness evidence and on expert evidence. The court has the right and the duty to nominate the experts. If the parties present an agreement on the person of the expert the judge is obliged to nominate this person. But also in this case the court can additionally select another expert. Perhaps this system has some advantages in comparison with the Anglo-American expert witness rules.

In the Japanese code of civil procedural law the 2003 amendment introduced a schedule of proceedings which is to be set by the court after conferring with the parties. A time frame for issue-evidence management procedure and for the examination of witnesses should be included in this schedule as well as the expected date to close hearing and render judgment. In his national report on Japanese law M. Honma explains that the schedule of proceedings is supposed to solve the problems of complicated cases such as medical malpractice. Though this is not expressly said in the report the taking of expert evidence probably may form an important part of a schedule of proceedings. Though in Japanese law experts are nominated by the court in the same way as in German law the choosing of experts seems to be a problem in practice. A schedule of proceedings in agreement with the parties may help to find an appropriate solution. Furthermore the schedule of proceedings in Japanese law allows the court to dismiss allegations and evidence brought after the end of the time limit which was fixed in the schedule.

IX. WRITTEN PROCEEDINGS; THE INFLUENCE OF THE PARTIES AND THE PRINCIPLE OF PUBLICNESS

In this context written proceedings means proceedings without any oral hearing. The oral and immediate discussion of the law suit by the parties in presence and (in modern law) under active participation of the judge has many advantages. But there are also cases or procedural situations where an oral conference seems to be unnecessary or disproportional. Therefore many national systems allow written proceedings under certain circumstances.

One possible solution consists in omitting the oral hearing if both parties agree. In German civil procedure the court can render judgment without precedent oral hearing if the parties have declared their consent. The court can ask for such an agreement if it thinks that such proceeding is favourable.

The oral hearing obviously produces costs compelling the parties or their lawyers to go to court. If the value of the lawsuit is low it may be preferable to avoid these costs and to leave it at written proceedings. In German Civil procedure there is no general provision that small claims procedure consists in written proceeding. But it is in the discretion of the judge at the local court to order written proceeding if the amount involved in the case does not exceed 600 € (ZPO § 495 a). Also after the court has ordered written proceedings there must be held an oral conference if one of the parties brings in such a motion.

Another possible solution is to allow written procedure (without the necessity of consent of both parties) if one of the parties lives far away from the place of the court so that it would be unreasonable to oblige this party to appear at the court. In German law such a rule existed for small claims. But it was abandoned when the general permission to proceed in written manner in cases of low value was introduced.

Certainly the observation that the representation of a party in oral hearing may be too costly if the court is a long distance from the domicile of a party is the reason why the European small claims procedure is formed as a written procedure (Art. 5 paragraph 1). This is consequent as the European small claims procedure should simplify and speed up litigation in cross-border cases and reduce costs. The written procedure is the principle in this European regulation. But an oral hearing should be held if it is considered necessary by the court or if a party so requests.

If the civil procedure is realized without oral hearing or trial not only the principle of orality but also the principle of public access are abandoned. It is more or less impossible to admit public access to the record of a lawsuit. Examination of the record scarcely can be allowed to everybody and also if doing so the aim of public presence would not be achieved as the record does not reveal the interactions of judge and parties and the results of evidence in a complete and transparent way. The principle of public access is intended to allow public control of proceedings and judgements. Thus the independence and the neutrality of the judge guaranteed. The principle of public access can get into conflict with the right of data protection. Therefore in cases of family law (including divorce cases) the oral hearing usually is not held in public. Also in other cases the court has the right to sit in camera if the maintenance of secrecy so requires. Moreover there is a discussion about the importance of public presence in civil cases. I cannot deal with the details in this context. But in my opinion the principle of public presence has fundamental significance not only in criminal but also in civil cases. The access of the public enables everybody to observe the law in action and the efficiency of the protection of rights also in the field of private law. Besides one should not forget that there are countries (also in Europe) where the impartiality of the judges in civil cases is not obvious and corrupt practices cause serious problems.

The conflict between written procedure and the principle of public presence within national law is especially evident if the constitution contains a

guarantee of public hearing at court. This is the case in Japan as already mentioned before. The German constitution does not guarantee the principle of public access by an explicit rule but to a certain degree the principle of due course of law (Rechtsstaatsprinzip) comprises the principle of public of court sessions as well. An explicit guarantee of public presence can be found within Art. 6 paragraph 1 of the European Convention for Protection of Human Rights and Fundamental Freedoms which declares:

"In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."

In a similar way Art. 47 paragraph 2 of the Charter of Fundamental Rights of the European Union provides as follows:

"Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law."

The European Convention is binding for all states which ratified this treaty. Though the European Union and the European Community could not ratify the convention (for more or less technical reasons) Art. 6 of the Treaty on the European Union recognises the fundamental rights guaranteed by the convention as a part of the law of the European Union. The legal force of the Charter of Fundamental Rights of the European Union is to be clarified by the Treaty of Lisbon giving the Convention the same legal values as the Treaties on European Union. But already today the European Convention is recognised on the European level when interpreting the contents of the fundamental rights. The details can not be discussed within the scope of this paper.

In the light of these fundamental guarantees all procedural provisions which exclude the orality are dubious. Both articles mentioned before do not contain an exception for lawsuits of low value and its not clear if such an exception can be introduced by interpretation. On the other hand it is clear that the guarantee of public hearing is provided by the conventions as a right of the parties protecting their interest in a fair trial. Therefore provisions which allow written proceedings if both parties agree and the oral conference is not necessary in the opinion of the court do not violate this guarantee. For this reason the above mentioned § 495a of the German code of civil procedure and the European Regulation on small claims procedure are conform with the European Convention of Human Rights as far as following these provisions an oral hearing is obligatory on request of one of the parties. But Art. 5 paragraph 1 of the European Small Claims Regulation permits that also on party request the oral hearing may be omitted if the court considers that with regard to the circumstances of the case an oral hearing is obviously not necessary for the fair conduct of the proceedings. The reasons for refusal of oral hearing should be given in writing but the refusal may not be contested separately. It seems rather doubtful to me if this provision is in accordance with Art. 6 of the European Convention on Human Rights and Art. 47 of the Charter of Fundamental Rights of the European Union. The authors of the European Regulation paid attention to the problem. In the introduction to the regulation (comment 9) it is underlined that the regulation seeks to promote fundamental rights and takes into account the principles recognized by the Charter of Fundamental Rights of the European Union. In this context it is explained that the court should respect the right to a fair trial also when deciding on the necessity

of an oral hearing. But as the guarantee of oral hearing does not permit to deny the oral hearing in the case of request by one of the parties in my opinion this provision can not be applied.

It is interesting to compare the European Small Claims Regulation with the ALI/Unidroit-Principles because the latter also refers to transnational civil procedure. The principles underline the orality of the main (last) hearing and suggest to give the parties the right to oral presentation to the important issues (principle 19.1 and 19.2)⁷.

X. SETTLEMENT OF THE LAWSUIT IN ORAL OR WRITTEN PROCEEDINGS

One of the most outstanding characteristics of modern attempts to reform civil procedure is the purpose to support all methods to reach a settlement between the parties. The aim is to avoid civil litigation or if this is not feasible at least to bring the process to an end without contested judgment. If an oral conference or a written procedure provide the better way to reach settlement is a question which cannot be answered simplistically. On the contrary it seems to depend on the circumstances of the case and on the phase the lawsuit has already reached whether an oral discussion between the parties and the judge is helpful to get to an agreement or if the hearing only produces delay and costs and the parties can settle the case without hearing saving time and money. Recent reforms of German procedural law deliver an example for the efforts of the legislator to use oral and written procedure as well to encourage the parties in solving their conflict by mutual consent. In 1999 an amendment to the introductory act to the code of civil procedure (EGZPO § 15a) permitted the federal states to enact a law which makes a conciliatory proceeding obligatory before a lawsuit is admitted by the court. Such conciliation statutes may relate to cases within the jurisdiction of the local courts (Amtsgerichte) with an amount in dispute of not more than 750 €, as well to conflicts concerning neighbour law and to claims in defamation. In the meantime most of the federal states made use of this chance and enacted conciliation statutes. The person of the conciliator is different within these statutes. E.g. in Baden-Württemberg lawyers can be appointed as conciliation persons. The attempt to reach an agreement is made by means of an oral conciliation hearing without access for the public. In principle the parties are obliged to appear in person to this hearing. The success of the obligatory conciliation before litigation is rather poor. It is criticized that this conciliation procedure in most cases only leads to unnecessary delay because usually the lawyers have already made attempts to get to an agreement before litigation is recommended.

In 2001 the reformed Civil Procedure Code (ZPO § 278 (2)) introduced the requirement of a formal settlement conference (Güteverhandlung) before the commencement of the oral hearing⁸. Within the settlement conference the judge is required to discuss the legal and factual issues of the case with the parties. The

⁷ "ALI/UNIDROIT-Principles of Transnational Civil Procedure", *ZZPInt* (Zeitschrift für Zivilprozess International) Vol. 11 (2006), 403, 411 (principle 19: orality and written proceedings).

⁸ For details see STEIN/JONAS/LEIPOLD, ZPO, Vol. 4, Tübingen 2008, § 278 mn. 10 ff.

parties are to be summoned in person to the settlement conference. With this new provision the legislator hoped to achieve similar advantages as with the settlement conference in labour law procedure which already exists quite a long time. But the experience with this formal distinction of settlement conference and contentious oral hearing are not very encouraging. As some experts already explained before the reform law was enacted the success within the labour law procedure has to be viewed in connection with the special subject matter of the proceedings. Labour law procedures mostly consist in action against unfair dismissal. In such litigations there is a specific interest of employer and employee to reach an agreement (frequently consisting in a payment by the employer) and to avoid a time-wasting lawsuit. This contrasts with the situation in the civil cases which are more complex and where the interest of the parties to reach settlement already at the beginning of a lawsuit is less obvious.

Whereas with the new provisions just mentioned the legislator made an attempt to use the advantages of oral proceedings to promote settlement other reforms also facilitated the conclusion of settlement without obligatory oral hearing. ZPO § 278 (6), introduced by amendment of 2001, authorizes the judge to send the parties a written settlement proposal. This can be done in every stage of the procedure, at the beginning as well as after the taking of evidence. The parties can accept this proposal in writing. Then the court has to document the content of the settlement by simple court order which is a title for execution. In practice this provision created some difficulties because sometimes the parties do not agree with the proposal of the court in every item. It was not clear if in such case the settlement could be reached with contents different from the text presented by the judge. In the course of another amendment of 2004 it was clarified within the text of ZPO § 278 (6) that the parties themselves also have the right to present a settlement to the court in writing with the same consequences (court order with the contents of the settlement) as described before. But one can see also in this context that it is a typical danger of written procedure to produce one written statement after the other whereas in an oral hearing the clarification of details may be reached immediately.

The attempt to encourage and to facilitate party agreement is a common characteristic of modern civil procedural law all over the world but the methods to reach this aim can be rather different. If there is a preliminary hearing within the preparatory phase of the lawsuit then usually one of the aims of this conference is to try to get to a settlement. In detail the attempts to reach an agreement follow different ways. E.g. in Greek law we find interesting efforts to activate not only the court but also the attorney within the civil procedure. The plaintiff's attorney has to undertake a last attempt at conciliation after the commencement of the action. But as D. Maniotis points out for certain reasons this provision is not very successful in practice.

In the context of this paper in first line the efforts to reach settlement within civil procedure are to be discussed. For a period of some years there is a remarkable international trend to support alternative methods of settling disputes outside of the court. The most recent legislative product with this purpose is the Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters. The provisions of this directive apply only to mediation in cross-border disputes. Mediation is understood as process whereby the parties attempt by themselves, on

a voluntary basis, to reach an amicable agreement on the settlement of their dispute with the assistance of a mediator. The directive should not apply to processes administered by persons issuing a formal recommendation. The mediation process can also be conducted by a judge who is not responsible for any judicial proceedings relating to the matter in dispute. The most important item in the directive is that the member states are obliged to ensure that the content of the agreement can be made enforceable not only in the Member state where the mediation process took place but also in the other Member states of the EC. The directive does not prescribe details for the mediation process as the use of oral or written procedure. But the mediation has to take place in a manner which respects confidentiality and Member states are obliged to ensure that in principle mediators shall not be compelled to give evidence in civil judicial proceedings regarding information arising out of or in connection with a mediation process.

XII. THE PRINCIPLE OF ORALITY - TRADITIONAL DOGMATIC CHARACTERISTICS AND DECREASING SIGNIFICANCE IN MODERN GERMAN CIVIL PROCEDURE

In the year 1877, a civil procedure code for the new German Empire was enacted for the first time. Usually the original code is cited with the abbreviation CPO to distinguish it from the new text (cited as ZPO) which was published in 1898 with the main purpose to adapt the procedural code to the then new German Civil Code.

When creating the CPO one of the most important subjects of discussion was the fundamental distinction between written or oral procedure. The decision to introduce oral proceedings as the centre of civil procedure must be understood against the background of the former German common civil procedure of the Early Modern Age⁹. This procedure was largely in writing. The result was a very prolonged form of litigation. In contrast to this the French Code de procédure civil which was enacted by Napoleon in 1806 introduced the oral public hearing as the heart of a civil procedure. When during the 19th century new codes of civil procedure were elaborated in various German states there was a remarkable influence of French law. Under these new codes of the German territories the code of the kingdom of Hannover (1850) was a predecessor of the later code of the German Empire. Adolf Leonhardt can be called the father of the Hanoverian procedural code. Later on Leonhardt became minister of Justice in Prussia and a central figure within the reform discussion on the level of the German Empire. For Leonhardt the choice between written or oral procedure was a central principal question when forming the new procedure. A famous remark by Leonhardt on this subject reads as follows:

⁹ For details of the historical development in Germany see AHRENS, M., *Prozessreform und einheitlicher Zivilprozess, Einhundert Jahre legislative Reform des deutschen Zivilverfahrensrechts vom Ausgang des 18. Jahrhunderts bis zur Verabschiedung der Reichszivilprozessordnung*, Tübingen, 2007; KIP, H-G. *Das sogenannte Mündlichkeitsprinzip, Geschichte einer Episode des Deutschen Zivilprozesses*, Köln - Berlin, 1952.

"The legislator has to decide whether written form or orality of the procedure, and if this than full orality not a procedure which is half written and half oral."¹⁰

The principle of orality as it was introduced into the German Code (1877) was based on such thinking and shows puristic aspects. In a dogmatic view the principle of orality does not only mean that an oral conference is necessary before any sort of court order or judgment can be rendered, but also that only the statements of the parties within the oral conference are juridically valid. From the beginning the new German code allowed and (at the district court) even demanded written pleadings but this was only understood as announcement of the future statements within the oral conference. To maintain the orality it was forbidden to abbreviate the oral statements referring to the written pleadings. As a consequence of the accent on oral statements there was no preclusion if allegations had not been announced in written form. If the oral hearing was conducted in various sittings the principle of unity of oral hearing was valid. This meant that new requests, allegation of facts and means of evidence could be presented till the end of the last oral hearing.

All these characteristics have been abandoned in the course of further development of reform legislation. So I am claiming that in German civil procedure today orality of pleadings is no longer a dogmatic principle but a mere question of expedience. For a long time it is allowed to refer to the written pleadings if the court thinks that this is appropriate and the opponent does not contradict (ZPO § 137 (3)). Reference to the written statements is the common practice and only the allegations which are unclear or contested by the opponent are discussed in the court session. In increasing manner the court was given the right to reject allegations and means of evidence which were not pleaded in written form within the timetable fixed by the court. Practically by these rules the written pleading has obtained vital importance. But also the juridical validity must be accepted in an increasing variety of procedural situations. The modern legislator allowed court orders and judgments in more and more phases of the procedure where the obligatory oral conference seemed to be useless. So e.g. within the written preparatory procedure the court renders default judgment if the defendant fails to declare his intention to defend against the claim within two weeks after service of the claim. A judgment by admission is also permitted without previous oral hearing. This was the case within the written preparatory procedure since 1976 and by amendment of 2004 judgment by admission without oral hearing is generally allowed. The tendency to extend the written proceedings can also be seen in ZPO § 128 (4) (from 2004) which allows to hand down all court orders (which are no formal judgments) without previous oral hearings. Another detail which underlines the increasing importance of litigation in writing concerns the duty of the court to raise questions and to give hints to the parties if the case so requires. Traditionally it was clear that the right place to fulfil this duty to give advice on proper procedure was the oral hearing. But since 2001 ZPO § 139 (4) states that the judge has to give the advice as early as possible. Although

¹⁰ German Text: "Der Gesetzgeber muß sich entscheiden, entweder Schriftlichkeit oder Mündlichkeit des Verfahrens, wenn diese, dann volle Mündlichkeit, kein halb schriftliches, halb mündliches Verfahren." Cf AHRENS, M., "Prozessreform", cit., p. 604.

the significance of this provision is not quite clear (I think that also after this amendment the clarification usually should be done within the oral hearing) there is a remarkable, perhaps already prevailing opinion that the court should express its questions and hints within the written procedure. The advantages of oral hearing - a concentrated discussion with active participation of the judge where questions can be answered immediately by the parties or their lawyers - can be lost in this way.

On the other hand it was one central aim of the 1976 amendment to revitalize the oral hearing in the context of concentration and acceleration of procedure. Until 1976 in many civil cases there was a plurality of oral hearings without significant contents. The reform from 1976 had the intention to concentrate the procedure to only one main hearing which should be carefully prepared by court and parties as well. As mentioned above there are two different preparatory procedures. But in practice the written preparation predominates. Within the main hearing after the adversarial hearing taking of evidence shall follow immediately. Thus the main hearing has the purpose to make it possible to terminate the case by judgment if amicable arrangement is not achievable.

The same reform idea - revival of oral proceedings in order to produce efficient proceedings - can be found in Japan. M. Honma describes that also in Japan the oral proceeding had lost its efficiency. The three different tracks to prepare main oral hearing which were introduced in 1996 have been presented above. It is remarkable that in Japanese practice the preparatory proceedings which emphasize orality are preferred. This is an interesting difference to the development in Germany.

The main hearing resembles the trial in Anglo-American procedure. But there remains a very important difference. In Anglo-American procedure the large majority of lawsuits is settled before trial. As J. Reinhard points out in his national report (in accordance with other informations) in USA only 3 - 5 % of all cases reach the trial. In contrast to this in German civil procedure the majority of the cases is scheduled for a trial/main hearing. This is another reason for being cautious when comparing the preparatory phases in Anglo-American and in Continental proceedings. Observing the law in comparative view can deliver too simple or even wrong impressions if it is done on a very abstract level.

XII. CONCLUDING REMARKS

The principle of orality in civil procedure cannot deliver the framework for a civil lawsuit as a whole. Written elements are indispensable. On the other hand it is quite possible to organize a civil procedure completely in writing. Therefore the question is which specific advantages can be achieved by a combination of written proceedings with oral conference. The answer can be different in the various stages of development of a lawsuit.

At the very beginning of a civil lawsuit there is not much space for oral elements. The complexity of the subject of litigation requires fixation of the requests and of the allegations of facts in writing. Therefore it is quite understandable that complaint and defence reply usually have to be delivered in written form.

The exigency of written pleadings could be criticized as restriction of the access to justice for people who are not used to such forms of communication and

argumentation. To avoid such obstacles it makes sense to allow the parties oral declaration before a court clerk at the lower courts. As the court clerk has to write down the complaint or defence this proceeding also leads to written fixation in the necessary way. In many states the real importance of this alternative is not high. One has to take in account that representation by lawyers is very common also at the local courts and under this circumstances the necessity of written pleadings does not produce problems.

Providing forms for claim and defence can be an attempt to grant access to justice. But for the same reason as already mentioned - widespread representation of the parties by lawyers - at least for strictly national lawsuits probably such advantages of forms are limited. Perhaps the use of obligatory forms produces advantages for the case management by the court.

In cross-border litigation the use of forms for claim and defence may be more useful. The big differences of the national rules of civil procedure can make it difficult for a foreign party and its domestic lawyer to fulfil the formal requirements of claim or defence. Therefore the introduction of forms by the European Regulation on small claims proceedings can serve as an interesting model.

Oral filing/raising of claim and defence in the full meaning of the concept is permitted if the parties can immediately go to court sessions and present their conflict to the judge. Such proceedings may be considered as antiquated in modern world. But in countries where not all regions have reached the same standard of transportation and communication such forms of proceedings can contribute to improve access to justice and to support the efficiency of law.

One of the most interesting latest developments in civil procedure is the tendency to regulate the pre-action phase of a lawsuit as well. This can be found in the pre-action-protocols of English law and - to a lower degree - also in certain rules of Spanish and Japanese law about the exchange of information before initiating a civil procedure. The aim of these rules is ambiguous. One attempt is to make it easier for the parties to reach an agreement and to avoid litigation. The other aim is to deliver better weapons for litigation. In the pre-action phase written proceeding is absolutely dominant.

After commencement of the lawsuit a preparatory phase follows - it seems to be a common characteristic of modern civil procedural law that there is a distinction between preparatory and final phase. With regard to the details the rules of the national procedural codes are rather different. Written elements prevail but some codes (e.g. the Latin-American codes, partly also the German law) make an attempt to use the advantages of oral hearings already at the beginning of a lawsuit. As it seems impossible to decide between the advantages of oral or written proceeding in a general manner at first glance it is a good solution to give the choice to the court following its discretion. But in reality early oral conferences are less frequent than preparatory stages in written form.

Usually the oral proceeding is connected with the principle of public access to the hearing. In the preparatory phase this can lead to problems because when trying to reach an agreement the parties may be interested in confidentiality. Modern Japanese law presents an interesting solution which makes a difference between a preliminary hearing without public presence and the oral conference in a formal sense which has to be held in public.

On the other hand proceedings which are completely in writing also lead to problems as this is necessarily connected with the exclusion of the public. To fulfil the requirements of the European Convention on Human Rights - guarantee of fair public hearing - it seems indispensable to give each party the right to apply for an oral hearing and to oblige the court to follow such a motion. Discretion of the court in this situation - up to a certain degree provided by the European Regulation on small claims procedure - is questionable.

Already in the pre-action phase and even more in the preparatory stage of a civil procedure another general tendency of contemporary procedural legislation can be seen: the intention to support all methods to reach an agreement of the parties. In this context we find a remarkable emphasis on orality. Indeed oral conferences can be very helpful to discuss the contents of a possible settlement. It is often said that it is better to finish a lawsuit by settlement than by judgment. The preparatory stage of a lawsuit especially in the form of extensive discovery can play an important role to convince the adversary that it is better to accept an agreement than to go on litigating until trial and judgment. On the other hand access to justice and effective protection of rights must also include main hearing (trial) and contentious judgment. Sometimes the predominant promotion of conciliation, mediation and so on raises the suspicion that the main aim is not improvement of the access to justice but save public expenses for the judiciary.

As a conclusion: in the present time it is also an important question for every procedural code to which extent written or oral elements prevail in a civil process. But orality is not an indispensable principle for every lawsuit. On the contrary it is a question of functionality which role oral hearing has to play¹¹. This is especially the case in the preparatory stage I had to deal with in this paper. Generally it seems to be a good solution to give the court some freedom of design taking into account the circumstances of the case and the opinion of the parties. Case management by consent between the court and the parties certainly is the best way - whether this can be achieved in every lawsuit remains to be answered.

¹¹ See LUEKE, W., *Zivilprozessrecht, Erkenntnisverfahren, Zwangsvollstreckung*, 9. ed., München, 2006, § 2 III, p. 25. The general advantages of orality are underlined by ROSENBERG, L./SCHWAB, K.H./GOTTWALD, P., *Zivilprozessrecht*, 16. ed., München, 2004, § 79 mn. 7 f.; STEIN/JONAS/LEIPOLD, D., *ZPO*, Vol. 3, 22. ed., Tübingen, 2005, § 128 mn. 1 ff.