

# ORALITY AND WRITING AS FACTORS OF EFFICIENCY IN CIVIL LITIGATION

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## I. INTRODUCTION

Approaching the classical and neverending problem of orality and writing in civil litigation from the standpoint of efficiency has a positive and a negative side.

The positive side is that, in such an instrumental perspective, one is allowed –hopefully- not to take into account the myths that since at least a century, or more, are inherent in such a topic. I say “myths” in the plural because they are at least two: the “positive myth” according to which orality is considered as a basic positive value, a sort of panacea that should solve all the difficulties in the functioning of civil litigation, and the “negative myth” according to which writing is bad in itself, is responsible for most of the problems arising in the functioning of civil proceedings, and therefore should be reduced to a bare minimum, and possibly to zero. I have nothing against myths in general: they are a part of each culture and, together with ideologies (and more often than not mixing up with ideologies), they provide a basis for any kind of social and legal constructions. However, they may also be a powerful hurdle in the proper understanding of procedural machineries.

In the current times, on the other hand, we need less myths and more efficiency. Among the many reasons for that, one is specially important and is going to become more and more important in the near future: in the globalized and globalizing world, with all those extremely complex economical, financial and legal phenomena that are creating a transnational or supra-national network of relationships, efficiency is perhaps the most relevant value. More specifically: the efficiency of legal systems, and particularly the efficiency of procedural remedies, is becoming an extremely important factor in the market and in the competition among jurisdictions. In the global market, efficient jurisdictions are going to be the leaders, while the inefficient ones are preferred only by those who try to profit by the deficiencies in the judicial protection of rights.

However, the more important efficiency becomes, the more difficult is to define what it means to think of an efficient system of litigation. On the other hand, talking of orality and writing as factors of efficiency of judicial remedies is probably impossible without defining what is meant as efficiency of civil litigation. In the perspective that we are adopting, in fact, orality and/or writing are considered as means, as mechanisms that are instrumentally aimed at achieving a purpose that is labelled as “efficiency of civil litigation”. But means, mechanisms and instruments, when taken by themselves, are neutral, neither bad nor good. A paint-brush may be a good instrument for painting, but not to turn screws; a knife may be fit to cut slices of bread, but not to fan oneself...and so on. All this is very obvious, but it shows that the instrumental value of a tool, its being good or bad at doing anything, depends essentially on the choice of the purposes for which it is used.

On the other hand, focusing upon the dimension of efficiency means to set aside other problems that could be connected with the choice between oral or written forms of adjudication. When Eduardo Oteiza writes that orality is tightly connected with the publicity of proceedings, and publicity allows a public control, he is clearly right; he is also right in emphasizing that writing favors secrecy and lack of control, as it has often been historically. However, these extremely interesting remarks deal with the political and cultural meaning of the opposition between orality and writing, while here we have to restrain ourselves to the more modest and prosaic dimension of procedural efficiency.

Before approaching this topic a further disclaimer is due: this report has been written on the basis of my personal knowledge of some procedural systems, and also relying upon national reports, materials and information that were provided by some colleagues(\*). However, it does not aim at being a complete and detailed comparative analysis of various systems, nor can it provide adequate specific information about them. Rather, it is just an attempt to offer some remarks concerning the topics of orality and writing as factors of efficiency, supporting such remarks with the reference to some significant examples.

## II. CONCEPTS OF EFFICIENCY

A first step on the way of understanding what we mean by efficiency of civil litigation consist of asking ourselves the question: efficient for what? It is not a step on a slippery slope, or “ad infinitum”. It is just a right step for the simple reason that efficiency is “by itself” an instrumental concept: then it makes sense to wonder why, and in view of which final outcome, a procedural device should be efficient. Only after having decided it, in fact, one may wonder which procedure could be efficient. And with a further step one may wonder whether, and under which conditions, orality or writing may be considered as factors of efficiency.

In order to figure out a possible answer, the goals of adjudication should be defined, since in the light of such goals the problem of defining procedural efficiency can be put in its proper terms. This is –as everybody knows- a very difficult task, that cannot be accomplished here in a satisfactory way. However, with a very strong simplification a general distinction may be expressed in the following terms: the goal of civil litigation may be defined either: A) as pure dispute resolution or B) as dispute resolution by means of just decisions.

A) means that the goal of litigation is accomplished as soon as the dispute between the parties is put to an end. It is a matter of fact depending upon a number of conditions, but the most relevant aspect is that the contents and the quality of the final decision are not relevant: a mistaken or even illegal decision may well put the conflict between the parties to an end when, by whichever reason, none of them intends to pursue the dispute further on.

B) means that the goal of litigation is to put the dispute to an end, but only by means of decisions that should be considered as fair, correct, accurate, and just. In such a perspective the contents and the quality of the decision are extremely

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relevant, since they determine the real core of the purposes of litigation. Such purposes may or may not be achieved, but they should orient and determine the functioning of judicial mechanisms.

If the definition A) is adopted, it seems consistent to believe that efficiency should be defined basically in terms of speed and low costs. The quicker and cheaper the resolution of the dispute, the more efficient the litigation. In such a perspective one may think in general terms that judicial proceedings tend to be by themselves highly inefficient: often such proceedings are not specially quick, and often they are rather expensive. Then one might think of different techniques to solve disputes in much more efficient ways: according to Rawls the “pure procedural justice” was that of lotteries, and flipping a coin is an extremely quick and cheap way to decide anything. It may even be fair in terms of equal treatment, since each party has a 50% of probabilities of victory. These are not paradoxes. Not only a random solution of disputes is sometimes proposed: the fact is that if the quality of the solution is not relevant, because the real goal is to end up the dispute, then the most efficient methods are those that maximize the advantages in terms of time and money. These should be the only values deserving to be implemented.

If the definition B) is adopted, things are much more complex: on the one hand, even in this case the time and the money required to arrive at the resolution of the dispute are important, since the waste of time and money is counter-efficient in any judicial proceeding; on the other hand, factors concerning the quality and the contents of the final decision should also be considered. In order to be just, a decision has to be based upon a proper, complete and fair presentation of the legal aspects of their case by both parties, and an accurate, complete, and possibly truthful decision about the facts in issue, based upon a fair assessment of the evidence. Then a system of litigation is efficient when it is reasonably quick and inexpensive, but also when it is structurally oriented to reach fully informed, accurate and reliable decisions on the whole merits of the case. These two ideas of efficiency are both reasonable, and may be considered as the two faces of the same coin: however, they may be in conflict between each other, since a quick and cheap proceeding may lead to incomplete or incorrect solutions, while a just decision may require time, money and judicial activities of the parties and of the court itself. Therefore, in perspective B) an all-or-nothing choice is probably wrong if one thinks to take one face of the coin and to exclude completely the other: probably a fair solution may be achieved just by thinking of a compromise or a point of equilibrium between the two competing ideas of efficiency. On the other hand, it should be considered that between such ideas there is a relationship of inverse and complementary proportionality: if a system maximizes its efficiency in terms of speed and low costs, it probably will minimize its efficiency in terms of accurate and just resolution of the dispute; on the contrary, if efficiency as accurate and just resolution is maximized, probably efficiency in terms of reduction of time and money will be minimized.

### III. EFFICIENCY OF WHAT?

A civil litigation is an extremely complex machinery: talking of its efficiency by taking it as a unitary whole would compel the examiner to restrain herself to just a few general and useless platitudes. This is specially true in the present context, in which efficiency should be discussed from the standpoint of a sort of comparative evaluation of the advantages/disadvantages of orality and

writing. Therefore, and in order to achieve a better level of analysis, two premises seem to be necessary, that is: 1) the landscape may be reduced by setting aside the definition A) of the purposes of civil litigation. I am aware of the fact that many people are –more or less consciously- in favor of such a definition, but I am inclined to believe that it is inadequate and substantially mistaken. Then I shall use the privilege of the reporter that consists of choosing the theoretical perspective that she considers worth adopting. Therefore, from here onwards I will assume that the purpose of civil litigation is to solve disputes by means of accurate, complete and just decisions.

The premise 2) is that the machinery of civil litigation can be studied, specially in a comparative perspective, at least by distinguishing some main topics, that are: a) the presentation of the case; b) the presentation of evidence, c) the discussion of the case in view of the final decision.

### **1. An efficient presentation of the case**

With the terms “presentation of the case” the reference is made to several activities that the parties perform –with or without the active participation of the judge- with the purpose of defining and presenting their own “cases” to the court.

A) A case is started by means of the first pleadings that are filed by the parties, and first of all by plaintiff. It is well known that there are several rules, in the various procedural systems, dealing with the form and the contents of the plaintiff’s statement of claim and of the defendant’s response. For instance, a substantial difference separates the American federal “notice pleading” from the detailed statement of the facts that is required in most civil law procedural codes. The most interesting point here, however, is that as a rule the written form is required for the first pleadings. Only in some cases (as the various French “procédures orales”), and usually in small claims proceedings, the plaintiff is allowed to state her claim in an oral form to the court. Probably the explanation is that in some of such cases the poor and uncultured plaintiff is allowed to have access to the court without the assistance of a lawyer; another explanation may be that in small claims –and in other special cases as well- the cost of a written pleading could and should be avoided. However, the most important point is that only in limited instances the claim may be filed orally. On the other hand, one may wonder whether it is a common practice, since some experiences seem to suggest a negative answer. An oral statement of claim may be efficient in terms of less time and no money required, but it appears to be less efficient from a different point of view: the oral statement of claim will usually be put into a written form by the judge or by a clerk, and then the orality will be set aside and some time (and public costs) will be required.

Usually, therefore, writing is the common form of the first pleadings of the parties. This is not the most efficient form in terms of time and money, but it is for sure the most efficient form in terms of accurate, detailed and complete presentation of both parties’ cases. The American federal system is different, as we shall see shortly, but the civil law systems usually require the parties to state their claims, defences, legal arguments, facts and offers of evidence, from the very beginning of the case. This is the reasons why they define analytically what the contents of written pleadings are expected to be. The basic purpose of such rules is rather obvious: the law aims at inducing the parties to define their claims and defences, with all the legal, factual and evidentiary bases, from the first step of the

proceeding. In this perspective the written form is clearly efficient: a pleading that includes some claims and issues expressed by legal and factual statements, legal and factual arguments, conclusions of fact and law, and that may deal with a complex case, is difficult to imagine in an oral form. Even in this case, however, an immediate translation in a written form should be provided, in order not to miss the content and to preserve all the details of what the parties have said. A proceeding in which the first pleadings were based just upon the memory of what the parties said is clearly doomed to be uncertain and dangerous, that is: inefficient.

**B)** An essential aspect of the presentation of the case is the preliminary preparation of the case. Such a preparation usually aims at two main purposes: to define the subject matter of the case in view of the presentation of evidence and of the following steps of the proceeding, and –whenever it is possible- to solve the dispute without going further in the course of litigation.

In several procedural systems the proceeding is clearly divided into two phases: a “pre-trial” phase, mainly devoted to a further preparation of the case after the first pleadings, and possibly to an early solution of the dispute; and a “trial” phase, mainly devoted to the presentation of evidence and to the making of the final decision.

It is well known that in modern systems the pre-trial phase has become the most important part of the proceeding, essentially because of its capacity, at least in some systems -as in England and to some extent also in the United States- to put the dispute to an end avoiding the trial and the final judgment. This is the reason why most of the procedural lawgivers have devoted a special attention to the regulation of this phase and to the various procedural devices that it includes, mainly with the purpose of favoring an immediate resolution of the dispute. In the present context the variety of such regulations cannot be taken into adequate consideration; however, some remarks are due in order to understand the role that orality and writing perform in this part of the proceeding.

The ideal-type of a pre-trial phase derives mainly from the experience of the common law systems, although relevant differences exist between the American and the English pre-trial.

According to the Civil Procedure Rules enacted in 1999, in England the pre-trial phase may take different forms according to the kind of “track” that the judge chooses in every single case, mainly by considering its importance and complexity. In the “small claims track” there is usually only one hearing, in which the case is discussed by the parties before the judge, in view of a quick solution of the dispute. In such a case orality is efficient in terms of saving time and procedural activities. In the “fast track” there is a more complex pre-trial phase, which consists mainly of the exchange of written briefs and the disclosure and discovery of documents. Here writing is efficient for the preparation of the case, and usually no oral hearing is provided. In the “multy track”, that is used in more important and complex cases, the judge has a rather broad discretion in managing the pre-trial phase: usually, however, the preparation of the case is made in written form, and only in cases of high complexity a special hearing, named “pre-trial review”, is held with the purpose of clarifying and determining the relevant aspects of the case in view of the trial. Therefore, with the exception of small claims cases the orality is a rather rare occurrence in the English pre-trial, and the

use of written briefs and documents is considered as the most efficient way to prepare the case.

The American pre-trial performs a variety of functions, including the amendments of the first pleadings, the discovery of documents and of any kind of other evidence, as well as a more complete and detailed definition of the facts in issue. In the USA the pre-trial phase is very different from case to case: it may be quick and simple when the nature of the case allows it, or it may be extremely complex, long, expensive and burdensome in important and complex cases. Two important aspects deserve to be mentioned here. First: the pre-trial, and in particular the discovery, are completely dependent on the initiatives of the parties, who may determine how and which evidence is discovered. Second: although some discovery devices (as for instance the so-called “depositions”) are performed orally, actually most of them are performed in a written form, that is by disclosing and inspecting a variety of written documents. For instance, a deposition may be taken by oral examination (and a written record is drafted), but it may also be made by means of “interrogatories” in which a prospective witness writes down her answers to written questions (see Rules 27 (3), 30 (4) and 30 (c) and (f), 31 of the Federal Rules of Civil Procedure). Besides the discovery, the other procedural activities of the parties are performed by means of written briefs that are exchanged among the parties and submitted to the court. If the court so decides (in its discretion) the pre-trial phase may end up in a “pre-trial conference” which may be used, among other things, to schedule and plan the following course of the proceeding, to improve “the quality of the trial through more thorough preparation”, and to facilitate the settlement of the case (see Rule 16 (a) and (b) of the Federal Rules of Civil Procedure). In such a conference the court performs most of its managerial functions. However, it should be outlined that such a conference is substantially the only moment of orality inside a preliminary phase of the proceeding that may be extremely complex but is almost totally performed in a written form.

In modern civil law procedural systems there is a variety of provisions dealing with the preparation of the case in a phase that takes place before the presentation of evidence. Such provisions cannot be analyzed here in the details, but some examples may be useful in order to understand how orality and writing may perform different roles in this phase of the proceedings.

A first very interesting example is that of Spain. After a long historical tradition in which the written form was the only form of civil litigation, the “Ley de enjuiciamiento civil” enacted in 2000 introduced a dramatic change into the structure of the proceeding. The most important aspect is represented by the “audiencia previa”, that is a preliminary hearing in which many things are done: attempts to achieve a settlement, solution of prejudicial issues, amendments of the pleadings, definition of the contested and not contested facts, offers of evidence and decision about the admission of evidence. In a world, everything that is necessary either in order to end up the case immediately, or in order to clarify, simplify and determine the subject matter of the case and the facts in issue, has to be done in the “audiencia previa”. Everything is done orally, that is by means of oral discussions and arguments by the parties, with the active participation of the judge. In such an extremely important hearing, orality plays a fundamental role, and is a necessary and substantial factor of efficiency: if all the activities that are performed in the “audiencia” were performed by means of written briefs and

orders, they would require a huge amount of time. The efficiency of the system has been tested in practice, since the statistical data show a dramatic reduction in the length of the Spanish civil proceedings. As to the Spanish system, it is also worth mentioning a special “juicio verbal” which is applied in simple cases in which speed is specially important: in one oral hearing all the activities required are performed, including the presentation of evidence, and the hearing ends up with the final judgment.

A second very interesting example, but in a rather different sense, is offered by Germany. The German “Zivilprozessordnung” ascribes a central role to the so called “mündliche Verhandlung”, that is to the principle of orality in the preparation and discussion of the case. The preparatory phase may take two forms depending on the importance and complexity of the dispute: in less important cases the preparation is made in a preliminary oral hearing named “früher erster Termin”, while more important and complex cases require a pre-trial phase that is developed in writing (the so called “schriftliche Vorverfahren”). The choice is made by the judge according to the features of the case and to the probability that an oral hearing may lead to dispose of the case. In the preliminary oral hearing the parties and the judge deal with all the aspects of the case, with the aim of determining the issues and the disputed facts in view of the following trial. When the preparation is made in a written forms everything is much more complicated: there is an exchange of briefs among the parties and briefs are submitted to the judge, in order to determine all what is needed in view of the trial. The written preparation is more efficient in complex cases, because it allows the parties to develop their pretensions and arguments in a complete and detailed way, and then to prepare themselves adequately for the trial. Despite the assertion made in § 128 I of the ZPO, concerning the oral character of the German proceeding, according to Peter Gilles the practical experience shows that the actual role of orality is reduced to a bare minimum: it seems, therefore, that the German litigation is in fact an “Aktenprozess”, that is a proceeding that is mainly made of written documents, briefs and records.

It seems that something similar happens in several Latin American systems: in such systems various provisions state that the litigation should be based upon the principle of orality, but such a principle is not applied in practice. Even recent reforms aiming at least in part at introducing this principle (as for instance in Argentina, Brazil and Mexico), seem to have completely failed: the consequence is that orality is virtually nonexistent, and the whole preparation of the case is made in writing. This is of course an important factor of inefficiency that results in delays, waste of time, cumbersome and complicated proceedings. However, the problem is to understand the reasons (traditions, advantages for lawyers, problems concerning judicial organization, and so forth) why the practice of litigation is still based upon writing, notwithstanding the efforts made in order to introduce a fair amount of orality.

The third interesting example is Italy. In theory a civil litigation should have an oral form (art.180 of the Italian code of civil procedure), and recent reforms attempted to implement this principle in the preliminary phase of the proceeding. Unfortunately such reforms were drafted in such a mistaken way that in fact the opposite outcome has been achieved. Art.183 of the procedural code now provides for a hearing in which the parties (i.e. their lawyers) appear before the judge in order to prepare the case in view of the presentation of evidence.

However: on the one side, the attempt to settle the case could be made only in another hearing, and only if both parties apply for it (which almost never happens); on the other side, the parties are allowed to amend their pleadings, to develop their arguments and to make their offers of evidence, in written briefs that are submitted to the judge after the hearing. Also after the hearing the judge will decide, by a written order, about the admissibility of evidence. In short: the hearing is devoted just to fix the dates for the further submission of written briefs; the judge does not perform any managerial function, and the preparation of the case is made exclusively by means of written briefs. It means that there is no clarification or simplification of the issues and of the arguments that the parties submit in their pleadings, and there is almost no managerial role of the judge. Moreover: a sort of sanctification of the written preparation of the case may be found in a special proceeding for corporate matters that was enacted in 2003 with the intention of making a test for a broader reform of the code of civil procedure. Such an intention fortunately failed, but the most important point is that such a proceeding includes a preliminary phase that takes place only by the exchange of a relevant number of written briefs among the parties, without any participation of the judge. It means that such a phase is usually long, complex, expensive, and abandoned completely to the discretion of the parties, without any control by the judge on what the parties are doing and saying.

Looking at the Italian procedural system one could think, however, that at least in small claims procedure, that is used before the justice of the peace, orality could play a significant role. Actually art.320 of the Italian procedural code says that the proceeding should be ended up in only one oral hearing and in a deformalized way. However, the practice is that much of the formalities characterizing the ordinary proceeding are followed, and that the oral discussion before the judge is reduced to a minimum.

From this limited and sketchy review rather ambiguous and uncertain remarks may be derived. On the one hand, actually, it seems that litigation in small or relatively simple cases requires forms of oral preparation. An oral discussion is quicker, less expensive and much simpler than a written preparation, and therefore should be considered as more efficient. The examples of England, Spain, Italy and other countries, are rather clear in this sense.

However, it should be considered that such an efficiency –essentially in terms of saving time and money- has some costs in terms of completeness and fair development of the case, and therefore in terms of completeness and accuracy of the final decision. If there is one reason to use orality in small claims is just that they are “small”, and therefore that they do not deserve the full preparation that is required in bigger cases. One should consider, at any rate, that a claim that is small in its amount may be complex and even important from the point of view of the legal issue it involves: then it should deserve the full and careful preparation that an oral hearing probably does not provide.

On the other hand, one should take into account that the oral preparation in small and simple cases is successful in England, in Spain and to some extent in Italy, but the practice in Germany, and in other systems as well, indicates that even in these cases the written form is preferred. There are, then, reasons to consider that a written form may be efficient even in small claims cases. A confirmation of this may be found in the European regulation n.861 of July 11,



2007, dealing with proceedings in transnational small claims cases, in which a simplified type of proceeding, based upon written briefs, is regulated.

When complex and important cases are considered, it seems that the general tendency is to make use of complicated, articulated and essentially written procedural mechanisms. This is true, notwithstanding the various differences existing among these systems, in England, in the United States, in Germany, in Italy and in many other countries. It seems that from this point of view the exception is just Spain, since the oral preparation of the case in the “audiencia previa” seems to work in a very satisfactory way even in important and complex cases. Apart from the Spanish case, the reason why a written preparation of the case is preferred in important types of litigation is rather clear: the exchange of a number of written briefs among the parties, the submission of such briefs to the court, the filing of written applications to the judge and the issuing of written orders by the judge, seem to ensure a full, detailed, complete and articulated development of any relevant (or even irrelevant) aspect of the dispute. From this point of view, and assuming that a full-fledged preparation of the case is needed, it seems that the written form of litigation is more efficient.

#### IV. ORAL AND WRITTEN PRESENTATION OF EVIDENCE

The oral or written form of the presentation of evidence is also a classical topic of procedural theory, mainly in the domain of civil law procedural systems. In common law systems it never was a real subject matter for discussion, because of a very obvious reason: insofar as the model of the Anglo-American civil litigation has been the concentrated trial in the presence of the jury, the orality of the presentation of evidence was a practical necessity. In civil law systems, on the contrary, the tradition since the era of the roman-canon proceeding was based essentially upon the use of written evidence, while oral evidence was presented only in a limited number of cases. Even testimonies were often presented in a written form, that is by means of records drafted by clerks or notaries. As a reaction to this tradition, which led to burdensome, delayed and formalistic types of litigation, the overriding purpose of many reformers was, at least since the end of the 19<sup>th</sup> century, the introduction of orality in the presentation of evidence. Hence the origin of a wide literature in favor of orality, and a trend of reforms, in many civil law countries, aimed at adopting oral forms for the presentation of evidence. However, all this has mainly to do with the myths that were mentioned above. The practical reality, considered in the light of procedural efficiency, requires a deeper and somewhat different insight.

First of all, it has to be considered that in every modern systems of litigation a very frequent way to prove the facts in issue is the presentation of documentary evidence. In most corporate, commercial, financial and contract cases the typical evidence is made of a more or less broad collection of documents; various kinds of documents are used also in any other kind of litigation, including family, torts, and so forth. Moreover, almost all the so-called “atypical” items of evidence, that are usually admitted in most procedural systems, are in fact written papers. Here it is not important to analyze the nature and the variety of such an array of documentary evidence, nor is it relevant to examine the way in which such items of evidence are authenticated or checked. The relevant point is that in a huge proportion of cases the oral presentation of evidence does not occur simply because the evidence that is presented is not oral. This is not a matter of efficiency: it is just the consequence of the fact that in the

current market of legal relationships many people are inclined to draft and to use documents, for a variety of reasons that are not worth discussing here.

A second factor that deserves to be taken into consideration, may be defined as the transformation of oral evidence into written evidence. Such a transformation may occur at least in two main ways. The former way is because of necessity. As we shall see shortly, the oral presentation of evidence is based upon the assumption that the trier of fact forms her own impressions about the facts in issue by means of her direct contact with the witness, and then makes her decision immediately according to such impressions. But it may happen only when the decision-making follows immediately the presentation of evidence (and, obviously, when the trier of fact is the same person who attended the presentation of evidence). These conditions are fulfilled in some cases, but in many cases they are not. If the presentation of evidence is not concentrated in one hearing, and if the judgment is not delivered –by the same person- immediately at the end of the hearing, as it happens in several systems (as for instance in Italy), the originally oral evidence is actually transformed into written evidence. Months or years after the presentation of an oral testimony, the trier of fact will not be able to rely upon her direct perceptions and memories, simply because it is actually impossible: then she will rely upon the written record of the examination of the witness. Obviously it happens when the person who makes the decision is not the same person who attended the examination of a witness, because the judge has been changed during the proceeding or because the judge belongs to an appellate court: in all these cases the evidence used to make the decision is actually written. One should distinguish, moreover, between “verbatim” records, that reproduce word by word what has been said, and records that merely include a summary of the oral presentation of evidence: at least in this second case (that is rather common, as for instance in Italy), it is clear that the written document that is used at the moment of the decision-making has little to do with the original oral examination of the witness.

### **1. Examining witnesses**

Focusing now the attention upon the presentation of oral evidence, we may take into consideration its main example, that is the oral examination of witnesses. In very general terms it is worth observing that examining a witness is not a specially efficient method to get some information, since reading a written statement would require much less time, but on this point we shall return shortly.

Assuming that a witness has to be examined orally, a relevant question concerns the efficiency of the method that is used. In this context efficiency may be defined in terms of capacity of the method to achieve at least two purposes: a) obtaining from the witness anything she knows about the facts in issue; b) checking the credibility of the witness and the reliability of her answers. Both purposes are important in the perspective of arriving at a truthful decision about the facts in issue, since an incomplete or unreliable testimony would not be useful for such a goal.

In this perspective a comparative evaluation may be sketched about the two main techniques that are used to examine witnesses.

One technique, that is traditional in most civil law systems (with some exceptions, as for instance Spain after the 2000 reform), is based upon an official examination performed by the judge, who ask questions to the witness and gets

her answers. In many cases the judge follows the suggestion of the parties who called that witness (not necessarily in France, where the judge may examine the witness on any fact in issue: see art.213 of the code of civil procedure). Usually the judge may ask the witness for clarifications; the parties have no role to play in the examination and cannot ask directly questions to the witness. In practice, this technique means that usually the judge limits herself to ask the witness a list of questions that were previously submitted by the parties and were admitted by the judge as relevant to establish the facts in issue. One may wonder whether this is an efficient method to obtain complete information from the witness and to check her reliability. The answer that can be given by intuition, but also on the basis of the practical experience in several systems, is: no. In most cases the judge does not make use of the more or less limited powers that she has, and the examination of the witness is a sort of bureaucratic interrogation dealing only with some aspects of the facts in issue that have been indicated by the parties. Almost no control upon the credibility of the witness is performed by the judge or by the parties.

The other technique is the well known system based upon direct- and cross-examination of witnesses performed by the parties' lawyers. This system is in itself a myth, celebrated by thousands of films and TV serials, and relies upon the authority of John Henry Wigmore, whose famous dictum was that cross-examination "is the greatest legal engine ever invented for the search of truth". It is probably under the influence of this myth that some civil law reforms (as the civil procedural code in Spain and the criminal procedural code in Italy) attempted to introduce something similar to the Anglo-American method of cross-examination. Such a topic is too broad and too complex to be discussed here, but some remarks can be made from the point of view of the efficiency of the method. First of all, the current practice of cross-examination in the United States leads to conclusions that are much less optimistic than Wigmore's: harassments and abuses are rather frequent, and one could wonder whether the "mental duel" between a well trained lawyer and a lay witness, or the fight between aggressive lawyers, is the most efficient way to elicit the truth. There are different opinions about this point: this uncertainty cannot be solved here, but at least some doubts are justified about the efficiency of cross-examination as a device for obtaining reliable information about the facts in issue. It is also commonly said that cross-examination is particularly efficient as a means to check the credibility of the witness. This is probably true, at least insofar as the cross-examining lawyer does not push too far her assault to the unfavorable witness (which she is expected to do, specially when she knows that the witness has told the truth).

## **2. Immediate contact with the evidence**

Setting aside the problems concerning the methods for the oral examination of witnesses, we may now focus upon the point that seems to be the basic core of any kind of oral evidence, that is the direct and immediate contact between the trier of fact and the witness. The traditional view is that if the judge can only read the written record of an examination performed by another person, she cannot appreciate the reliability of what the witness said, nor can she establish whether the witness is or is not credible. On the contrary, it is said, the immediate personal contact of the trier of fact with the witness, that may occur only in the context of an oral examination, allows the trier of fact to appreciate the answers given by the witness, to develop a complete and thorough examination, and to

evaluate the credibility of the witness: therefore, the trier of fact will be in the ideal position to determine the proper probative value of the testimony.

This is the received wisdom, according to which the oral presentation of evidence is immensely more efficient than the presentation of a written record. As traditional and widespread as it is, however, this wisdom does not prevent some doubts. One of such doubts is that such a belief relies upon a sort of armchair psychology according to which the trier of fact is able to ascertain the credibility of the witness just by observing directly her demeanor, watching her “body language”, listening to how she speaks, considering how she answers, with boldness or blushing, and so forth. In short: the direct observation of the witness’s verbal and physical behavior would empower the trier of fact to establish whether or not the witness has told the truth. But everybody understands how uncertain and even unlikely is such a sort of psychological analysis that the trier of fact is supposed to perform on the witness. Most judges are not specially trained in testimonial psychology; at best some of them may have made some experiences in their judicial practice. When the triers of fact are lay jurors, the only basis of their psychological insights are the rough generalizations (that more often than not are based upon prejudice and bias) provided by common sense. From this point of view, the oral presentation of evidence has a doubtful efficiency as a method to obtain reliable information from credible witnesses. At any rate, it has to be excluded that the immediate contact of the trier of fact with the witness may lead to a sort of divination or of subjective intuition about whether the witness told or did not tell the truth. In other words, the immediate contact should not be a means for irrationalistic and inscrutable insights into the mind of the witness; on the contrary, it should give the trier of fact the opportunity to collect information for a rational assessment of the witness’s credibility, based upon the reference to rational standards of evaluation. Correspondingly, the trier of fact should be able to justify her evaluation in the reasoned opinion included in the judgment.

As to the completeness of the information about the facts, it depends on the method by which the examination is performed. The judge that examines a witness “*ex officio*” may not be specially interested in carrying out an autonomous and thorough examination, and in several cases she has no power to do that. On the other hand, the parties’ lawyers performing direct- and cross-examinations may not be specially interested in searching the complete and objective truth of the facts in issue: their main interest is to win their own case, not to establish the truth, which means that the truth is searched by a lawyer only when it is favorable to her client (and perhaps not even in this case).

From the point of view of the “economic” efficiency the oral presentation of evidence raises some doubts as well. Examining a witness usually requires a rather relevant amount of time, specially when she has to be examined and cross-examined. Moreover, the preparation of the examination requires time to the parties’ lawyers, either in order to submit to the judge the facts on which the judge should examine the witness, or in order to prepare the direct and cross-examination. All this means, in both cases, that time has to be available, and money should also be available in order to pay the fees of the lawyers involved. Further problem of time and costs arise when, as it happens rather frequently, the witness lives far from the court, perhaps in a different country, and she has to travel to the place where the court seats or has to be examined by means of rogatory devices.

Reasons like these justify the trend that is emerging in several systems, in favor of the use of written testimonies instead of oral ones. The practice of “affidavits”, that is of written statements with a testimonial content, is frequent in common law systems. Moreover, the Rule 32 (a) of the Federal Rules of Civil Procedure allows the parties to use as items of evidence the written depositions that were taken in the course of pre-trial discovery. A similar possibility exists in England as well. Actually it means that written testimonies are frequently admitted. In civil law systems the use of written testimonies was traditionally excluded, but now it is more and more commonly admitted. A very relevant example of this phenomenon are the “attestations” regulated by arts.200-203 of the French procedural code. Another interesting example may be found in Germany, where the § 377 n.3 of the ZPO provides that the court, on its own discretion, may decide that a testimony be given by answering to written questions. Similar provision are included, in Italy, in the rules concerning arbitration (see art.816-ter, al.2, of the code of civil procedure), and now in art.9 of the European regulation of transnational small claims quoted above. Therefore, it should be taken into account that the traditional oral type of evidence, that is testimony, is becoming –so to say- less and less oral. The reasons of this change are simple and practical: in many cases it is quicker and less expensive to read written statements instead of examining orally a witness. The traditional oral examination is still useful, however, when the problem arises of checking directly the reliability of the author of such statements: as a rule, actually, the court may always order the direct examination of the witness in any case in which the written testimony does not appear to be satisfactory in terms of credibility and reliability. On the other hand, written testimonies are usually accepted when the evidentiary problem is rather simple (as for instance when the problem is just to confirm the date or the terms of a contract). When complex facts have to be established on the basis of the direct knowledge of people who had an immediate perception of those facts, and when their reliability is doubtful, then the only available device is the oral examination of witnesses.

#### V. THE IDEAL MODEL OF A CONCENTRATED ORAL TRIAL

As abovesaid, orality can be an efficient form for the presentation of evidence when two main conditions –beside the immediate contact of the trier of fact with the sources of evidence- are fulfilled, that is: concentration and immediate decision-making just at the end of the final hearing.

The concentration of the proceeding, and in particular of the presentation of evidence, is necessary in order to preserve the oral character of the evidence. This is the main reason why the procedural systems that are oriented to implement the principle of the orality of evidence provide for single and concentrated hearings in which all the items of oral evidence should be presented without any interruption. This is traditionally true in common law procedural system, but it is also true in most civil law systems (such as Germany, Spain and others), in which the evidence should be presented in a single hearing.

In some systems, however, the presentation of evidence is not concentrated: Italy is among the main examples of it. Actually evidence is presented in a number of hearings, with long delays (of months, if not of years) between each other: the proceeding goes on “by instalments”, so that when ten witnesses have to be examined it can require three or four hearings and –perhaps- a couple of years. Only when the lawgiver aims at implementing effectively the

principle of orality, mainly for sake of speed, the rule is that all the evidence should be presented in a single concentrated hearing: the main example, in the Italian system, is offered by the proceeding in labor disputes.

When the presentation of evidence is not concentrated, the consequence is not only that it will require a much longer time, and then that its efficiency is impaired, but also that the written record will be the only source available when the trier of fact will make her decision about the facts in issue.

An immediate decision is also an important factor of the orality: as abovesaid, if the decision on the facts is made months or years after the hearing in which the evidence was presented, the real source of the decision will be the written record instead of the oral evidence. Of course it implies a further sub-condition, that is: the trier of fact that makes the final decision has to be the same person who attended the hearing in which the witnesses were examined. It is obvious because if it does not happen, once again the source of the final decision making will be a written record.

These conditions support the definition of what may be considered as the “Idealtypus” of an oral proceeding: it is a trial-type hearing in which most of the procedural activities are concentrated and are performed in an oral form, and that ends up with the final decision-making. The model of such a hearing is rather simple: a) it may start with opening speeches of the parties’ lawyers presenting and explaining each own’s version of the case; b) then it goes on with the oral presentation of evidence; c) then the lawyers of the parties will perform a final discussion of the case, drawing their consequences from the presentation of evidence, submitting to the court their conclusive legal arguments and asking the court for the decision they consider adequate as a resolution of the dispute. On such a basis: d) the court delivers its final judgment just at the end of the hearing. Sometimes the hearing may include other moments, as the direct examination of the parties and the court’s attempt to promote a settlement, but these factor do not change substantially the structure of the model.

Such a model is followed in many systems. Of course it happens in common law countries, according to a long tradition based upon the presence of a jury: then oral and concentrated trial was a practical necessity in proceedings at common law. An indirect confirmation of it is given by the fact that the same did not happen in the proceedings in equity, that were essentially written and non-concentrated, mainly because the jury did not exist. In England, however, things have changed in the last decades and mainly with the 1999 reform. On the one hand, the civil jury has virtually disappeared since several decades; on the other hand, the Civil Procedure Rules introduced significant reforms of the pre-trial phase of the proceeding, with the consequence that the trial judge is already informed about the claims and defenses of the parties, the documents, the expert reports and the written testimonies produced by the parties themselves. Then the trial is usually very simple: when necessary, the judge will allow just the cross-examination of a witness if her credibility is in issue. Therefore, orality is reduced to a minimum.

In the United States, on the contrary, the trial still follows the model just described: the parties’ lawyers deliver their opening statements, then the witnesses are examined, then the parties’ lawyers deliver their closing speeches and then the jury (in the not unfrequent cases of jury-trial) delivers its verdict. When there is

no jury, the basic structure of the trial does not change substantially; it just may be simplified to some extent, and the judge may use written documents and read the records of the presentation of evidence before delivering her final judgment.

The same model is followed also in some civil law systems, when the procedural law is oriented to implement the principle of orality. It is for instance the case of Spain: the so-called “juicio” is a hearing in which the evidence is presented and the parties develop their final arguments in view of the decision. It is also the case of Germany: the so-called “Haupttermin” is a hearing that corresponds perfectly to the model: first the parties present their cases, then the oral evidence is presented, and then the parties submit to the court their closing arguments. Even in some systems in which the orality of the ordinary proceeding is not generally ensured, the model is followed in some special proceedings: in Italy, for instance, it is used in some important special proceedings, as in the case of labor and corporate litigation.

On the other hand, the model is not followed in a variety of systems that did not adopt the trial-type structure of proceedings. Besides various Latin-American countries, the main examples of this different trend are the ordinary proceedings in France and Italy. In both countries the proceeding is not concentrated, and evidence is presented in various hearings depending upon the way how the case is managed by the court. When all the items of oral evidence have been presented, the evidentiary phase of the proceeding is closed and the case goes towards its final steps. The final discussion of the case may be regulated in various ways. In France, for instance, a special final hearing is devoted to the oral discussion of the case (the so called “débats”), with the lawyers of the parties developing their arguments and conclusions under the direction of the presiding judge (arts.430, 440 of the code of civil procedure). In Italy the judge fixes a hearing in which the parties finally state their conclusions. After this hearing the parties submit to the court a first final brief containing all their arguments concerning the facts in issue and the legal issues that shall be decided; after that, each party may submit another brief containing replies to the other party’s concluding brief. So the final discussion of the case is made in a written form, and each party is entitled to file two concluding briefs. The law provides the possibility of combining one brief for each party with an oral discussion (art.281-quinquies of the code of civil procedure), and even to substitute the final pleadings with an oral discussion (art. 281-sexies), but these semi-oral or oral forms are seldom used in practice.

Looking at such different systems, and mainly taking the final discussion of the case into consideration, some remarks may be made in the perspective of efficiency.

On the one hand, the model of a trial-type hearing described above seems to be specially efficient in terms of time: the concentration of the presentation of evidence in one or a few continuous hearings is not only a necessary condition for the implementation of orality, but is also a means to prevent delays and waste of time. In such a model, the oral form of the final discussion of the case, in view of an immediate decision, is a necessary part of the system. Moreover, a final discussion included in a concentrated hearing tends to be relatively short, and then it is also efficient in terms of time. However, this does not mean necessarily that such a system is always working well in practice. Actually Peter Gilles, referring to the German situation, says that the oral discussion is usually avoided, with the

consequence that the decision is made on the basis of the written pleadings. This is efficient in terms of time, because the time of the oral discussion is spared, but it is very doubtful whether it may be efficient in terms of a fair and adequate treatment of the case. This is a strong suggestion to consider not only the abstract models provided by the law, but also –and particularly– the practical implementation of such models.

The French “débats” are usually performed in oral form and in a special hearing according to the provisions of the French procedural code, but it would be interesting to check how efficient they are for a thorough discussion of the case, and whether or not the oral discussion is reduced to a quick formality. Moreover, the “débats” may be performed by means of written briefs: in such a way the orality of the discussion is completely set aside. On the other hand, Loïc Cadet writes that when the discussion is really oral it may imply several problems of fairness between the parties, because of possible ambushes and unfair tactics.

On the contrary, it seems that the Spanish “juicio” is performed orally and efficiently, both for the presentation of evidence and for the final discussion of the case: Fernando Gascón writes that this is one of the main factors that contributed to a dramatic reduction of the length of the Spanish proceedings.

Finally, systems like the Italian one, in which there is no oral conclusive discussion, and the final treatment of the case is made by means of written briefs, is clearly non-efficient in terms of time (and then of costs, since lawyers are paid also “by brief”). However, such a system seems to work efficiently in complex cases, not in terms of time but in terms of the possibility of developing a fair, complete and thorough final analysis of the case, and of submitting to the court in a due form all the factual and legal arguments that each party finds to be relevant in view of an accurate and fair decision.

## VI. A FEW WORDS ABOUT NEW TECHNOLOGIES

Of course in this context there is no chance to approach in a reasonable time the topic that Peter Gilles calls the “electronification” of civil litigation; nor is it possible to deal with the somewhat narrower but nevertheless too broad topic concerning computer documents. Such topics have important connections with the general problem of the efficiency of civil litigation, but they would lead the discourse too far from the core of this report. On the other hand, there is no possibility here to deal with the general cultural and philosophical problem of whether the new technologies are creating new forms of language and communication that are neither oral nor written.

However, some remarks can be made with a specific reference to the problem of orality and writing as factors of efficiency in civil litigation. A premise is needed here: I substantially share Peter Gilles’s opinion according to which – notwithstanding the appearances– we are not witnessing any kind of revolution concerning the forms of litigation, but only a “reform of the form” that does not imply a “reform of the content”. Actually I believe that in some cases the use of the new techniques may have a positive role in terms of efficiency, but it occurs essentially in terms of preservation of what has been originally said or written.

An example of that is the sound-recording or the videotaping of an oral hearing, for instance of the examination of a witness (as it seems to be the current regular practice in Spain). Of course it seems to be extremely useful because the



judge –and even more the appellate judge- will be able in any moment to hear what was said or –much better- to watch what happened in that hearing. The advantages of such a system are obvious: it avoids the transformation of oral evidence into written evidence, since what was oral remains oral, and it allows anyone to perceive exactly what happened during the oral hearing. No doubt about the advantages in terms of orality, but: on the one hand one could observe that it is only a way to preserve a representation of the hearing. On the other hand, one may observe a very obvious thing, that is: watching a video is not the same thing as living directly the situation represented. Even when we may safely exclude manipulations or forgeries, we are exposed to a representation in which we cannot intervene and that we cannot modify. These problems may be relevant, for instance when we refer to the immediate contact of the trier of fact with the witness: a film is not the reality. Things may be different, of course, in the case of a video-conference, since all the participants can perform an active role in determining what's going to happen. Here, however, the technique is not aimed at preserving a representation of the hearing: it provides a different way of making the hearing.

On the other hand, one has to consider that in many cases the “electronification” deals with modern systems of transmission and –once again- of preservation of documents. Thousands of pages of documents may be stored in a computer or in a database, and can be sent everywhere in seconds. The briefs and all the written documents of a proceeding can be served, filed, exchanged and submitted in a time that is even hard to measure. There is no need to insist describing the advantages of all this: they already belong to our everyday experience. One could just observe that they determine a huge increase in the efficiency of writings. An “electronified” proceeding is a proceeding that is composed of a sequence of written briefs, documents, affidavits, orders and judgments: it is essentially a written proceeding. The efficiency that is produced by the use of the new technique not only does not change the substantial nature of civil litigation, but is going to become a very strong factor in favor of writing. Not only: since the transmission of e-messages requires extreme precision (we all now know what happens if we dial a wrong letter in an e-mail address), we are probably going towards what Peter Gilles calls a “hyperformalization”.

Then the use of modern sophisticated techniques does not clearly move the balance of efficiency in favor of orality or of writing, although such techniques seem to be easier to use in support of a written form of proceeding. At any rate, the use of such techniques has –at least so far- a huge negative factor in terms of efficiency: costs.

## VII. FINAL REMARKS

From the sketchy overview developed in the preceding pages some tentative final conclusions may be drawn.

First of all, it has to be emphasized that in terms of efficiency no absolute preference can be given in general terms either to orality or to writing. On the one hand, each of the two forms may be efficient for some purposes but not for other purposes: orality is efficient in terms of saving time and money, but is not necessarily efficient in order to prepare accurate and truthful decisions on the merits of the case; writing may be efficient also in terms of saving time and specially for the preparation of complex cases, but is not efficient when the

problems arises of assessing the reliability of oral evidence. At any rate, it seems improper to speak in terms of oral or written form of civil litigation as a whole: all the existing systems rely upon various combinations of both forms, and often within the same system there are predominantly oral or written kinds of procedures.

Another remark is that the efficiency of oral or written procedural devices should be considered in the context of every specific type of litigation that is taken into account. If the main value that is pursued by the lawgiver is the speed of the dispute resolution, and correspondingly a concentrated proceeding is provided, then orality is clearly the most efficient form: concentration does not allow the exchange of written briefs and barely tolerates the use of written evidence. Then everything, from the preparation of the case to the presentation of evidence and the final discussion, should be made in an oral form. The ideal model of an oral trial described above is a clear illustration of it. Things are different, however, when and to the extent that concentration is not considered as necessary, because priority is ascribed to other values, which therefore prevail upon the speed of dispute resolution. It happens, for instance, when policy reasons taken into account by a lawgiver suggest to let the parties free to determine the pace of the proceeding, since the “adversarial values” are considered as more important than the “public” interest to a quick disposal of disputes: this is the case of the Italian special proceeding in corporate matters, as well as the case of the American discovery. In such situations the basic choice of the lawgiver is not the efficiency of the procedural system but the protection of the parties’ freedom to perform their competition with no constraining rules and no managerial powers ascribed to the judge. Correspondingly, there is no need of orality, and the use of written briefs and documents becomes the rule.

A further remark is that the efficiency of oral or written devices depends, at least to some extent, on the kind of disputes. In many cases an oral, simplified and concentrated trial-type hearing is provided for small claims: in these cases orality is a factor of simplification and then of efficiency in terms of time and money. Orality is also efficient in the preparation of simple cases, independently of the amounts of money involved, as for instance in the German oral preliminary phase of the proceeding. However, in other cases the exchange of written briefs and the reading of documents may also be efficient in terms of time. On the other hand, when the facts and the issues involved in a dispute are complex, the resort to written forms of preparation is an almost general trend. The examples are various, from the American discovery to the English “multy track”, to the German written preliminary phase. The reason underlying this trend seems rather clear: briefs and documents seem to be more efficient for the purpose of dealing with complex issues in a complete, detailed and thorough way; the fact that a written preparation is not efficient in terms of time and money may not be specially relevant. However, Spain provides with a significant counterexample, since orality is used in all kinds of disputes, both in the “audiencia previa” and in the “juicio”.

In this perspective, the main problem seems to be that of adapting the proceedings to the needs of the specific case. Two dangers should be prevented from this point of view: the danger of oversimplification, that could arise when simple oral forms are used to deal with complex and difficult cases, and the danger of overburden that exists when complex written formalities are used in

simple cases. It is rather unlikely that both these dangers are avoided once forever by a legislator choosing abstractedly which kind of proceeding –oral or written, concentrated or not concentrated- has to be followed, and in which kinds of disputes. It is what happens in some systems, as for instance in Italy, but this is a wrong approach to a complex and difficult problem. The experience of more mature systems, as for instance England and Germany, is that the judge should decide case by case, playing an important managerial role, how the single litigation should proceed in the most efficient and adequate way. Then it would be up to the judge to decide, considering the specific features of the single case, whether a simple and oral preparatory hearing is adequate or if a written preparation is necessary, whether the witnesses should be examined orally or written testimonies may be sufficient to prove the facts, and whether the conclusive discussion of the case in view of the final decision deserves an exchange of written briefs or may be performed by means of oral closing speeches. Correspondingly, the main standard should be flexibility of the forms of litigation, under the careful control and the active management of the judge.