

The Right to a Fair Trial in Practice

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Paper and Practice

- The right to a fair trial on paper/in practice
 - Also Judges are human beings
 - Number of cases and limited time
- Uncooperative respondent
- RTFT guarantees applies from the commencement of the proceedings till the final decision
 - Exceptions: Before (*Golder v . The United Kingdom*, Judgment of 21 February 1975, para. 35) and execution proceedings

How to Conduct a Fair Trial

- Fair Trial = combination of all of the particular aspects
- *Salesi v . Italy*, Judgment of 26 February 1993, paragraph 24: *It must not be forgotten that Article 6 para. 1 (art. 6-1) imposes on the Contracting States the duty to organise their judicial systems in such a way that their courts can meet each of its requirements (...).*
- *Swiftiness of proceedings can be at the expense of justice*
- *Wittgenstein „Language Games“*

About Schemas

- Published in our book *The Right to a Fair Trial* and in Czech „Buletin advokacie“
- Adjudication of cases is fundamentally limited by time
- Every judge creates a sequence of steps how to proceed in the vast majority of cases
- Diagrams represent „ideal“ schemes of civil proceedings



About Schemas

- Not tailored on a specific domestic civil procedure
 - „international“ thinking is desirable – even new courts will be created
- Rectangle – progress in the case, next
- Diamond represents decision making, assessment of condition, choice between different variants
- Oval – closing the case



Procedure before the Hearing Takes Place

- The flowcharts depict the effective sequence of steps that are specifically arranged to complete written proceedings and to summon hearing as soon as possible.
- While respecting all the aspects of a fair trial and procedural rights of participants.
- Applicable to the vast majority of cases, routine, legal assistant.
- Experience allows us to skip certain steps.

Case Load, Competence and other Conditions of the proceedings

- Organization of court system, right to a lawful judge, competence of a different authority, referral to a court of different instance, referral to a more convenient forum.
- Bias – *Remli v. France*, Judgment of 23 April 1996, paragraph 48 – court duty to check whether it is „an impartial tribunal“.
- Conditions of the proceedings: capacity before, *res iudicata*, *lis pendens*, arbitration clause.

Court Fees, Claim Corrections, Payment order

- No action until fees are paid (claim corrections can be very time-consuming task, exemption from this duty)
- Legal aid
- Claim Correction – failure usually leads to a dismissal
- Payment order and likelihood of submitting complaint against

Qualified Call

- The aim is to obtain the response under penalty of a „Judgment of recognition“
- Not every response can prevent a judgment of recognition
- Serving Claim
- Possible searching for respondent, appointment of a guardian
- Serving response, summons to the hearing

Procedure During the Hearing

- Hearing as a peak or judicial activity
- Public hearing = protection against the administration of justice in secret with no public scrutiny. It is also one of the means whereby confidence in the courts can be maintained (*Diennet v. France*, Judgment of 31 August 1995, paragraph 33)
- Exception in *Osinger v. Austria*, Judgment of 25 March 2005, paragraph 45:

In the course of proceedings where exclusively legal or highly technical questions are at stake, the requirements of Article 6 may be fulfilled even in the absence of a hearing. Moreover, neither the letter nor the spirit of this provision prevents a person from waiving of his own free will, either expressly or tacitly, the entitlement to have his case heard in public

Opening the Case, Presentations, Settlement

- Default judgment if a duly summoned participant fails to appear
- Request for adjournment have to be justified and timely
 - Timely – as soon as an excuse can reasonably be submitted
 - Reasoned – health, collision (prior, substitute)

Settlement – conditional – settlement – withdrawal
with incentive Non-binding opinion on the merits

Short Introduction to the Claim, Oral Presentations

- What was done so far by the court
- Contentious and non-contentious Facts – simplify the fact-finding process
 - Unopposed facts

Evidence

- Right to have knowledge of and to comment on the evidence and observations, both on the evidence proposed (why it should not be produced) and also on evidence already produced – the right to adversarial proceedings
- No substantial disadvantage vis-à-vis to his or her opponent – equality of arms – see more in *Dombo Beheer B. V. v. the Netherlands*, Judgment of 27 October 1993
- Participant is obliged to state clearly and unequivocally which allegation a concrete piece of evidence is aimed to prove

Evidence

- The Court does not allow to produce proposed evidence if:
 - Irrelevant
 - Cannot prove material facts
 - „Fruit of the poisonous tree“ – see more in *Khan v. The United Kingdom*, Judgment of 12 May 2000
 - Fails to demonstrate which allegation should be proven
 - Purposefully prolong the proceedings
 - The court will justify denial in the reasoning

Duty of fair trial: participants follow to meet their burden of proof

Closing of the Production of Evidence

- Before closing: Instruction regarding the necessity to apply the relevant facts and evidence before announcement of the decision on the merits = important concentration of the evidentiary proceedings at first instance. Participants' reaction should be noted in the records.
- Decision on closing of the production of evidence and to reject any unnecessary and redundant evidence.

Closing Submission

- Participants should comment on the facts and on the legal aspects as well
 - Problem with lengthy submissions
- Postponement for the purpose of rendering judgment
- Interlocutory or partial judgment

Judgment

- „Pronounced publicly“
 - Could be met also by making the judgment available in the court registry – see *Pretto and Others v. Italy*, Judgment of 8 December 1983, paragraph 26:

‘However, many member States of the Council of Europe have a long-standing tradition of recourse to other means, besides reading out aloud, for making public the decisions of all or some of their courts, and especially of their courts of cassation, for example deposit in a registry accessible to the public. (...) – two possible ways – first during public session, second a written form where public has access to written decisions...’

Judgment

- Judgment has to be „reasoned“ – every decisive factor has to be elaborated with the aim of making its reasoning persuasive.
- On the other hand it does not mean that detailed answers must be given to every argument - see more in *Hiro Balani v. Spain*, Judgment of 9 December 1994
- English civil procedure: „small claims track“, „fast track“ and „multi-track“
- *Justice must not only be done, it must also be seen to be done*

Discussion bullets – before hearing

- Competence, conditions of proceedings, collection of court fees, claim correction – what has precedence
 - Court fees – German doctrine
 - What might lead to easy finalization of the proceedings
 - Claim corrections can be very time-consuming task with uncertain result

Payment order – always on likelihood of success

Qualified call – have to call for initial from Regional court that the qualified call should not be issued

Discussion bullets – hearing

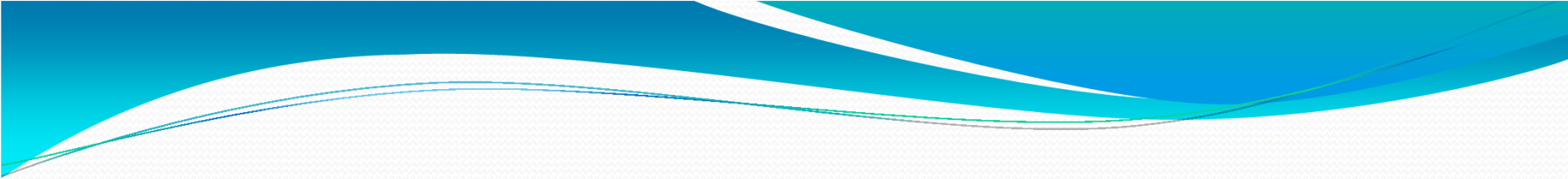
- Cases without hearing
 - Experience, did you see proceedings without hearing as fair
 - How successful is to ask participants to agree to have proceedings without hearing and in which form
 - Calling expert to the hearing
- Experiences with adjournment requests – misusing
- Settlement – easy to reach? – in which type of cases
 - Are you giving non-binding opinion on the merits
- Contentious and non-contentious facts
 - Asking parties?
 - Considering what is contested in submissions
 - Unopposed facts

Discussion bullets – hearing

- Saving evidence: proposing later, in closing speech
- Which allegation is aimed to prove by this concrete piece of evidence
- *Fruit of the poisonous tree* doctrine
- Duty to instruct participants how they meet their burden of proof
- Concentration of evidentiary proceedings
- Long closing submission/speech
- Judgments without reasoning, shortened reasoning



Questions?

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- Justice must not only be done, it must also be seen to be done