

Preclusion of late allegations and evidence as a tool to increase efficiency of civil proceedings in Poland: A short story of the ugly past and the long way towards the bright future

by Bartosz Karolczyk*

1. Introduction

In this article I concisely present selected issues regarding preclusion of untimely allegations and evidence¹ in civil proceedings. In other words, this paper deals with the doctrine of concentration of procedural material, as it is called in Poland. In the background there are inherent internal tensions between two key values of the legal process. Namely, efficiency on the one hand, and reliability of factual inquiry on the other. I will carry out my presentation by mixing a healthy concoction of doctrine, law and practical observations. One caveat is in order, however. Given the limited space and the sheer size of the subject of inquiry, some readers may find this article a bit general. Although a side effect, this should be in fact beneficial for a foreign reader as a meticulous discussion might have been too abstract and too detailed for comparative purposes.

I start with a brief characterization of the Polish system of procedure, including the still powerful dogma of truth-seeking. After a short historical comment on the principle of concentration, I move to its recent “ugly past” and “the bright future” ahead in light of recent amendments to the Polish Code of Civil Procedure (the “CCP”)². I conclude with some thoughts on the new law.

2. The Polish model of procedure: a view from above

I would like to start by making two points.

2.1. Theoretical classification

First, although it does not perfectly match Damaška’s model, I would argue that the Polish system is a type of “social” or “policy-implementing” model of procedure.

Theoretically, this model has the following characteristics: 1) as a part of its function, the active state has adopted a certain idea of “good society” should work; 2) a civil dispute is a

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¹ In this paper the term “allegation” means factual allegations or statements introduced, in principle, into the proceedings by the parties. The term “evidence” is used to denote a motion to admit (take) evidence, unless otherwise indicated. Where the term “procedural material” is used, it means both allegations and evidence.

² References to Articles of law in this paper are to the CCP, unless otherwise indicated.

social problem, because it disrupts the orderly workings of society; 3) so, the state needs to be actively involved in the legal process, should one be invoked; 4) accordingly, the legal process is about more than merely solving civil disputes; it is also about that idea of social order; 5) thus, the lawmaker infuses procedural norms with substantive policies; 6) because otherwise these policies will remain on paper, the primary goal of civil proceedings is to make correct factual findings, which is a *conditio sine qua non* for giving a proper judgment. Given how important the ultimate outcome is, this model of procedure has a tendency to incorporate officialdom. Ultimately, the fate of the proceedings, in particular both identification and taking of evidence is left principally to the judge as an emanation of the state, so that neither the procedural, nor the substantive goals of the process are compromised by private contest³. Procedural norms are mostly *ius cogens* in character, meaning neither the judge, nor the joint accord of the disputants can alleviate their application⁴.

It is fair to say that this approach to adjudication was taken by the principal drafter of the Austrian Code of Civil Procedure of 1895, Franz Klein⁵. The Polish Code of Civil Procedure of 1930 was heavily based on the Austrian Code. The CCP was, in turn, heavily based on the Code of 1930. However, due to political changes in post-war Poland and the Soviet influence, the social model was gradually turned into a socialist model. As a result, several key concepts were significantly modified. The prime examples relevant to this paper are Articles 3 § 2, 7, 213 and 232 in their original wording (until 1996)⁶. Generally speaking, the sole responsibility for the efficiency⁷ of proceedings has been placed with the courts (the judges).

³ See Damaška 1986, p. 80-88.

⁴ Regardless of Damaška's brilliant analytical framework, I should point out that Franz Klein is considered the architect of this approach to civil litigation. He did not invent these elements, although he put them together in a unique manner. The literature on the topic is vast.

⁵ This code is commonly accepted as the most influential code of civil procedure in 20th century Europe. See generally e.g. Van Rhee 2008a.

⁶ The court was under the duty to examine all material circumstances of the case in a comprehensive manner and discover the actual substance of factual and legal relations. The court, acting on its own, could take any steps, allowed given the stage of the proceedings, deemed necessary to supplement the [factual] material and evidence submitted by the parties (Article 3 § 2). Article 7 (still) authorizes public prosecutors to initiate civil proceedings in every case in which they believe the protection of the rule of law, the rights of citizens or public interest requires it. Pursuant to Article 213 § 1, the court could order appropriate inquiry in order to supplement or clarify the parties' allegations. Moreover, in principle, the court was not bound by the defendant's acceptance of the complaint. The parties were obliged to submit evidence, the court could take evidence not submitted by the parties; the court could also order an appropriate inquiry, so that necessary evidence could be established (Article 232).

⁷ Procedurally, in Europe this concept has two elements. First, cases should be decided within reasonable time and as economically as possible. Second, cases should be decided fairly on the merits, that is, in accordance with substantive law. See Taruffo 2008, p. 187; Pogonowski 2005, p. 61. and Łazarska 2012, p. 379 and on. See also generally Ereciński & Weitz 2006. Cf. the overriding objective of the English Civil Procedure Rule 1.1 (available at <http://www.justice.gov.uk/courts/procedure-rules/civil/rules/part01>) [last access 27 April 2013].

Things have, of course, changed quite a bit after 1989. However, a significant consequence of these historical events is that a lot of concepts of “social” origin are viewed as “socialist”. This is because the differences between these two, despite changes in the law, may indeed be subtle at times or are not readily clear to a lot of common observers. As much as this is important, this is a discussion for another day⁸.

2.2. A system in flux

Second, regardless of such categorization, the Polish system is in flux.

Since its entry into force in 1964, as of April 2013 the CCP has been amended over 170 times⁹. The current code is criticized by many as incoherent, vague, detailed and complicated. These claims are neither surprising, nor false given the act was created in times of “deep” socialism and has “survived” the political, economic and social changes¹⁰. Nonetheless, as far as first instance procedure is concerned, the CCP has basically remained structurally unchanged since 1964.

Looking back at the last 20 years through the comparative lens produces some amusing results.

The first major reform took place in 1996. A lot of socialist tissue has been removed from the patient, who at the same time was applied with a healthy dose of measures oriented towards production of adversarial environment. Still, judicial discretion, a concept hardly recognized in the legalistic, bureaucratic and hierarchical system of justice¹¹, was nowhere to be found – a result of the post-feudal, 19th century line of thought, whereby discretion is to be avoided as its elimination protects the citizens against capricious and abusive judges. There was no pre-trial, no judicial case management and the practice of commencing trials for unprepared cases was both notorious and frequent¹².

Meanwhile in England, in March of 1994 Lord Woolf was appointed to review the rules of civil procedure. The goal was to improve access to justice, reduce the cost of litigation and remove unnecessary complexity. I assume that every reader of this paper is well familiar with the famous Woolf Reports. If not, it suffices to quote this phrase by Lord Woolf: “Ultimate responsibility for the control of litigation must move from the litigants and their legal advisers

⁸ Cf. conclusions and citations in Karolczyk 2013b.

⁹ According to notes in the commercial digital database Lex Prestige (Wolters Kluwer).

¹⁰ See conclusions and citations Karolczyk 2013b.

¹¹ See Damaška 1986, p. 19, 21-22, 51-52. Thus the classic attachment to rules, and lack of standards. Moreover, as a result, the trial is divided into many hearings spread between months and, in many cases, years.

¹² Unfortunately, this is arguably still the case. See section II. in Karolczyk 2013b.

to the court”¹³. In 1999 *Adrian Zuckerman* wrote about „the universal assertion of judicial control” as an European trend in the search for efficiency in civil litigation¹⁴.

Yet, in the year 2000 the Polish lawmaker introduced preclusion at the pleading stage to the special procedure for commercial matters¹⁵, arguing this will speed up the proceedings and increase the adversarial environment by forcing the parties to be more active. That year marked the beginning of a decade during which the doctrine, the lawmaker and the courts commonly fell victim to two fallacies. One, that entrepreneurs involved in civil litigation should be held to a higher standard because they do business. Two, that formalism promotes efficiency. Subsequent changes to this procedure prohibited amendments to the prayer for relief and the subject matter of the complaint, as well as limited the admissibility of the set-off defence¹⁶. Effectively, those and other changes, by eliminating any traces of reason and flexibility took this procedure back to early 19th century. For a vibrant, developing, economy with mostly legally unsophisticated players it was, I believe, a shot in the foot.

Meanwhile in Austria and Germany (2002 and 2003, respectively), the courts were granted *the right* to disregard untimely submissions of procedural material¹⁷. Norway passed new code of civil procedure in 2005, abandoning its German heritage and leaning more towards *common law* standards¹⁸. By 2008, judicial case management was on the lips of everyone¹⁹.

2.3. Constitutional foundation

The Polish Constitution of 1997 contains several key declarations about legal process. Fundamentally, Article 45 stipulates that “every person has the right to a fair and public

¹³ See Woolf 1996, p. 5.

¹⁴ Zuckerman 1999, p. 47.

¹⁵ Generally, every matter between two entrepreneurs was a commercial matter. Any legal entity or natural person carrying out economic or professional activity on one's own behalf was considered an entrepreneur. See Article 43¹ of the Polish Civil Code of 1964. Thus, this included, for example, sole proprietors and partners of civil law partnership.

¹⁶ At the same time, the general (ordinary) procedure for civil disputes remained basically untouched. The only change to that procedure in 2000 was the introduction of Article 207 § 3. This provision authorized the presiding judge to order a party to raise or submit procedural material (literally, “allegations, defences and evidence”) in writing by a certain date, provided that the party was represented by an attorney. Should such party fail to comply, it would be barred from raising allegations or defences or moving for evidence at a later stage, provided that these could have been made in response to the judge's order. The nature of that provision was disputed, while it remained in force until 3 May 2013.

See sec. 3.3 below for more details about the changes to the special procedure.

¹⁷ See §§ 179, 180(2) and 275 of the Austrian ZPO. See also Oberhammer 2004, p. 227; Oberhammer & Domej 2005, p. 116, 123; Verkerk 2010, p. 40.

¹⁸ See generally Act of 17 June 2005 no. 90 relating to mediation and procedure in civil disputes (The Dispute Act) [*om mekling og rettergang i sivile tvister (tvisteloven)*] and the contributions in Lipp & Fredriksen 2011. The English translation of the Dispute Act is available in that volume, as well as online. See <http://www.ub.uio.no/ujur/ulovdata/lov-20050617-090-eng.pdf> [last access 10 May 2013].

¹⁹ See generally contributions in Van Rhee 2008b. See also sources cited in Karolczyk 2013b.

resolution of the matter without undue delay”. Following the model of Article 6 of the European Convention on Protection of Human Rights and Fundamental Freedoms of 1950, Article 45 of the Polish Constitution is a manifestation of a basic, substantive right to court. This right includes, *inter alia*, the right: 1) of access to courts; 2) to effective judicial remedy; and 3) to have a matter resolved in reasonable time²⁰. I would argue that all three elements, that is “fair, public and reasonably fast” have been given the same weight.

Unfortunately, until very recently the only provision in the CCP pertaining to efficiency of judicial process was Article 6 § 1. It reads: “The court should counteract delay in the proceedings and strive to resolve the matter at the first hearing, if it is possible without compromising the inquiry into the dispute”. There was no a single hint in the code that the speed with which the matter is decided also depends on the parties and, therefore, cooperation between them and with the court is not only warranted, but expressly required.

2.4. The dogma of truth seeking

The second part of Article 6 § 1 brings me to the dogma of truth seeking.

In the field of procedural theory, Polish doctrine follows the German thought. Much of it is, therefore, based on the concept of fundamental principles of civil procedure²¹. One such principle is the principle of truth.

Currently, this principle should be understood as a postulate to decide the matter on the merits after a diligent, but reasonable factual inquiry. Given the existing model this is self-explanatory. However, many commentators believe that despite the change of the model (from socialist to social), the court is still under the duty to “pursuit the truth, while this command is clear and does not require any dogmatic justification”²². Moreover, even stronger claims are commonly made in the doctrine, namely, that determination of truth is the goal of legal process. Notably, also the Supreme Court seems to approve this line of thought in the context of judicial power to introduce evidence²³.

Indeed, from my perspective, the best example and a living testament to the socialist model is the court’s authority to introduce evidence on its own accord (*ex officio*). Literally,

²⁰ See Pogonowski 2005, p. 7, 16.

²¹ These are „general assumptions”, „leading ideas” of the procedural system, which affect all other elements of that system and the relations between them. Cf. Andrews 2012, p. 12-38 (an interesting attempt to synthesize a doctrinal approach to fundamental rules under English law).

²² Ereciński 2012, p. 120.

²³ See Supreme Court’s resolution of 17 February 2004, III CZP 115/03, OSNC 2005, No 5, Item 77 (Article 232 2nd sentence is the manifestation of the limited, albeit still existing, principle of material truth); Supreme Court’s judgment of 22 February 2006, III CK 345/05, OSNC 2006, No 10, items 174 (since Article 232 2nd sentence has remained unchanged, it is a good indication to conclude that the legislator still gives priority to the principle of material truth).

this is discretionary²⁴. Despite the clear wording of the provision, however, under certain circumstances this right turns into a duty²⁵. Specifically, the Supreme Court has ruled that “the court should introduce evidence on its own accord in special circumstances”. These include, among others, a risk that an unrepresented party’s interest, deserving special protection, may be infringed due to lack of activity on her part, despite proper instructions by the court²⁶. In addition, it was ruled that “sometimes due to existence of public interest (which always exists in social security cases) the discretionary right to introduce evidence *ex officio* becomes the court’s duty”²⁷.

Most importantly, this right (or obligation) is not subject to any time limitations in. Accordingly, the court may (or must) admit evidence that would be otherwise barred as untimely. This was the rule in commercial cases. Although it was considered controversial then, it very likely remains good law today²⁸.

Still, the Code contains many provisions that sacrifice the search for truth for other equally important values. Furthermore, two such values are, arguably, the (individual) right to have one’s matter decided without undue delay and the efficiency of court system (common interest). In civil litigation, it is simply unreasonable to expect that truth be determined in each and every case²⁹. What is essential, thought, is that “the legislator should provide the courts and the parties with tools, which used with reason and regular diligence”, allow for proper inquiry into the facts of the case³⁰. Accordingly, regardless of the soundness of the said

²⁴ See Article 232 2nd sentence (“The court may admit evidence not indicated by the party”). It is interesting to contrast this with the Code of 1930 and its Article 244. It read: “The court may admit evidence which neither party has moved to admit, provided that the court took notice thereof from the file of the case or the parties’ statements, and provided that this code does not stipulate otherwise.” A subtle, yet significant difference, isn’t it?

²⁵ This is pretty stunning given the civil character of the Polish legal order and the relevant provisions of the Constitution. According to its Article 178, while performing their duties, judges are only subject to the Constitution and statutes.

²⁶ See e.g. Supreme Court’s judgment of 8 December 2009, I UK 195/09, OSNP 2011, No 13-14, Item 190.

²⁷ See e.g. Supreme Court’s judgment 4 January 2007, V CSK 377/06, OSP 2008, No 1, Item 8. Cf. Supreme Court’s judgment of 15 January 2010, I CSK 199/09, LEX nr 570114 (holding that if the only way to avoid a incorrect decision on the merits it to take expert witness evidence, than the court’s lack of initiative in that regard violates Article 232 2nd sentence, regardless of the parties’ initiative).

²⁸ See K. Weitz, P. Grzegorzczak, in: Ereciński 2012, p. 135-136, 1042. The authors limit the rule by writing that the court’s initiative should be limited exclusively to properly introduced parties’ allegations.

²⁹ This has been said many times before. Cf. *Pearse v. Pearse* (1846) 1 De G & Sm 12, per *Knight-Bruce V-C*: “The discovery and vindication and establishment of truth are main purposes certainly of the existence of Courts of Justice; still, for the obtaining of these objects, which, however valuable and important, cannot be usefully pursued without moderation, (...) Truth, like all other good things, may be loved unwisely - may be pursued too keenly - may cost too much . . .”,

cited in *A (FC) and others (FC) v. Secretary of State for the Home Department* [2005] UKHL 71.

³⁰ Gudowski 2005, p. 1027. Cf. Jakubecki 2006, p. 366 (citing *A. Wach*). See also legislative opinion supporting the bill, p. 52 (available at [http://orka.sejm.gov.pl/Druki6ka.nsf/0/46931DF8C9071DE8C12578B1003FF809/\\$file/4332.pdf](http://orka.sejm.gov.pl/Druki6ka.nsf/0/46931DF8C9071DE8C12578B1003FF809/$file/4332.pdf)) [last access 9 May 2013].

postulate, it should not be understood as an absolute command. However unpleasant and costly that is, we need to accept, therefore, that judicial decision may sometimes not be based on the facts.

In light of recent amendments it is indeed conceivable that such situations could be caused by the parties themselves. Specifically, when a party intentionally or recklessly obstructs the proceedings, treats the court instrumentally or exercises her procedural rights in such a manner or with such a (malicious) purpose³¹. I believe such acts or omissions should, after proper notice: 1) constitute a deemed waiver of the right to have the case decided pursuant to facts; and 2) in consequence, relieve the court of the duty to decide the case pursuant to facts³². This line of thought, however, has a long way ahead to be seriously considered.

3. The concentration of procedural material

3.1. Preliminary remarks

The policy that proceedings should be swift is expressed in Article 6 § 1, which stipulates that the court should counteract delay in the proceedings and strive to resolve the matter at the first hearing, if it is possible without compromising the inquiry into the dispute. This provision is treated as a normative foundation of the concentration principle.

It is understood as all provisions, which facilitate efficient collection of procedural material and – in turn – conclusion of disputes at the first hearing³³. Moreover, there is a formal aspect to it as well, since it is said to set time limits on certain actions, including raising certain procedural defences and initiating interlocutory proceedings³⁴. I think it is fair to say that this theoretical approach is universally accepted both in Poland and in some other European countries³⁵.

According to Polish legal writing the concentration principle can be implemented in two ways³⁶. First, through a system of preclusion that incorporates the rule of contingent

³¹ This could arguably be put under the umbrella of abuse of procedural rights. Although some authors argue prohibition against abuse of right is a general principle of the CCP, it does not contain any general provision that would address procedural abuse by parties or their attorneys (similar to, for example, Rule 11 of the Federal Rules of Civil Procedure). See generally Plebanek 2012.

³² Similarly Łazarska 2012, p. 670 („Procedural rights ends, where their abuse begins.”).

³³ This is both theory and fiction, indeed a harmful one since the disharmony between the reality and the letter of the law is striking even to a layperson.

³⁴ One can build a rather extensive catalogue of procedural defences that need to be raised prior to appearance under pain of preclusion. Since this is a rather common rule I will not talk about it. What I would like to note that in Poland there are nine defences that affect the admissibility of the complaint, which the court has to consider on its own motion. Accordingly, they are not subject to preclusion and can thus affect the outcome of the case even at the very last trial hearing.

³⁵ See Weitz, p. 74 and sources cited there; Taruffo 2008, p. 198-199.

³⁶ Historical research into that statement has been painfully limited. This claim has been made consistently throughout the 20th century, mostly by reference to two important Polish books, namely Wańkowski 1932 and

accumulation (*Eventualmaxime*)³⁷. This system originated in the formalized, written Romano-canonical procedure and was further developed in Germanic *gemeines Recht*³⁸. Generally, it is based on express statutory deadlines for identification and submission of procedural material. The lapse of a deadline renders any omitted material belated. If a party submits such material nonetheless, the rule of preclusion will activate. Exclusion of such untimely allegations or evidence from the file thus occurs automatically by mere operation of law. As Engelmann notes, very little room for manoeuvre, if any, is left to the judge³⁹.

Many Polish authors argue that the rule of contingent accumulation is an inherent element of the system of preclusion⁴⁰. The said rule makes it mandatory for the parties to submit *all* allegations and evidence, at a certain stage in the proceedings, including potential procedural material (*in omnium eventum*), namely allegations and evidence that *could become* relevant⁴¹. In other words, you are expected to plead “just in case”, apparently regardless of how plausible such pleas may be or the (the little) information you actually have. Thus, inconsistencies between such “primary” and “secondary” material do not matter. What matters though, is that if you fail to allege or make a motion for evidence and the proceedings move to another stage, such material will be automatically deemed untimely and thus inadmissible on procedural grounds⁴².

Wengerek 1958. These two scholars looked mostly into German sources. However, there are some interesting inconsistencies between their work and Engelmann 1927. Suffice to say, the picture of the sequence of process and the legal doctrine one gets from the latter is definitely less coherent than the one presented by the former. The most comprehensive modern Polish research into these matters can be found in Weitz 2009.

³⁷ Engelmann also referred to it as *Konzentration der Rechtsbehelfe*, whereas Millar wrote about *the principle of mass-attack or mass-defense*. See Millar 1923, p. 25.

³⁸ Weitz 2009, p. 76.

³⁹ Cf. Engelmann 1927, p. 32.

⁴⁰ Wengerek 1958, p. 38; Weitz 2009, p. 75-76.

⁴¹ See Millar 1923, p. 26 (citing German sources) and Engelmann 1927, p. 28.

⁴² Even though I have researched these areas rather extensively I have not come across a comprehensive analysis of the actual purpose or function of this rule. K. Weitz concludes, with regard to both systems, that it is their preventive function that was essential. In other words, the rules were there to make sure parties would submit procedural material in a complete and concentrated manner, and thus their repressive function was secondary in that it enhanced the preventive function. See Weitz 2009, p. 78.

I find this explanation both unpersuasive and incomplete.

As a side note, I think drawing conclusions for both of these systems is unfounded given their different historical roots. This becomes clear when we consider that preclusion was a product of a secret, inquisitive, written and formalized Romano-canonical procedure, whereas judicial discretion (during trial) was an essential element of unitary trial by jury under *common law*. We should also remember the rigid common law pleading rules (which effectively worked the same way as preclusion), which were oriented towards simplifying the issue for the trier of fact (the jury).

Given the origin of Germanic rules I find the explanation unpersuasive. For any rule of law to operate as a preventive measure, the parties need to take actual notice. How were the parties under German *common law* supposed to know these highly technical rules? Were they obliged to use professional legal help? Did the court advise them about the preclusion? These themes are unfortunately not explored in K. Weitz's paper and make his conclusion susceptible to critique.

The second system of concentration, which originated in England, is based on judicial discretion⁴³. Theoretically, such system does not incorporate strict statutory deadlines for submissions. On the contrary, it is the judge who decides whether to accept or reject new (untimely) averments or evidence late in the proceedings. In order to do so, the judge weighs different factors and evaluates how such material affects both the other party and the course of the trial⁴⁴. In other words, preclusion is a result of judicial decision, not an automatic outcome of statutory rules⁴⁵.

Regardless of its origin, neither the Austrian, nor the German ZPO have incorporated the *Eventualmaxime*. In fact, both of these codes copied the liberal French rule⁴⁶.

3.2. The ugly past (special procedure for commercial matters)

As mentioned before, in 2000 the CCP was amended to “adjust” resolution of commercial disputes to “the high standards of professional business” by introducing preclusion at the pleading stage⁴⁷. Effectively, it made the pleadings the sole means for identification and submission of evidence. As a consequence, a party would lose the right to make allegations and submit evidence at a later stage in the proceedings simply by failing to include these in her pleading. Until that moment, no such rules have ever existed in 20th century Polish civil procedure.

I think the key question is: who benefited the most from this rule and why?

Given the general knowledge about the Germanic procedure at the time, my hypothesis would be: the judge. Given its inquisitive nature, i.e. the duty of the judge to pursue the truth and the lack of party contest, that answer seems to be plausible. The nature of the process could have been generally known to potential disputants, but that is a speculative claim. In any case, elimination of the information asymmetry between the parties was certainly not a concern. We should also remember that the principle of *nemo tenetur edere contra se* reigned on the Continent until early 20th century. I would argue, therefore, that it was the repressive function that was essential. Simply put, it was there to punish parties for not helping the judge do his job properly.

Cf. paragraphs from the General Judicial Ordinance for the Prussian States, in Engelmann 1927, p. 591.

⁴³ On the Continent, it was the French who in 1806 introduced the rule that allegations and evidence can be submitted until the very end of trial.

⁴⁴ Cf. Weitz 2009, p. 77; Wengerek 1958, p. 39.

⁴⁵ See Weitz 2009, p. 77.

⁴⁶ Neither the Dutch code of 1838 had it. See Verkerk 2010, p. 63. This has changed over time, however. See Article 111 § 3 and Article 128 § 5 of the Dutch code of procedure. See also Hooijdonk & Eijvoogel 2009, p. 34. As I understand, professional representation before Dutch courts is, in principle, mandatory.

⁴⁷ Article 479¹² § 1 (after the year 2000): In the complaint, the plaintiff must provide all allegations and evidence [to support them] or he shall lose the right to submit them in the course of the proceedings, unless he can show that their submission in the complaint was not possible or that the need to submit them arose later.

Article 479¹⁴ § 2 (after the year 2000): In the answer, the defendant must provide all allegations, defenses and evidence [to support them] or he shall lose the right to submit them in the course of the proceedings, unless he can show that their submission in the complaint was not possible or that the need to submit them arose later. (...)

To make things worse, shortly thereafter the Supreme Court announced that the new system is in fact based on the *Eventualmaxime*⁴⁸.

Allegations, objections or defences as well as motions for evidence, if omitted from pleadings, were by default deemed untimely⁴⁹. Thus, the court had no choice but to bar a party from acting or disregard such submissions altogether, if already made, regardless of their relevance or how they would affect the judgment. That was the case, unless the omission was excused. One had only two options, namely to either show that earlier submission of material was impossible, or the need to allege or to move for evidence arose after the initial pleading had been filed with the court. As shown by the initial line of case law, this was very difficult.

Fast forward to 2010 and the ultimate result is the snowball effect in case law on these points. It got voluminous, detailed and not necessarily coherent quite fast⁵⁰. Limited empirical data showed that preclusion was one of the most important aspect of every commercial court case⁵¹. In other words, the focus shifted from the merits to technicalities.

Thus, the Polish legislator, with the “help” of the Supreme Court, “succeeded” in creating a 19th century style procedure in the 21st century. What we had were procedural (technical) rules that fundamentally affected how a case was decided. Commercial, often complex suits began to hinge on the art of pleading, á la 19th century *common law* style⁵². The plaintiffs’ attorneys were literally expect to guess how the opponent would respond in her pleading, and the defendants’ counsel – having only the complaint to work with – would come up with every allegation, claim, defence or objection imaginable, in a single responsive pleading, the

⁴⁸ From today’s perspective it is truly remarkable. Neither in the law, nor in the legislative materials was there a single hint that was the case. An alternative, more rational reading of the provisions was not even considered in the decision. See Supreme Court’s resolution of 17 February 2004, III CZP 115/03, reported in “Prokuratura i Prawo” 2004(9), p. 33. This resolution announced the rule that under the system of preclusion both parties are required to submit all facts, evidence and defenses known to them in the pleadings, including those which would become relevant only if the first line of allegations would prove ineffective or got dismissed by the court. Should they fail to do so, they lose the right to submit that particular piece of procedural material that could have been included in the pleading in the first place, regardless of its weight or relevance, unless the delay can be excused. The Court has given zero thought to policy or functional considerations behind this formal, archaic reading, merely repeating empty conclusions about the need for efficiency in civil litigation.

⁴⁹ An intention to modify a motion already made was treated as a new motion. As already noted, preclusion did not apply to the court, who by exercising its right/duty could admit otherwise procedurally inadmissible evidence.

⁵⁰ See generally Sadomski 2010, p. 83 and on.

⁵¹ See Sadomski 2010, p. 123. The literature on the topic is very large.

⁵² Cf. e.g. *Clark v. Pennsylvania R. Co.*, 328 F.2d 591, at 594 (2nd Cir. 1964):

“In the heyday of Common Law Pleading, when each of the numerous technicalities involved provided the members of the bench and bar with a source of continual intellectual amusement and pleasure, the sporting theory of justice prevailed. To win a lawsuit by guile and surprise or by the skillful manipulation of mysterious rules, understood only by the elite, was quite the thing to do. (...)”

This description, although taken from a different legal culture and from a different time, is an incredibly accurate description of the Polish reality AD 2000-2013, except apparently nobody was amused or pleased.

answer⁵³. Both parties were in fact invited to second guess what the judge would make of it all. Since, there was no opportunity to take to the judge, this proved to be quite a game – to identify the law and to allege facts that fit the law right at the outset of the case! Thus, just like under *gemeines Recht*, this form of preclusion “led to monstrous formalism and basic eccentricity, so that finally a party was compelled to allege wholly contradictory things, the one in the first line, the other for the case that the first was unavailing: the presentation of the case was a most unnatural one, and what is more, the use of such contradictory allegations prejudiced the cause of candor and honourable dealing.”⁵⁴.

I took the Supreme Court 10 years to recognize two things. First, that preclusion is not *really* automatic and it *has* an important element of judicial discretion in it. Second, that *Eventualmaxime* is not *really* there, or – at least – it is not as broad as we have initially announced⁵⁵. These developments were important as they have introduced a urgently needed element of rationality into the system. Also around that time, the special procedure came under heavy and widespread criticism that eventually led to its demise.

Calls for review of the ordinary procedure have been also growing louder. *K. Weitz*, professor at the Warsaw University and Member of the Civil Law Codification Commission, concluded that: 1) the CCP lacks general provisions that would stipulate the parties' responsibility for proper implementation of the concentration principle and burden them with the duty to support (diligent conduct of) the proceedings⁵⁶; 2) the CCP lacks provisions based on judicial discretion, that would provide for a general tool to achieve proper concentration of procedural material⁵⁷; and 3) general rules addressing parties' activity in the course of proceedings are needed; on the other hand the court needs to be authorized, but not bound, to bar or disregard untimely submission of procedural material, unless the delay is excused⁵⁸.

To summarize, the ordinary proceedings for civil matters lacked mechanism that would ensure and mandate effective flow of information. Following the old French rule the parties

⁵³ There was a rule in the CCP that was directed, perhaps intentionally, at mitigating these difficulties. Specifically, Article 479¹² § 2. It required the plaintiff to attach to the complaint a copy of either a notice of complaint (pol. *reklamacja*), or a demand for voluntary satisfaction of the claim, sent to the defendant prior to filing of the complaint, as well as information or copy of documents pertaining to pre-trial settlement negotiations. A complaint lacking any of these would be deemed formally defective and plaintiff needed to remedy that by a set date.

⁵⁴ See Engelmann 1927, p. 591 (citing Kohler, *Zivilprozess and Konkursrecht*, in: Von Holtzendorff, *Enzyklopädie der Rechtswissenschaft*, 1913, vol. III, p. 263).

⁵⁵ See Karolczyk 2012a, No 1, p. 54-55 (noting the change in case law with regard to *Eventualmaxime*).

⁵⁶ Weitz 2009, p. 93.

⁵⁷ Weitz 2009, p. 94.

⁵⁸ Weitz 2009, p. 96-97.

were allowed to amend their pleadings, allege new facts and introduce new motions for evidence until the very end of trial.

3.3. The flexible future?

On 3 May 2012 the separate procedure for commercial matters was abolished, whereas the ordinary procedure was heavily amended. According to the written opinion accompanying the bill, its overriding objective was to increase efficiency of the legal process⁵⁹. New provisions pertaining to the concentration principle are based on judicial discretion and are both flexible and rigorous enough “to ensure that proceedings, also between entrepreneurs, will run efficiently”⁶⁰.

Apart from general conclusions, however, the opinion lacks actual reasoning as to why the existing system of concentration should be changed from preclusion to judicial discretion. One will search in vain for explanation of how exactly is the new system better than the one employed to resolve commercial cases⁶¹, especially in light of recent case law that has rationalized preclusion. Moreover, the change may come as surprise because statistical data from the Ministry of Justice clearly showed that commercial disputes took less time to decide than “regular” civil disputes⁶².

Let’s now take a closer look at what is new.

First of all, Article 3 was changed⁶³. The new part is that all procedural acts by the parties should comply with the established standards of good behaviour⁶⁴.

Second, a new Article 6 § 2 was introduced. It reads: Parties and participants in the proceedings are under the duty to submit allegations and evidence without delay, so that the

⁵⁹ Legislative opinion 2011, p. 6–7.

⁶⁰ Legislative opinion 2011, p. 7.

⁶¹ Karolczyk 2012a, p. 52.

⁶² See sources cited in Karolczyk 2012a, p. 52. Still, I should note that in light of legislative materials to previous “fundamental” amendments to the CCP, the opinion at hand stands out as coherent and elaborate.

⁶³ By stipulating that the parties should explain truthfully (as to the facts) and not withhold anything, as well as produce evidence, this provision is basically a translation of § 178(1) of the Austrian ZPO.

⁶⁴ This is a rather awkward expression to use in procedural provisions. Ironically, I think the English translation captures that awkwardness nicely. Its use has been criticized during the legislative process, but the wording did not change. As it stands today, it is hard to say whether this expression includes a fairly straightforward concept of “good faith”. It remains to be seen how the courts will handle it. Although, it may be purely academic inquiry since violation of the duty to act in compliance with established standards of good behaviour does not give raise to any meaningful sanctions under the CCP. Interestingly enough, for example, I am not aware of any published court decision which would refer to this article in the context of duty to reveal unfavourable evidence (which was clearly the intention of the Austrian legislator). Therefore, it is likely that this provision will remain what it has always been - an ideological manifestation.

proceedings can be concluded efficiently and swiftly. All in all, this provision introduced a new procedural burden, namely the duty to support (diligent conduct of) the proceedings⁶⁵.

Third, pursuant to the new Article 207 § 6 the court ignores untimely allegations and evidence, unless the moving party can show with high probability (latin *semiplena probatio*) that their omission from the complaint, answer or other preparatory written submission has not been negligent, their admission shall not delay the disposition of the case or other extraordinary circumstances exist⁶⁶.

Another new provision is Article 217 § 2, which applies to trial. It is similar to 206 § 6, yet the wording is subtly different. Specifically, the court ignores untimely allegations and evidence, unless the moving party can show with high probability that lack of their submission *in due time* has not been negligent, their admission shall not delay the disposition of the case or other extraordinary circumstances exist.

These detailed, sanctioning provisions are there to protect the new procedural duty. In essence, the statute requires the court to ignore untimely allegations and evidentiary motions, regardless of the opposing party's position in that regard⁶⁷.

These amendments have been heavily criticised even at the bill stage. After entry into force, reviews have been rather mixed⁶⁸ or outright negative⁶⁹. Both the judiciary and the legal profession seem utterly unhappy about them, or at least that part of the two groups is very vocal about it.

4. Critique and conclusions

4.1. *The imbalance remedied?*

The universal goal of the civil process around the Western hemisphere is to swiftly produce a fair judgment. The structure, including the sequence of the process, must represent a certain compromise and balance between the swift part and the fair part. It seems that in Poland that is not the case. I believe that, until very recently, the review of law and literature indicated that the scales were clearly shifted towards the latter, with the former being on the losing end. In fact, it is a fresh development that the imbalance has been identified. Some

⁶⁵ Cf. § 178(2) of the Austrian ZPO. Cf. also §§ 282, 283 of the German ZPO.

⁶⁶ Analogous provisions have been introduced in special proceedings (order for payment, simplified), as well as in relation to appeal against default judgment.

⁶⁷ It remains to be seen whether lack of objection by the other party will be treated as an extraordinary circumstance, and thus allow for admission of belated material.

⁶⁸ See e.g. Arkuszewska & Kościółek, p. 11.

⁶⁹ See e.g. Piebiak 2012a, p. 618 Piebiak 2012b, p. 676. Judge Piebiak believes these amendments will be reversed sooner rather than later because they will in fact increase delay in courts. Additionally, he has verbalized a very common charge against the new law, i.e. that it was written by theorists or judges who lack trial experience and thus “[their] assumptions are detached from the practice and the needs of the [trial] courts”

members of the new generation of judges have recently loudly, and bravely, spoke about it – the problem of depreciation of the swift approach to adjudication among the judiciary⁷⁰. The way I see it, May 2012 amendments to the CCP were to remedy this imbalance, at least partially.

4.2. Structural deficiencies

These provisions are new and as far as I know there is only one reported order of the Supreme Court, that is somewhat irrelevant for this paper. Whereas, doctrinally, there is an ongoing debate about the interpretation of certain elements, this might not be necessarily engaging from a comparative perspective. In my evaluation of the new system of concentration I will, therefore, focus on some broader interrelated themes, revolving around the lack of transparency and the lack of pre-trial.

Although there is indeed an arguably wide margin of discretion to admit untimely submissions, I believe that Article 207 § 6 is a systemically flawed solution. There are at least seven reasons for that.

First of all, this provision seems to manifest a belief that written pleadings can be used as effective tools to crystallise both factual and legal issues. However, such belief is only partially justified. While this approach may work in courts of law or for simple cases, and clearly should applied to a responsive pleading, its application to courts of fact (trial courts) and the complaint is doubtful. The lesson has been already taught by 19th century English *common law* where pleading stage became a game of skill, just as in 21st century Polish proceedings for commercial matters. Arguably, under Germanic *common law*, on the other hand, preclusion was there to help the inquisitive judge research all the potential avenues of solving the case right from the start. Therefore, I find it quite ironic that preclusion was originally introduced into Polish law under the guise of enhancing the adversary system.

So, what about the plaintiff? Under Polish law she is not required to hire an attorney to file a complaint. Is it likely that she knows about Article 207 § 6? I don't think so. It is significant to note that the 2011 bill prepared by the Codification Commission provided for mandatory professional legal representation in (upper) trial courts (pol. *sąd okręgowy*), which handle more complex cases. However, that change did not become law. Additionally, the court puts the defendant on notice about Article 207 § 6 upon service of the complaint. Thus,

⁷⁰ Łazarska 2012, p. 670. She concludes that this is the legacy of the former (socialist) system, where the “absolute dominance of the principle of objective truth” has “degraded the right to have the case decided within reasonable time”. An inquiry into the reasons or incentives for this (still often prevailing) attitude warrants a separate research.

an important safeguard for the plaintiffs (at least in some cases) is gone and a procedural imbalance has been created. I already have suggested in my writing that this makes Article 207 § 6 susceptible to constitutional challenge.

Let me now turn to lack of transparency.

The problem is that the CCP does not really provide for a modern pre-trial stage⁷¹. Its structure is ancient. As a result, there is no effective exchange of information prior to trial. I will name just a few problems. Questioning of the parties for informative purposes and potential discussion may only take place once the trial has begun⁷². The court may not rule on evidence outside of actual trial hearing, except for motions for expert witness. Although the parties are under the duty to specify evidence in their pleadings, their access to each other's information is otherwise basically non-existent⁷³. These are problems attorneys face every day in trial practice. As for the answer, it is still, in principle, a facultative pleading. It lacks comprehensive statutory regulation pertaining to admissions, denials, defences etc., so as to actually improve efficiency⁷⁴.

Forth, neither schedule for proceedings, nor trial plan is prepared in Polish courts. Most of the time, all managerial decisions are made “secretly” by the judge, in her head, and without meaningful parties' participation⁷⁵. What is a party's or the court's point of reference to decide *ex ante* what should have been submitted at an earlier stage? The 2011 bill prepared by the Codification Commission attempted to slightly modify that territory by requiring the court to discuss with the parties the substantive law they believe should apply to the case. Unfortunately, that important change did not become law.

Fifth, as a result, every piece of evidence admitted at trial has the potential to open new avenues of inquiry and naturally affect the dynamic of trial or the burden of proof. As a consequence, in all those legitimate circumstance the court must apply Article 217 § 2. Having put the party to the standard of high probability, the court will hopefully conclude that a new allegation or motion for evidence is in fact not untimely, and therefore, admissible. It

⁷¹ See generally Karolczyk 2013b.

⁷² See Article 212 § 1.

⁷³ With regard to the complaint and the answer, motions for admission of evidence have to be included in those pleadings. For example, how do I establish address of Mr. Smith, which I need to put in the pleading? Well, the fact of the matter is, you don't. You just ask the court to do that for you in the course of the proceedings. Moreover, it is a common belief that an attorney cannot contact a potential witness. However, there is not a single provision either in the law, nor in codes of professional conduct that addresses the question.

⁷⁴ See my observations and citations in Karolczyk 2012b, p. 509.

⁷⁵ For a comprehensive discussion of the problem of lack of transparency and analysis of the proposed Article 212¹ that ultimately did not become law see Karolczyk 2013a, p. 348 and on.

may be the case that this will occur at every hearing (since there is no trial plan). Personally, I see a potential for procedural disaster.

Sixth, regardless of political manifestation by stipulating different procedural burdens (truthfulness, acting in conformity with established standards of good behaviour etc.), they in fact do not affect in any way exchange (disclosure) of information. There is no effective sanction that would enforce it⁷⁶.

Seventh, the arguably „open catalogue of evidence” is simply insufficient. Polish civil procedure does not, for example, recognize: written inquiry (interrogatories), taking of testimony out-of-court prior to trial, written statements (affidavits) made under oath or in presence of a public officer, demand for written admission, and examination of location or object by the party.

All in all, I believe that first instance proceedings in Poland suffer from a serious lack of transparency, which is an essential component of modern trial oriented towards fair results. How can we, in these circumstances, meaningfully use preclusion as a sanction? The answer is simple. We cannot and we should not.

⁷⁶ See Article 233 § 2 and 251. See also Supreme Court’s judgments of 14 February 1996 r., II CRN 197/95, Lex nr 24748, and 20 January 2010 r., III CSK 119/09, Lex nr 852564. But cf. Piasecki 2010, p. 1303 and 1309.

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