Astrid Stadler, Vielfalt der Gerichte - Einheit des Prozessrechts, in: Die Rechtskontrolle von Organen der Staatengemeinschaft/ Vielfalt der Gerichte - Einheit des Prozessrechts?, Berichte DGVR Bd. 42, Heidelberg 2007

Summary

Plurality of Courts – Unity of Procedure?

by Prof. Dr. Astrid Stadler, Konstanz

Modern civil procedural systems all over the world have fundamental similarities. Basic features that most systems have in common are, for example, free access to justice, public trials, specifications for a neutral adjudicator, the right to be heard, procedural equality of the parties and finality of judgments. Party disposition and party initiative are widespread characteristics of civil litigation as well. Despite remaining differences the fundamental incompatibility between common law and civil law proceedings, still claimed only several years ago, does not exist any more. In Europe this convergence of systems is primarily due to the 1999 reform of civil procedure in England and Wales.

Looking at the structure of proceedings in Europe we find two basic procedural models. On the one hand civil procedures in France and in countries of the Romance legal family have developed three stages of litigation: a written introductory phase (pleading stage), a fact-finding phase with the taking of evidence by an instructing judge and a final hearing before a panel of judges generally without the taking of further evidence. On the other hand there is the German-Austrian procedural model with three stages as well: a pleading stage, a preparatory phase and a final hearing including the presentation of evidence to the trial court. With modern English and Spanish civil procedure it has in common an extensive pre-trial phase preparing for the final hearing of the case without the taking of evidence, as is the rule in traditional Romance legal systems. In English as well as in Romance civil litigation, preparation and fact-finding in the second phase are conducted by a judge other than the deciding judge or court. Nevertheless, at least in Europe there is a general tendency towards a single judge's being responsible for the whole proceeding. Thus the distinction between procedural stages becomes less important, unless they have a strict preclusive effect as is for example provided for in the draft for a Swiss Federal Code of Civil Procedure.

Of course, remaining differences in European and Anglo-American civil procedural systems must not be underestimated. First of all, the selection of judges in both systems follows different patterns. In addition jury trials available in American courts require specific rules of evidence and result in a different function of the pre-trial stage, which is not designed for the information of the trial judge. It is rather designed for the information of the parties and their attorneys in order to be prepared for the trial. Beyond that, both systems differ in their basic concept of litigation. Civil law litigation on the one hand has a focus on the claimant's legal position and the claims asserted. This has numerous procedural consequences. For example in civil law systems parties must present facts relevant to the claim in dispute in reasonable detail at the beginning of the litigation; the taking of evidence is restricted to facts directly relevant to the claim and defence of the parties; third parties can be included in litigation and in the taking of evidence only to a limited extent; the understanding of *lis pendens* and res judicata is not a very broad one. American civil litigation on the other hand puts the facts of the case into the centre of litigation and is designed to resolve the whole dispute in a comprehensive way. This involves a broad understanding of fact-finding, discovery, *lis pendens* and res judicata; third parties can be easily introduced into the proceedings.

Efforts toward the harmonization of procedural law are being taken on different levels. In Europe, close judicial cooperation in civil matters among the EC Member States results from the guarantee of a free common market. Since the year 2000 a great number of EC regulations and directives relating to judicial cooperation in civil matters have entered into force. European civil procedure has become the outrider of legal harmonization in the European Union. Mutual judicial assistance among the Member States is no longer governed by international treaties. EC Regulations on the service of judicial and extrajudicial documents and on the cooperation between the Member States in the taking of evidence constituted a significant waiver of national sovereignty. In many cases this helps to make cross-border litigation faster and more efficient. However, an important point of discussion is whether the service regulation gives adequate attention to the language problem in cross-border litigation and protects the rights of a foreign defendant sufficiently.

Jurisdiction, recognition and enforcement of judgments have also developed continuously since the Brussels Convention of 1968. Due to Regulation 44/2001/EC there is almost free movement of judgments within the Member States today. Reasons for declining recognition and enforcement have been reduced to a minimum in the aforementioned regulation. A new regulation creating a European enforcement order for uncontested claims entered into force in November 2005 and was another import step toward a uniform and union-wide enforcement of judgments rendered in any of the Member States. The new enforcement order grants enforcement in all Member States without any intermediate measures in this state, if the creditor obtained a judgment on an uncontested claim, including judgments by default. It has been criticized for giving up public policy control of judgments too early and for grossly neglecting the interests of the defendant in default proceedings including his or her right to be heard.

In contrast to the successful harmonization within the EC the idea of a world-wide Hague Convention on jurisdiction, recognition and enforcement of civil judgments failed just recently. Taking into consideration this failure of the Hague Conference it must come as a surprise that in spring 2004 UNIDROIT and the American Law Institute succeeded in adopting the "Principles of Transnational Civil Procedure". The adoption required a number of concessions by the ALI as the Principles more or less give priority to a European procedural model. In an effort to contribute to a worldwide harmonization of civil procedure, the Principles had to consider different legal cultures. The final text adopts numerous features of European civil procedure. There is, for example, the decision of the Principles in favour of an active role of the judge, the obligation of the parties to present relevant facts in reasonable detail during the pleading phase, free evaluation of evidence and a rather narrow concept of *lis pendens* and res judicata. Even with respect to the allocation of costs the "American rule", which generally does not allow cost shifting from the winning to the losing party, has been rejected.

In international commercial and legal disputes there is not only a competition between arbitral panels and national courts, but also among courts having concurrent international jurisdiction. Despite far-reaching harmonization of private international law in the EC the result of litigation will not be the same before different courts. This is at least partly due to particularities of procedural rules. Therefore, forum shopping and parallel proceedings will remain an import issue even within the court system of the EC. Art. 30 Regulation 44/2001 EC now offers a reasonable solution to the question of *lis pendens*.

However, the jurisprudence of the European Court of Justice on the question, whether the matter in controversy before two courts is identical ("core"-theory), allows a broad application of Art. 30 and thus gives absolute priority to the action first filed irrespective of the claimant's demand for relief. In practice "Italian torpedoes", used by litigants to delay proceedings, disprove the theory of equal protection from litigation in all Member States.

US jurisprudence has a variety of ways to deal with parallel proceedings. In contrast to most European legal systems, parallel proceedings are not deemed negative per se. Nevertheless, the doctrine of forum non conveniens and antisuit injunctions help to prevent proceedings before different national courts. Within the EC, however, English antisuit injunctions interfered with the system of international jurisdiction established by the Brussels Convention (now Regulation 44/2001/EC) and were therefore barred by the European Court of Justice in 2004.

Within the Member States of the EC a number of options concerning the extent of the harmonization of civil procedure are being discussed. The scale ranges from the introduction of uniform procedural rules in all Member States to framework regulations by the EC and model codes for civil litigation offering rules for national and/or international litigation, which the national lawmakers may accept, although they are not obliged to do so. Today we have a sound mixture of independent national rules on civil procedure (having a number of similarities as well as differences) supplemented by harmonized European rules on questions of international civil procedure. Of late the Commission has tended to interfere more and more with purely national rules of civil procedure, for example in the field of service of documents, in proceedings for payment orders or in small claims proceedings. However, the further development of European judicial cooperation in civil matters and the demands of a common market do not require uniform rules on civil litigation. The great success of international arbitration proves that parties in international commerce can cope very well with different procedural rules as long as mutual recognition of judgments and the cross-border taking of evidence are provided for. Procedural law is very much "law in action". Its application depends on the social background, education and individual temper of the judge. Therefore, even uniform procedural rules cannot guarantee a uniform application throughout the Member States of the EC. The concept of model codes following the example of the ALI/UNIDROIT Principles seems to be the best way to achieve harmonization step by step. European lawmakers should not over-accelerate the process of harmonization and should not disregard the difficulties and problems, especially language problems, which inevitably come along with defending a case in a foreign state, even within the EC.