RIGHT OF ACCESS TO A COURT AND RIGHT TO A FAIR TRIAL IN SLOVENIAN CIVIL PROCEDURE

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1. Introduction

Slovenia became an independent state after the dissolution of Yugoslavia in 1991 and at the same time this meant a shift to a parliamentary democratic system and a market economy. Slovenia has become contracting party to the European Human Rights Convention (hereinafter the ECHR) in 1994. As the first one among former Yugoslav republics it joined the European Union in May 2004.

The Slovenian Constitution (adopted in 1991) contains an extensive chapter on human rights and fundamental liberties (Part II; Art. 14-65). Many of these concern guarantees in civil procedure: right of access to court, right to independent and impartial judge, pre-determined by law, right to trial within reasonable time (all Art. 23); right to due process (Art. 22); right to appeal (Art. 25); right to public trial (Art. 24). International treaties in the field of human rights, such as the ECHR are directly binding and are applied by Slovenian courts. However, as all of the rights and freedoms, contained in ECHR, are guaranteed also by the Slovenian constitution at least to the same degree, the Constitutional Court usually examines allegations regarding violations of the ECHR in the framework of examining the violation of corresponding rights under the Constitution.[1] For example, a party's allegation of a violation of a right of access to court, guaranteed by art. 6 ECHR, would be considered (and reasoned) from the viewpoint of the right to judicial protection, guaranteed by Art. 23 of the Constitution. In any case, the case law of the European Court of Human Rights has a strong influence on Slovenian courts.[2] Especially the Constitutional Court often relies on the case law of the ECHR and its positions concerning particular procedural guarantees (such as right to be heard and right of access to court) – which shall be evident also from the forthcoming presentation of the case law of Slovenian Constitutional Court concerning right of access to court and right to fair trial. Judgments of the European Court of Human Rights are often cited and referred to in decisions of the Constitutional Court.

According to Art. 160.6 of the Constitution, one of the powers of the Constitutional Court is also to decide on constitutional complaints in case of alleged violation of human rights and fundamental freedoms (it is a system that on a national level roughly corresponds to the individual complaint pursuant to the ECHR on the

[1] *See e.g.* decision of the Const. Court, Up 262/99, 25.4.2002.
[2] A. Mavčič, `The influence of the European Court on human rights case-law on Slovenian constitutional case-law : the right to fair trial´, *Revue de justice constitutionnelle Est-Européenne*, 2003, numéro spécial, str. 103-123.

international level; with one important difference; if the Constitutional court finds that a judgment of a regular court violates human rights, it has, unlike the European Court for Human Rights, powers to quash the judgment and order a retrial. A party, who alleges that a certain human right was violated by a court judgment, can, after exhaustion of all available remedies within ordinary courts proceedings, file a constitutional complaint with the Constitutional Court.[3] The Constitutional Court cannot be regarded as a further court of appeals for civil cases. When deciding upon constitutional complaints, the Constitutional Court is not empowered to control the correctness of the application of procedural and substantive law and finding of facts, but only whether an ordinary court has interpreted laws in such a manner that contravenes a certain constitutional right.[4] The system of constitutional protection is not complete if a law itself is in conformity with a constitution, but is then interpreted in an unconstitutional manner by a court, which applies it in a individual case.

Both the provisions of the constitution as well as of the ECHR concerning procedural guarantees are directly applicable also in proceedings before regular courts. Thus, also the motivations (reasons) of the regular courts' judgments should and often do contain aspects of constitutional guarantees and rights, guaranteed under the ECHR.[5] Also the parties to litigations are expected to include arguments about constitutional rights into their pleadings. If they fail to do so, they might be precluded from submitting such arguments in the subsequent constitutional complaint (for the lack of exhaustion of remedies on substance).[6] One of conditions for admissibility of the constitutional complaint is also the exhaustion of all other remedies; this condition is construed in such a manner, that it does not suffice to exhaust remedies just formally, but the party needs to exhaust them in substance. Thus, if it is possible to seek redress against a certain violation already by remedies, available in civil procedure (appeal, revision), a party, who fails to do so, will later be precluded from referring to such violations in a constitutional complaint.[7]

2. Right of access to a court

Article 23 of the Constitution explicitly guarantees a right of access to court (`right to judicial protection´). Pursuant to the aforementioned provision, everyone has the right to have any decision regarding his rights, duties and any charges brought against him or her made *without undue delay* by an independent, impartial court constituted by law. The notion of `court´ is interpreted in a strict sense – meaning that it must be a proper (state) court and the judicial power must be exercised by a judge in the sense of

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[3] Art. 50 of the Constitutional Court Act (Zakon o Ustavnem sodišču); Official Gazette RS, No. 15/94 and 108/07.

[4] *See* for example Decision of the Const. Court, Up 408/00, 20.11.2001 and A. Mavčič, `The specialities of Slovenian constitutional review as compared with the current systems of souch review in the new democracies´. in: De Vergottini (ed.). *Giustizia constituzionale e sviluppo democratico nei paesi dell´Europa centro-orientale* (Torino, Giappichelli, 2001), pp. 161-188.

[5] See D. Wedam Lukić, `Vloga in odgovornost sodnika v civilnem pravdnem postopku´ [The role and responsibilities of the judge in litigation], 29 *Podjetje in delo*, 2003, No. 6-7, p. 1675.

[6] *E.g.* decision of the Const. Court, Up 39/95, 16.1.1997.

[7] Decision of the Const. Court, Up 39/95, 16.1.1997.

Judicial Service Act (unlike Art. 6 of the ECHR which provides for a broader notion of a `tribunal´). Thus, in Slovenian system, for the right of access to court to be respected, it is not possible to vest a judicial power into certain non-state tribunals, even if these would comply with conditions of (relative) permanency, independence and impartiality of the tribunal and of the position of its members.

The right of access to court guarantees that a person can submit his or her civil dispute to a court and obtain the court's judgment on the merits.[8] The right of access to court is effectively fulfilled only if a court decides on a submitted dispute on merits. Thus, rejecting the claim as inadmissible for procedural reasons is not an effective fulfilment of the right of access to court. This of course does not mean that the law cannot impose procedural conditions for admissibility of actions and formal requirements that a claim should comply with. However, as such conditions restrict the right of access to court, they must be based on reasonable and constitutionally acceptable grounds.[9] Concerning the time limits, for example, the Constitutional Court stated that they must always be predictable and that both their length and preclusive nature must clearly follow from the wording of the law, besides, they must not be so short as to make an effective accomplishment of certain procedural act practically impossible.[10] Also the standpoint that any kind of action is inadmissible if the claimant does not have legal interest or standing for achieving a court judgment is constitutionally acceptable.[11] In the opinion of the Constitutional Court, it is no violation of the right to access to court protection in case of a lack of international jurisdiction in a dispute on damages against a foreign state due to immunity. The Constitutional Court found that such immunity does restrict the right of access to court, but it is constitutionally acceptable as an expression of international law standards; besides the right of access to court is not entirely frustrated as the claimant can file an action in a foreign state.[12] However, the right of access to court was found to be violated in a case, in which the court had dismissed the action for reason of a lack of subject matter jurisdiction, instead of transferring the case to the court with jurisdiction.[13]

The right of access to court can also be violated if the court dismisses a motion to order an interim protective measure if it turns out that this entails ineffective subsequent judicial protection. With this reasoning, the Constitutional Court enabled for the issuing of regulatory interim measures in favour of the creditor in cases when unrecoverable damage would be sustained without such a measure.[14]

A part of an effective right of access to court is also the guarantee that a final judgment shall be binding; principle of *res iudicata* is an expression of the right of access to court.[15] Besides, a part of the broader notion of `access to court´ is also that a party can

[8] Decision of the Const. Court, Up 107/99, 23.5.2002.
[9] Decision of the Const. Court, Up 107/99, 23.5.2002.
[10] Decision of the Const. Court, Up 268/00, 21.5.2002.
[11] Decision of the Const. Court, Up 334/98, 10.2.2000.
[12] Decision of the Const. Court, Up 13/99, 8.3.2001.
[13] Decision of the Const. Court, Up 54/704, 3.5.2005.
[14] Decision of the Const. Court, Up 275/97, 16.7.1998.
[15] Decision of the Const. Court, Up 206/02, 16.4.2002.

rely on an effective enforcement proceedings if the debtor does not voluntarily fulfil the obligation, imposed by a final judgment.[16]

The Slovenian Constitutional Court has also dealt with the problem of the relationship between financial burdens of the litigation and the right of access to court. The Constitutional Court confirmed that it is a constitutional demand that an effective access to court is guaranteed and is thus it is not sufficient if the right of access is recognized only theoretically. From this demand it also follows that financial burden of litigation must not form an insurmountable obstacle for the access to court for a poor party. This is a consequence of not only the right of access to court but also of the right of equality before the law and the prohibition of discrimination with regard to financial status (Article 14 of the Constitution).[17] Regulations on court and attorney fees and legal aid are therefore important from this point of view.

3. Right to be heard

Article 22 of the Constitution (the right to equal protection of rights in court) imposes a constitutional demand for `equality of arms´ in any court proceedings - including in civil litigation. Every party of the litigation should be given equal opportunity to present his case, including the evidence under circumstances that do not put the party in substantial disadvantage against the opponent.[18] The most important consequence (however, not the only one) of this constitutional guarantee is the right of each party to be heard (also sometimes referred to as the right to a contradictory procedure). This is one of the most fundamental procedural guarantees, contained not only in the Constitution but also in the CPA (Art. 5). Both the Supreme Court as well as the Constitutional Court have on many occasions reaffirmed the importance of this procedural guarantee and many aspects that it includes. The importance of the right to be heard is not merely to assure an equal treatment of the parties (after all, both parties are treated equally in a case when *none* of the parties are assured the right to be heard) but to assure that a person shall have full opportunity to `come to word´ (to have `a day in court´), that is to have an opportunity to influence the decision of the court in proceedings concerning his or her rights and legal interests.[19] The Constitutional Court stresses out that the right to be heard is based on the respect for human dignity.[20] This is a necessary precondition for a democratic state, devoted to the respect for human rights and rule of law. A party must be ensured the possibility to state arguments in favour of his or her position, make statements in any dispute regarding both factual and legal questions, make statements concerning the assertions of the opposing party and the results of the evidence taken, to be present in the taking of evidence and to cross examine witnesses and

[16] Decision of the Const. Court, U-I-339/98, 21.1.1999.
[17] Decision of the Const. Court, Up 103/97, 26.2.1998.
[18] Decision of the Const. Court, Up 39/95, 16.1.1997. Compare a similar definition, given by the European Court for Human Rights in: Dombo Beheer v. the Netherlands, 27.10.1993, Publ. ECHR, Ser. A, Vol. 274, p.33.
[19] L. Ude, N. Betetto, A. Galič, V. Rijavec, J. Zobec, D. Wedam Lukić, *Pravdni postopek - zakon s komentarjem* [Civil Procedure - Act with the commentary], Vol. 1, (Ljubljana, GV Založba in ČZ UL, 2005), p. 54 *et seq*.
[20] Decision of the Const. Court, Up 39/95, 16.1.1997.

experts.[21] In the broadest terms, a party must be able to get knowledge of and to comment on the whole procedural material on the file, thus all evidence adduced or observations filed, even if they were provided by a third neutral body (such as a judge of a lower court in his report for the court of appeals), but with the purpose of influencing the decision of the court.[22] In any case, when a law foresees that a certain person, although a neutral public body, shall have powers to present its comments to a litigation between two (other) litigants, such comments have to be served to parties and their right to answer must be guaranteed. [23]

If a party defaults a certain procedural act and this default results in a preclusion of a particular right, it is a constitutional demand that a party must have an opportunity to achieve a reinstatement (*restitution in integrum*) if the default was due to justified reasons.[24] However, it is a burden for the party to prove that the default was due to justified reasons.

A system of preclusions (time-limits) with regard to the question till when can a party submit new facts and evidence, has to be considered as a restriction of the right to be heard. However, such a restriction is in conformity with Constitution as it is a necessary precondition to achieve conformity with the right to trial within reasonable time and if, despite these preclusions, a party still has a reasonable opportunity to present its case.[25] At the later stage, the Constitutional court went on to confirm that a proper system of procedural sanctions, burdens and time limits in civil litigation is not only admissible but actually welcome.[26] By expecting parties and their attorneys actively and diligently to prepare the case and participate in the course of litigation, the law strives to achieve not only acceleration of proceedings but better substantive quality of adjudication.[27]

Another consequence of the right to be heard is that the court must drive the attention of the parties to legal grounds which it intends to use when solving the dispute and which the parties did not rely on. The rule of *iura novit curia* applies in Slovenian law and thus, a court may use a legal norm, which none of the parties has relied on. However, if a court decides to do so, it is a constitutional demand that a court should drive the parties' attention to the possibility of relying on such a norm and thereby enable the parties to comment on it and to adjust their factual assertion to facts, relevant from the viewpoint of such a norm.[28] This obligation of a court should, however, not mean that parties are totally free from obligation to diligently prepare their case, also with studying

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[21] *Ibidem*.
[22] Decision of the Const. Court, Up 108/00, 20.2.2003. Compare a similar definition, given by the European Court for Human Rights in: Niederost Huber v. Switzerland, 18.2.1997, Reports of Judgments and Decisions, 1997-I.
[23] Decision of the Const. Court, Up 108/00, 20.2.2003.
[24] Decision of the Const. Court, Up 184/98, 2.2.1999.
[25] Decision of the Const. Court, Up 487/01, 21.5.2002.
[26] Decision of the Const. Court, No. Up- 2443/08, 7.10.2009
[27] Ibidem.
[28] Decision of the Const. Court, Up 130/04, 24.11.2005.

relevant legislation and case law in order to determine what is the proper legal basis of the dispute.[29]

Concerning the evidence, the fact that a party can propose evidence is not the only consequence of the right to be heard, but there is also a corresponding obligation of the court to, as a principle, take all evidence offered by the parties, under a condition that such evidence is relevant for the case.[30] Thus, for the court to be able to reject the offered evidence there must be a constitutionally acceptable ground for such a rejection. As a principle, the constitutional court confirmed that also the fact that evidence was illegally obtained might be an acceptable ground for rejecting such evidence in civil (and not just in criminal) procedure. However, the test of proportionality must be applied to solve the conflict of rights, for example the right to privacy (which would be impeded if such evidence was taken by the court) and the right to effective judicial protection and the right to evidence as one of the expressions of the right to be heard (which is impeded if evidence is rejected by the court).[31] Besides, an evidence may be rejected if it is obvious that it is totally inappropriate for establishing the asserted facts or if is not properly substantiated (that is: a party who offers evidence has a burden to explain exactly which fact is to be proved, why is that fact relevant for the case and how the offered evidence could contribute to establishing such a fact).[32] On the other hand, it is not constitutionally acceptable (as a principle) to reject offered evidence with reasoning that it is unlikely that the evidence will succeed.[33]

Although the Constitutional Court admits that there may be some justified exceptions, the general principle (as a consequence of the constitutional right to be heard) is that a judgment may bind only the parties of the litigation (procedural privity). A result of litigation may not harm a person who was not a party in that litigation - neither by the *res iudicata* effect of the judgement nor by the fact that in a certain later litigation a court would apply evidence, produced in a prior litigation.[34]

The right to be heard must already be guaranteed in the court of first instance. It would not suffice that the opponent would obtain this right only with a possibility to file an appeal. In exceptional circumstances, for example in case of an interim measure of freezing of bank accounts when an effect of surprise is essential, it is permissible that

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[29] See *e.g.* M. Dolenc, `Materialno procesno vodstvo v luči odločb Ustavnega sodišča´ [Material procedural guidance in the light of jurisprudence of the Constitutional Court], Pravosodni bilten, 2007, no. 1, p. 70, L. Ude, N. Betetto, A. Galič, V. Rijavec, J. Zobec, D. Wedam Lukić, Pravdni postopek - zakon s komentarjem [Civil Procedure - Act with the commentary], (Ljubljana, GV Založba in ČZ UL, 2005), Vol. 1, p. 59.

[30] Decision of the Const. Court, Up 121/00, 18.9.2001. It must be stressed out that this procedural guarantee is not violated if the court rejects evidence on the grounds that facts, which it aims to establish, are not relevant for the case, however it later (in the course of appeal or revision) appears that the application of substantive law by the first instance court was erroneous. True, the erroneous application of substantive law resulted in an erroneous decision on which facts are relevant for the case, but the basis for this error is in the field of substantive law, not in the field of procedural law and procedural constitutional guarantees.

[31] Decision of the Const. Court, Up 472/02, 7.10.2004.

[32] Decision of the Const. Court, Up 266/01, 25.4.2002.

[33] Decision of the Const. Court, Up 121/00, 18.9.2001, N. Betetto, `Ustavna jamstva v dokaznem postopku´ [Constitutional guarantees concerning taking of evidence], 22 *Pravna praksa*, 2003, 21, p. 8.

[34] Decision of the Const. Court, Up 39/95, 16.1.1997.

such an order is issued *ex parte* and the right to be heard is assured *ex post facto* – with the debtor's right to file an objection against the interim measure. But also in such case it is essential that this objection is then decided by the court of first instance, who must again, in the light of debtor's submissions in objection, reconsider the interim measure.[35]

One important restriction of a right to be heard, applies in procedure in family matters (Art. 410, CPA). In a matter concerning parental responsibility (including a divorce proceedings, as this obligatory results also in decision on custody and maintenance of a child), a court must in an appropriate manner inform a child, who is capable of understanding the meaning of the proceedings and the consequences of the decision, of the introduction of the proceedings and of his right to state an opinion thereon. Considering the child's age and other circumstances, the child must be invited, through intermediary of the social services or a school social worker, to attend an informal interview with the judge. The judge makes a record on the discussion and, as the case may be, records the discussion on a tape. The law contains a very controversial provision, that for reasons of protection of interests of the child, the court may decide not to allow the child's parents to inspect the record or to listen to the tape recording. Since the purpose of the hearing of the child is to influence the decision of the court, but the parties to the proceedings (the parents) are not given an opportunity to acquaint themselves with these statements and reply to them, the parents' right to be heard in the proceedings is substantially encroached. It seems that this regulation (although with the purpose to ensure the best interest of the child) is going too far. Truly it is common also in other legal systems that the parents can not be immediately present at the hearing of the child and can not pose questions to the child, however this is still a less severe infringement into their procedural position from the Slovenian regulation. As the European Court for Human Rights defines that a right to be heard (as guaranteed by the Art. 6/1 of the ECHR) means that `the parties to a trial must have the opportunity to have knowledge of and comment on all evidence adduced or observations filed´[36] it is highly questionable whether the presented regulation in the Slovenian law is in line with these requirements. If important documents (*in casu*: records concerning child's hearing) are not disclosed to the party, this negatively affects her ability to participate in the proceedings and she is not granted a fair adversarial trial. Nevertheless, the Constitutional Court of Slovenia confirmed, although emphasizing on particular circumstances of the case (the case concerned a provisional protective measure, not the final decision on merits in the custody case) that the abovementioned system does not violate right to be heard, as guaranteed under Art. 22 of the Constitution and Art. 6/1 ECHR and that it is sufficient if the judge orally briefly summarizes the content of the protocol concerning the child's opinion to the parents.[37]

4. Obligation to give a reasoned judgment

[35] Decision of the Const. Court, Up 321/96, 15.1.1997.
[36] See such a definition in, for example, Apeh v. Hungary, Judgment from 5.10.2000, No. 43465/96. Concerning decisions in child custody cases, see Mc Michael v United Kingdom, App. no. *16424/90, judgment from 24.02.1995*
[37] Decision of the Const. Court, Up-498/08, 15.4.2008.

A duty corresponding to the party's right to be heard is the duty of the court to take into consideration all of the statements of a party, weigh their relevancy, and take positions concerning the relevant statements. An obligation of the court to give a reasoned decision is a necessary consequence of the party's right to be heard; only in such a way is the party's right to be heard effective and only in such a way is also the party's right to appeal effective.[38] The extent to which this duty to give reasons applies may vary according to the nature of the decision and must be determined in the light of the circumstances of the case. It is not necessary to answer every single argument of the parties, however at least the crucial arguments of the parties have to be dealt with specifically. Besides, it is also not always necessary to specifically answer a certain point, if already other parts of the reasons can be construed as an implied rejection of the party's position.[39] The standards as to the question how extensive reasons in a judgment should be are lower for appellate courts, especially for courts, against whose decisions there are no further appeals. If a court of a lower instance already gave extensive reasons concerning a rejection of a party's position and if that party's appeal does not bring any new standpoints, but merely repeats the positions that it already presented during the procedure in the first instance, then it is admissible for the appellate court, simply to endorse reasons of the judgment of the first instance court.[40]

5. Equality before the law

Case law is not formally recognized as a source of law in Slovenia. But in practice, an established case law is an important authority and lower courts tend to follow positions of the appellate courts and of the Supreme Court. Besides, according to an established doctrine of the Constitutional Court, the right to equal protection before the court expands beyond the demand of equality of the parties of one litigation - it also implies that equal cases should be decided alike.[41] In the opinion of the Constitutional Court, this constitutional right would therefore be violated in a case when a court in a civil litigation arbitrarily decides on the case differently as courts regularly decide similar cases. Thus, the constitutional complaint will have success if the appellant can demonstrate that the judgement in his case contravenes the well established case law and that the court's decision not to follow the established case law lacks sufficient reasons – in procedural sense; the constitutional court will not determine whether the previous or the new case law is (more) appropriate or correct in substance.[42] From the reasons (grounds), contained in the judgment it should be evident that the departure from the established case law was intentional (and not just a result of a judge's lack of knowledge of case law) and that there were, according to the opinion of that judge, good grounds for a change in the case law. It is expected from the judge to specifically explain the reasons that substantiate the departure: this means that they must know the case law, explain why

[38] Decision of the Const. Court, Up 77/01, 4.3.2004.
[39] Decision of the Const. Court, Up 286/001, 5.3.2001.
[40] Decision of the Const. Court, Up 429/01, 18.10.2001.
[41] M. Pavčnik, `Argument sodnega (pravnega) precedensa´ [Argument of judicial (legal) precedent], 30 *Podjetje in delo*, 2004, No. 6-7, p. 1032 *et seq*.
[42] Decision of the Const. Court, Up 188/02, 11.12.2003.

they do not agree with such, and provide reasons for a different decision and thereby an attempt to change the case law for the future.[43]

The prohibition of an arbitrary departure from case law does not mean that case law (precedents) cannot be changed. The Constitutional Court has already confirmed that it cannot and should not prevent changes and thereby the development of case law.[44] An attempt to change the case law only imposes an additional burden onto a judge, who intends to depart from a uniform and settled case law to explain, why he or she does not find such a case law suitable any more. In fact, through this constitutional procedural guarantee, a case law in Slovenia is gaining a similar position as it has in system of precedents (*stare decisis* doctrine).[45]

On the other hand, the constitutional court rejected the plea that it is a consequence of the equality before the law that a new procedural legislation ought not to be used in cases already pending. The Constitutional Court reaffirmed the traditional position in procedural law that the new procedural legislation may be applied also to cases which are already pending.[46] There is just a guarantee that an immediate application of new legislation should not result in a deprivation of the position of the party, who relied on the old (then valid) legislation. It was therefore permissible that a new law substantially raised a limit concerning the value of claim, which determines whether a revision (a further appeal on points of law to the Supreme Court) is permissible and that such new law was applicable also to cases, in which an action to the court of the first instance was filed already before the new law came into force.[47]

6. Right to appeal

Article 25 of the Slovenian Constitution guarantees a right to appeal against decisions of courts (no such right is laid down in the ECHR with regard to decisions concerning civil rights and obligations, a right to appeal is guaranteed by the 7th Protocol to the ECHR, however only in criminal procedure). The right to appeal as a constitutional right of course does not mean that the Constitutional Court is empowered to review the correctness of the appellate court's decision concerning the application of law and assessment of facts. The right to appeal as a constitutional right is a procedural guarantee, imposing an obligation upon appellate court to take the appeal into consideration and to answer all of the appellant's relevant arguments. Therefore, it is a consequence of the constitutional right to appeal that the decision of the appellate court must be reasoned; however, standards as to the question how detailed a motivation of the judgment should

[43] Decision of the Const. Court, Up-188/02, 11.12.2003.
[44] Decision of the Const. Court, Up 22/94, 7.3.1997.
[45] M. Pavčnik, `Argument sodnega (pravnega) precedensa´ [Argument of legal (judicial) precedent], 30 *Podjetje in delo*, 2004, No. 6-7, p. 1032 *et seq*., M. Novak, `The promising gift of precedents´: Changes in culture and techniques of judicial decision-making in Slovenia, in: Priban, Roberts, Young (Eds.), *Systems of Justice in Transition* (Hampshire, 2003). pp. 94-108, F. Testen, `Enotna in ustaljena praksa v civilnih in gospodarskih zadevah´ [Uniform and Settled Case Law in Civil and Commercial Matters], 30 *Podjetje in delo*, 2004, 6-7, pp 1050-1065,.
[46] Decision of the Const. Court, U-I-21/02, 12.9.2002.
[47] Decision of the Const. Court, U-I-21/02, 12.9.2002.

be, are lower for appellate courts than for the courts of first instance.[48] A precondition for the right to appeal is that a judgment of a court of first instance must always be reasoned, because only in such way can a party effectively fulfil his or her right to appeal against that decision. In the opinion of the Constitutional Court, the right under Art. 25 of the Constitution is also not violated if due to a different legal evaluation the appellate court overturns the judgment of the court of first instance. The Constitutional Court, however, found a violation of this right in a case in which the party missed the time limit to file an appeal due to erroneous legal instructions,[49] and in a case in which the court issued a default judgement, but from the reasoning it did not follow which legal norm was the basis for finding that the claim was substantiated.[50]

The constitutional court has also stated that the right to appeal as a constitutional right only guarantees a right of access to appellate courts, but not an appeal to the Supreme Court (revision) against appellate courts' judgements.[51] However, if a statute does provide for access to the Supreme Court, then the procedure before the Supreme Court must conform with all constitutional procedural guarantees – such as right to be heard and equality of arms.[52]

The constitution (unlike, for example, in case of a right to public trial) does not foresee that a statute could restrict the right to appeal. Therefore, it is not possible for a legislator in Slovenia to exclude an appeal *in toto*, for example, for small-value claims. It is however considered to be acceptable to restrict grounds for appeal – in Slovenian civil procedure, for example, an appeal against a decision in small claims procedure may only be based on an erroneous application of substantive law and on a grave (`absolute´) procedural error (Art. 458, CPA).

7. Right to a trial without undue delay

The Constitution of Slovenia (like the Art. 6/1, ECHR) explicitly provides for a guarantee of a trial within reasonable time (`without undue delay´ – Art. 23 of the Constitution). However, it can be critically assessed that Slovenia is still hampered by excessive duration of civil litigations and by huge backlogs in courts. This seriously undermines the reputation of the courts in public opinion as well as the legal certainty. Both The European Court of Human Rights[53] and the Constitutional Court of Slovenia[54] delivered influential judgments stating that there is a structural defect in the functioning of Slovenian civil justice and that the right to trial within a reasonable time is too often violated.

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[48] Decision of the Const. Court, Up 458/02, 13.11.2003.
[49] Decision of the Const. Court, Up 148/01, 29.11.2001.
[50] Decision of the Const. Court, Up 201/01, 6.11.2003. Pursuant to Art. 318.1 of the CPA, the default of a defendant results in a conclusion that he or she admits the facts, stated in the claim, however the court must still prove whether, based on such facts, the claim is well-founded in substantive law.
[51] Decision of the Const. Court, Up 188/01, 25.3.2002.
[52] Decision of the Const. Court, Up 373/97, 22.2.2001.
[53] ECHR Judgment, Lukenda v. Slovenia (no. 23032/02), 4.10.2005.
[54] Decision of the Const. Court, No. U-I-65/05, 5.10.2005.

Regarding the criteria to review the violations of the right to trial without undue delay, the Constitutional Court of Slovenia relied on the standards, established by the case law of the European Court of Human Rights. These are in particular the complexity of the case, the conduct of the applicant and of the relevant authorities, and the importance of what is at stake for the applicant in the litigation. But recently, foremost the question whether there are any effective procedural remedies against an excessive duration of procedure, gained on importance. The European Court of Human Rights has namely started to examine the length of proceedings cases from the viewpoint of two conventional rights: right to trial within reasonable time (Art. 6/1 ECHR) and the right to effective legal remedy against the violation of conventional rights (Art. 13 ECHR). The European Court found in the *Lukenda* case that also the Slovenian legal system does not provide for adequate and effective legal remedies against the violation of a right to trial within reasonable time.[55] It found that a party could neither invoke such remedies when the proceedings in question were still pending, nor can he or she effectively claim a compensation for – foremost – non-pecuniary damages after the termination of proceedings, in which the right to trial within reasonable time was violated. With regard to the damages it should be noted that the Slovenian Code of Obligations provided for a state's responsibility for damages caused by state authorities, but the Code contains an exclusive list of legally recognized non-pecuniary damages and the suffering, caused by an excessive duration of proceedings is not included in that list.

Shortly after the decision of the European Court in the *Lukenda* case, the Slovenian Constitutional Court also rendered a judgment in which it declared that the Slovenian legal system does not provide for adequate remedies against the violation of the right to trial without undue delay.[56]

Following the decisions of the European court and the Constitutional Court, the legislator adopted a new law – the Act on protection of the right to trial without unnecessary delay.[57] The act provides that in the event of a delay in the proceedings any party may lodge a request for supervision (*nadzorstvena pritožba*) with the president of the court. The president of the court may request the presiding judge to report on progress in the proceedings, and is required to indicate in writing to the presiding judge any irregularities he finds. He or she may put the case on the priority list or set deadlines for procedural measures, but it must be stressed out that no supervision of substantive or procedural decisions is possible and the principle of independence of the judge is maintained. If the delay has been caused by a heavy caseload, the president of the court may order the case concerned or other cases to be transferred to another judge. If this remedy proves unsatisfactory a further remedy is available: a motion for setting of deadlines with the president of a superior court.

Furthermore, the Act provides for a civil action for compensation after the proceedings had terminated. It specifically defines a non-pecuniary damage, caused by an

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[55] *Lukenda v. Slovenia*, No. of the application 23032/02; judgment dated 6.10.2005.
[56] Decision of the Const. Court, No. U-I-65/05, 22.5.2005.
[57] *Zakon o varstvu pravice do sojenja brez nepotrebnega odlašanja* (ZVPSBNO); Official Gazette, No. 49/06.

excessive duration of court proceedings as a legally recognized damage. The Act limits the amount of non-pecuniary damages to 300-5000 Euro, whereby a court can, when appropriate, taking in the account foremost the behaviour of the applicant in the previous procedure, reject the claim for monetary damages if it finds that a mere declaration of violation (and a possible publication of a judgment) presents a sufficient remedy. The Act also imposes a procedural prerequisite that prior to an action the claimant must seek a consensual dispute resolution with a state attorney. An action may be filed only if a settlement is not reached.

It would be unrealistic to expect that the presented new law would substantively contribute to the acceleration of court proceedings in Slovenia (it will just contribute to lessening of a burden to the European Court of Human Rights as an appeal to this court will only be admissible after the exhaustion of these remedies.[58] This is probably what the European Court foremost had in mind when it started imposing obligations to the member states to establish domestic remedies). Remedies such as a motion for setting of deadlines and a request for supervision can be very effective in a system which in general functions with the exception of individual cases of violation. However, Slovenian judiciary suffers from huge backlogs in (at least certain) courts and overburdening of judges, therefore violations of the right to trial within reasonable time are not that often a result of a inadequate measures of a judge in particular case but rather of the mere fact that the case did not yet get on the agenda due to backlogs. In such conditions, the mentioned remedies cannot really be effective – unless they result in taking the cases `over the queue´, which however jeopardizes the right to equality before the law. It still remains an unfulfilled obligation for Slovenia that it should organize its judicial system in such a way that its courts can meet each of its requirements, including the obligation to hear cases within a reasonable time.

8. Right to public trial

Save where expressly provided by law, all court proceedings are conducted in public and all judgments are delivered in open court (Art. 24 of the Constitution). The CPA defines circumstances which entail an exclusion of the public. The public may be excluded from all or part of the main hearing, where so required by the interest of state, business or personal secrets, or for moral considerations. Furthermore, public may be excluded from the main hearing also when by application of measures for maintenance of order if it cannot otherwise secure an undisturbed progress of the proceedings (Art. 294,

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[58] See Judgment of the ECourtHR, Grzinčič v. Slovenia, No. 26867/02, 3.5.2007, and P. Pavlin, `Prva pozitivna sodna presoja Zakona o varstvu pravice do sojenja brez nepotrebnega odlašanja´ [The first positive judicial examination of the Law on protection of the right to trial without unnecessary delay], 26 *Pravna praksa*, 2007, No. 18, p. 25.

CPA). Exclusion of the public does not apply to the parties, their statutory representatives, attorneys and interveners. The panel may give permission that the main hearing from which the public is excluded be attended by certain designated officials, court personnel, scholars or public representatives, if this is necessary for performance of official tasks, scientific activity, or public service. On request of a party, the panel may allow that the hearing be attended by not more than two persons designated by the party (Art. 295, CPA). In certain type of disputes, public is always excluded – family disputes (Art. 407, CPA) and non-contentious matters concerning family matters and personal status (Art. 38, Art. 72, Non-Contentious Procedures Act).

Even if public is excluded from a hearing, a judgment must always be pronounced in public. The public may only be excluded from the part when the judge is giving oral explanation of the judgment. However, as judgments are in most cases not proclaimed on the hearing (not just the reasons, but also the verdict), but are only sent to parties later in a written form, the guarantee of public pronouncement of a judgment is practically diminished. What remains possible is an insight into a judgment in the case file, which must be allowed to anyone (just the judgment, except for certain parts of its reasons, if the public was excluded, other parts of the case file can be accessed only by persons who prove their legal interest).

As the right to public trial is established in public interest, it is not left to the parties' free disposition to agree that their case will be decided on in a non-public trial. The court must disregard such an agreement.[59] An unlawful exclusion of public is a grave procedural error and an absolute ground for appeal (Art. 339/2, point 13, CPA). The importance of the right to public trial is diminished in appellate courts and in the Supreme Court. Appellate courts almost always and the Supreme Court always decides *in camera*. Neither parties nor their attorneys may be present in the sessions of these courts (unless, which in practice happens just exceptionally, the appellate court decides to have an appeals hearing). However, the judgments of these courts are accessible to public, just as the judgments of the courts of first instance. The constitutional guarantee of public trial does not include the right of direct transmission of court proceedings by media, such as TV or radio.[60] A president of a court may merely allow short parts of a trial (in the trial room) to be photographed or filmed; however just a visual, without sound (Art. 19 of the Court Order).

9. Distribution of roles between a judge and parties in light of guaranteeing a timely and efficient administration of justice

9.1 Preclusions of new facts and evidence

A distribution of roles between judge and parties in civil procedure also concerns the question, whether the judge has any efficient tools to disregard statements of fact and evidence that were not given on time without a proper excuse or whether it is left entirely

[59] L. Ude, N. Betetto, A. Galič, V. Rijavec, J. Zobec, D. Wedam Lukić, *Pravdni postopek - zakon s komentarjem* [Civil Procedure - Act with the commentary], Vol. 2 (Ljubljana, GV Založba in ČZ UL, 2006), p. 293.
[60] *Ibid*, p. 626.

to the parties in what stage of proceedings shall they present relevant facts and evidence. A certain system of preclusions was introduced in Slovenia by the CPA-1999.[61] According to Art. 286, the parties can assert new facts and evidence until (including) the first session of the main hearing (according to the Yugoslav CPA-1976 there was no limitation and parties were free to come out with new facts and evidence till the end of the last session of the main hearing and except in commercial cases even in appeal). At later hearing sessions, the parties shall be allowed to present new facts and new evidence only if at the opening session they were prevented from presenting them by reasons beyond their control. A notion of »reasons beyond their control« should be interpreted with a degree of flexibility.[62]

The described system of preclusions imposes an additional burden on parties for a diligent preparation of their case. It does however not mean that the activities of the court are diminished. On the contrary, precisely because a court may disregard facts and evidence, which are not submitted on the first session of the main hearing, the proper and active material procedural guidance (as explained above) on this hearing is gaining on importance. Precisely because the court will be able to refuse new statements of facts and new evidence, submitted in the later stages of proceedings, it is becoming more important that the court properly fulfills its obligations of stimulating parties to supplement and to clarify their submissions and, if necessary state new facts and offer new evidence already in the first session of the main hearing.[63] If the court did not pose questions and give hints and in this manner did not stimulate parties to state new facts and evidence on the first session of the main hearing, this might, at least in some cases, represent a proper excuse for the parties to state such facts and evidence in the later stage of proceedings.[64] Thus, the introduction of a system of preclusions in fact imposes an additional burden for a diligent preparation for the first session of the main hearing for both – for the parties and for the judge as well.[65]

6. Deficiencies in the preparatory stage of civil litigation and the problem of preparatory written submissions

Art. 298/2 of the Slovenian CPA provides that litigation, whenever possible, should be terminated in one single main hearing (trial). In this provision a principle of concentration is envisaged. However, this provision remains rather a »dead letter« and the practice of litigation in Slovenia clearly shows that the termination after only one session of a main hearing is just an exception. In reality, litigation usually consists of a number of

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[61] Of course, preclusion of new facts and evidence is not the only sanction for default and inactivity. A judgement by default can be entered in case of total passivity of the defendant (Art. 318, CPA) and an action can be dismissed if the claimant fails to attend the main hearing (Art. 282, CPA). Furthermore, the facts that were not explicitly denied or were denied in an unsubstantiated manner will be presumed to be admitted (Art. 214, CPA).

[62] See, e.g., A. Butala, Pravdni postopek brez nepotrebnega odlašanja [A litigation without unnecessary delay], *Podjetje in delo*, 1999, No. 6-7, p. 1160, N. Betetto, Ustavna procesna jamstva v dokaznem postopku [Constitutional procedural guarantees concerning evidence], *Pravna praksa*, 2003, No. 21, p. 18.

[63] Z. Trampuš, Materialno …, op. cit., p. 585.

[64] See e.g. judgment of the Ljubljana Court of Appeals, I Cp 1107/2004, dated 13.10.2004.

[65] D. Wedam Lukić, Vloga in odgovornost sodnika v civilnem pravdnem postopku, [The role and responsibilities of the judge in litigation], *Podjetje in delo*, 2003, No. 6-7, p. 1671.

consecutive ("piecemeal") hearings, many of which are empty in substance; the time intervals between sessions are often long; the date of a new hearing is much to often not determined at the end of the previous one (which means that it must again come to a service of court writs – which often causes problems in Slovenia). During the time period between consecutive hearings parties often file preparatory submissions. The goal of the concentration of litigation is predominantly frustrated due to the circumstance that the CPA does not provide for an adequate preparatory stage of litigation. The situation in Slovenian law is in this regard a way behind comparable legislations (for example German), which, especially through the latest reforms of civil procedure emphasize the importance of preparatory stage of litigation.[66] The introduction of a settlement hearing through the amendment to the CPA in 2002 was only a partial improvement.[67] This novelty did not prove to be particularly successful in practice, besides, a settlement hearing cannot take the role of a preparatory hearing anyway, if the court, as the Art. 305.c CPA suggests, continues with the main hearing immediately after the (unsuccessful) settlement hearing.

The experience of Slovenian courts shows that acceleration or delaying of litigation strongly depends on the fact whether the parties file their preparatory submissions (in which they assert new facts or evidence or just comment on evidence, already taken or express their legal opinions or drive attention to the case law in similar matters) on time or with delay.[68] In practice, written preparatory submissions of the parties play a very important role in litigations in Slovenian courts – from the viewpoint of collection of procedural material as well as from the viewpoint of causing excessive length of proceedings. A preparatory submission which is filed just a short time before a hearing or even at the hearing itself (whereby the situation is the same if a party reads this written submission at a hearing) in practice very often results in an adjournment of a hearing. Sometimes this is justified as the principle of equality of arms and the right to be heard demand that the opposing party should be given time to prepare an answer or comment, but sometimes an adjournment is not really justified if a preparatory submission does not contain anything that the other party could not comment immediately.[69]

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[66] General overview: N. Trocker, V. Varano, Concluding remarks, v: N. Trocker, V. Varano, The reforms of civil procedure in comparative perspective, Torino, 2005, pp. 243-266, M. Storme, Tommorow's civil trial, v: M. Storme et. al., The recent tendencies of development in civil procedure law, Vilnius, 2007, str. 14-25, R. Stürner, The principles of transnational civil procedure, RabelsZ, 2005, pp. 223-230), P. Oberhammer, Zivilprozessgesetzgebung: Content follows method, v: Honsell et al. (Ur.), Festschrift für Ernst A. Krammer, Basel, 2004, pp. 1039-1046), H. Van Rhee, History of civil litigation in Europe, Seminar materials for Public and Private Justice – dispute resolution in modern societies, Dubrovnik, 2006, published on: http://alanuzelac.from.hr/text/iuc-course.htm (15.7.2008).

[67] See e.g. N. Betetto, Settlement hearing [Poravnalni narok], *Podjetje in delo*, 2002, No. 6-7, p. 1561-1573, p. 1562.

[68] V. Balažic, Metode racionalnega vodenja postopka in odločanja v gospodarskih sporih [Methods of rational case management and decision making in commercial disputes], *Pravosodni bilten*, 1999, št. 3, str. 7-20, str. 170, J. Ogrizek, Novi zakon o pravdnem postopku – obet novega ravnovesja v civilni pravdi [New Civil Procedure Act – an expectation of a new balance in litigation], *Podjetje in delo*, 2003, No. 6-7, p. 1196, Ude et al., op. cit., Vol. 2, p. 606.

[69] See e.g. decision of the Ljubljana Court of Appeals, I Cp 1658/1999, dated 13.10.1999.

As has already been mentioned, the CPA-1999 limited the right to assert new facts and evidence to (the end of) the first session of the main hearing (later, only such new facts and evidence can be asserted which a party could not assert before without fault). But with this system the CPA remained »half way«. The problem of preparatory written submissions during the litigation remained entirely unsolved. If these submissions contained new facts and evidence, they could be presented even just a short time before the first session of the main hearing or even at this session (which shall often cause a need for adjournment). The system of preclusions as described above also did not solve a problem of preparatory submissions which the parties filed during the time between sessions of the main hearing. True, the possibility to assert new facts and evidence was limited; however there were no limitations for submissions which contain for example a denial of facts or an opposition to evidence, offered by other party or just further explanations and clarifications of facts which have already been asserted or contain legal viewpoints or the presentation of case law in similar cases.

7. The 2008 Amendment of the CPA – strengthening of procedural sanctions and emphasizing on the preparatory stage of procedure

The Slovenian CPA was substantially reformed in 2008.[70] Though the main field of the reform concerned reshaping of the system of access to the Supreme court (introduction of a "leave to appeal" system with aim to strengthen the role of the Supreme court in creating precedents), important novelties were introduced with regard to proceedings in the first instance court as well. The system of procedural sanctions for delays in litigations was strengthened and more importance was given to the preparatory stage of litigation. In order to enable the other party a right to be heard and to organize its case, a party is now obliged to, whenever possible, file new written submissions in sufficient time for them to be serviced to the other party in an adequate time limit before the main hearing, so the main hearing would never need to be adjourned for the reason that the other party must be given a reasonable time period to prepare a response (Art. 286a/4, CPA).

Besides, a judge now has powers on his or her own initiative to request from the parties (and to impose binding time limits for this purpose) to submit further written observations, comments or clarifications on their factual assertions, the evidence offered or already taken, to comment on legal questions or to reflect to submissions, provided by the opponent (Art. 286a/1, CPA). The provision is framed following the example of Art. 273 of the German ZPO, according to which a court can demand from the parties to submit written statements on certain points that need to be clarified (*klärungsbeduerftige Punkte*).[71] This tool can contribute to the goal that procedural material should be as much as possible collected and clarified already before the main hearing. If the judge exercises the aforementioned powers, he or she can achieve that the standpoints of the parties are clearer and more complete and that it is clarified which facts are really at dispute and

[70] Amendment to the Civil Procedure Act (ZPP-D); Official gazette of the Republic of Slovenia, No. 45/2008 (in force since October 1, 2008).

[71] This is considered to be a very important tool for achieving a proper preparation of a trial. See e.g. D. Leipold in: Stein, Jonas, KOMMENTAR ZPO, 22. Aufl., Vol. 4, p. 494.

which questions the main hearing should be concentrated at.[72] In fact, already before the implementation of the 2008 reform, judges in Slovenia have often requested parties to file further written observations and clarifications or to adduce evidence (e.g. documents). It has often been stressed out that at least in certain cases it is beneficial to exercise powers of material procedural guidance already in written phase of procedure.[73] What was missing however, was a sanction for case of non-compliance. With the implementation of the 2008 reform the situation is different: if a court set the time limits for the filing of new preparatory submissions and this time limit is not met, new submissions made after the time period has expired are admissible only if the court is convinced that admitting them will not delay the resolution of the dispute or if the party provides an adequate justification for the delay in presenting them (Art. 286a/2, CPA). These powers of the judge can be exercised during the oral hearing and also in a written form in time between hearings. What is even more important; the judge can now put questions and request further clarifications in writing to the parties *even before the first session of the main hearing* and requests from them to offer further evidence or to supplement their factual assertions (Art. 286.a CPA). If a party does not react, he or she is, unless justified reasons caused the default, precluded from making such submissions in the later stages of the procedure, including the first session of the main hearing. So, if the judge is active in a proper manner (with exercising material procedural guidance through means of written procedure) already before the first session of the main hearing, parties need to react in the same manner as otherwise, they will be precluded from stating new facts and evidence on the first oral hearing. In this manner, the goal that the procedural material is sufficiently collected already before the commencement of the main hearing can be more effectively achieved.[74]

Of course, there are numerous reasons (*inter alia*, new legal standpoints, which appear relevant due to the development of litigation, results of the evidence…) which justify the filing of new submissions not only at the first, but also at subsequent sessions of the court, but this should be solved through a flexible interpretation of the notion of »justified reasons«.[75] A system of preclusions as sanctions however must be attached to the imposed time limits, because otherwise it would remain a »dead letter«. It is also important that the system is flexible and that it enables a judge to adapt each litigation to its characteristics and to determine the proper time framework.[76] Litigations can differ strongly – some are easily solved, some involve difficult questions of law, some involve difficult questions of facts and time consuming evidence procedure, in some highly qualified attorneys participate (sometimes in a mutually co-operative manner, sometimes in a rather hostile atmosphere) while in others lay parties represent themselves. Therefore a flexible system (in which it is left to the judge to decide whether further written

[72] Such is also the official explanation of the novelty. See The Explanatory memorandum of the Ministry of Justice to the draft amendment of the Civil procedure Act, op. cit., p. 136.
[73] M. Dolenc, 2007, op. cit., p 73.
[74] V. Bergant Rakocevic, Materialno procesno vodstvo v pisnih fazah postopka in razmerje do prekluzije [Material procedural guidance in written stage of litigation and it relation to preclusions], *Podjetje in delo*, 2008, No. 6-7, p. 1598. See also: The Explanatory memorandum of the Ministry of Justice to the draft amendment of the Civil procedure Act, op. cit., p. 135.
[75] See M. Šipec, op. cit., p. 1206, N. Betetto, Ustavna procesna …, op. cit., p. 18.
[76] V. Bergant Rakocevic, op. cit., p. 1602.

submissions from the parties shall be requested and if so, in what time limit) is more appropriate than a rigid system of time limits imposed by law. It is also plausible that a judge can decide, according to the particularities of the given case, whether it shall implement a written preparatory procedure (requesting parties to file further written preparatory submissions) or whether an oral hearing shall take place and the case shall be discussed orally with the parties.[77]

It is necessary to stress out that precisely in the field of imposing binding time limits, it is very clearly shown that it can only be a mutual responsibility both of the parties as well as of the court to assure a concentration of proceedings.[78] The law must give the judge the power to prepare a case for a trial. Imposing a system which assures that all preparatory submissions shall be filed on time and especially a system which also enables a judge to have initiative in directing parties to file further observations and submissions can be a positive novelty which can contribute to concentration of litigation. But the goal that litigation should in principle be concluded in a single main hearing can be achieved only if this hearing is diligently and completely prepared. However, for a diligent and complete preparation of a main hearing the mere adequate statutory regulation does not suffice. It is also of a paramount importance that a judge already knows the file well, that he or she knows which facts are asserted by the parties and especially that he or she already have (a preliminary) legal evaluation of a dispute. Only this can namely enable him or her to realize which facts and evidence are relevant for the case.[79] A judge who is himself or herself not well prepared for the case, cannot effectively exercise powers in directing parties to give further clarifications and supplementations and neither can he or she decide on whether conditions for preclusion (debarring) of new facts and evidence are fulfilled. Thus, also in this regard it can be concluded that the new system is emphasizing on the responsibilities and activities of the parties without that this would result in diminishing of the active role of the judge.

The strengthening of procedural obligations, combined with the system of sanctions (as implemented by the 2008 reform) should not be seen as a formalization of the procedure or as an expression of an (assumed) trend that a goal of reaching a substantive justice is fading and that courts shall more and more often use procedural operations, merely to quickly "get rid of the case", without a proper examination of merits.[80] Such reproach, although nowadays quite often expressed in Slovenia, is, I believe, not well-founded.

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[77] This approach is evident not only in for example the German ZPO, but also in the new English CPR, according to which a court must direct a case in a certain »track«; fast track, small claims track or multiple track – especially the latter enables the court much flexibility in order to adjust the time framework to the particularities of each case. C. Osborne, CIVIL LITIGATION, Oxford University Press, 2002, p. 225-265.

[78] See e.g. M. Dolenc, Materialno procesno vodstvo – sredstvo za racionalizacijo postopka ali dodatno breme in prelaganje odgovornosti? [Material procedural guidance – a tool for a rationalisation of proceedings or an additional burden and discharging of responsibilities?], *Podjetje in delo*, 2008, No. 6-7, p. 1574, M. Voglar, Prekluzije in sankcije po ZPP-D v praksi: izkušnja sodnika [Preclusions and sanctions pursuant to CPA-D amendment in practice: experience of a judge]; *Podjetje in delo*, 2009, No. 6-7, p. 1654.

[79] See, for example, S. Triva, op. cit., p. 343-364, Z. Trampuš, Metode…, op. cit., p. 49, V. Balažic, op. cit., p. 17, L. Ude et al., op. cit., p. 73-76.

[80] M. Jelačin, Novela ZPP-D, njene skrite pasti in pravne praznine [The CPA Amendment, its hidden traps and legal loopholes], *Pravna praksa*, 2008, No. 25, p. 10.

With the aforementioned tools, the reform is aimed at stimulating parties diligently to participate in procedure in order to assure a timely gathering of procedural material, which it the same time does not mean that responsibilities and activities of the court are diminished. In consequence this contributes also to the substantive quality of adjudication.[81] Also the Constitutional court of Slovenia has already confirmed that a proper system of procedural sanctions, burdens and time limits in civil litigation is not only admissible but actually welcome.[82] By expecting parties and their attorneys actively and diligently to prepare the case and participate in the course of litigation, the law strives to achieve not only acceleration of proceedings but better substantive quality of adjudication.[83] The introduction of procedural sanctions does not mean that they shall actually often be implemented. It is not unrealistic to expect that in most cases time limits and court orders are respected and that the culture of compliance shall prevail. In such case, it is beneficial not just for the acceleration of proceedings but also for substantive aspect of adjudication that parties are well prepared and diligent in conducting of their litigation. The same goes also for the court and its activities in proper case management and material procedural guidance which is, through the latest reform, gaining on importance. For the substantive quality of justice (and also for the effective fulfillment of constitutional right to be heard) it is also beneficial if all relevant submissions are given on time, so the opponent has sufficient time to reflect on them. Actually, the experience in Slovenia proofs that it was the system which was without proper sanctions for inactivity and delay, that caused the fading of the goal of substantive justice. As explained above, the lack of proper tools that would enable for timely gathering of procedural material resulted in frequent adjournments of hearings and in "piece-meal" manner of presentation of facts. and evidence and therefore proceedings often get too formalized and bereft of substance.

[81] *See* J. Zobec, Predlagane novosti glede zamudne sodbe in posledic izostanka ter glede vmesne sodbe [The proposed reform concerning default judgment, sanctions for inactivity and interim judgment], *Podjetje in delo*, 2007, No. 6-7, p. 1060.

[82] Decision of the Constitutional Court of Slovenia, No. Up- 2443/08, dated October, 7, 2009

[83] Ibidem.