Ways of Implementation of the Right to Civil Proceedings within a Reasonable Time

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Autoriai:
Aurimas BRAZDEIKIS,
Vytautas NEKROŠIUS,
Rimantas SIMAITIS,
Vigita VĖBRAITĖ

Mokslinis redaktorius
Vytautas NEKROŠIUS

Recenzentai:
Prof. dr. Egidija TAMOŠIŪNIENĖ
(Mykolo Romerio universitetas)
Prof. habil. dr. Andrzej ZIELIŃSKI
(Varšuvos Kardinolo S. Vyšinskio universitetas)

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Faculty of Law, Vilnius University

Authors:
Aurimas BRAZDEIKIS,
Vytautas NEKROŠIUS,
Rimantas SIMAITIS,
Vigita VĖBRAITĖ

Scientific editor
Vytautas NEKROŠIUS

Reviewers:
Prof. Dr. Egidija TAMOŠIŪNIENĖ
(Mykolas Romeris Universitety)
Prof. habil. Dr. Andrzej ZIELIŃSKI
(Cardinal Stefan Wyszyński University in Warsaw)

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Contents

Ways of Implementation of the Right to Civil Proceedings within a Reasonable Time

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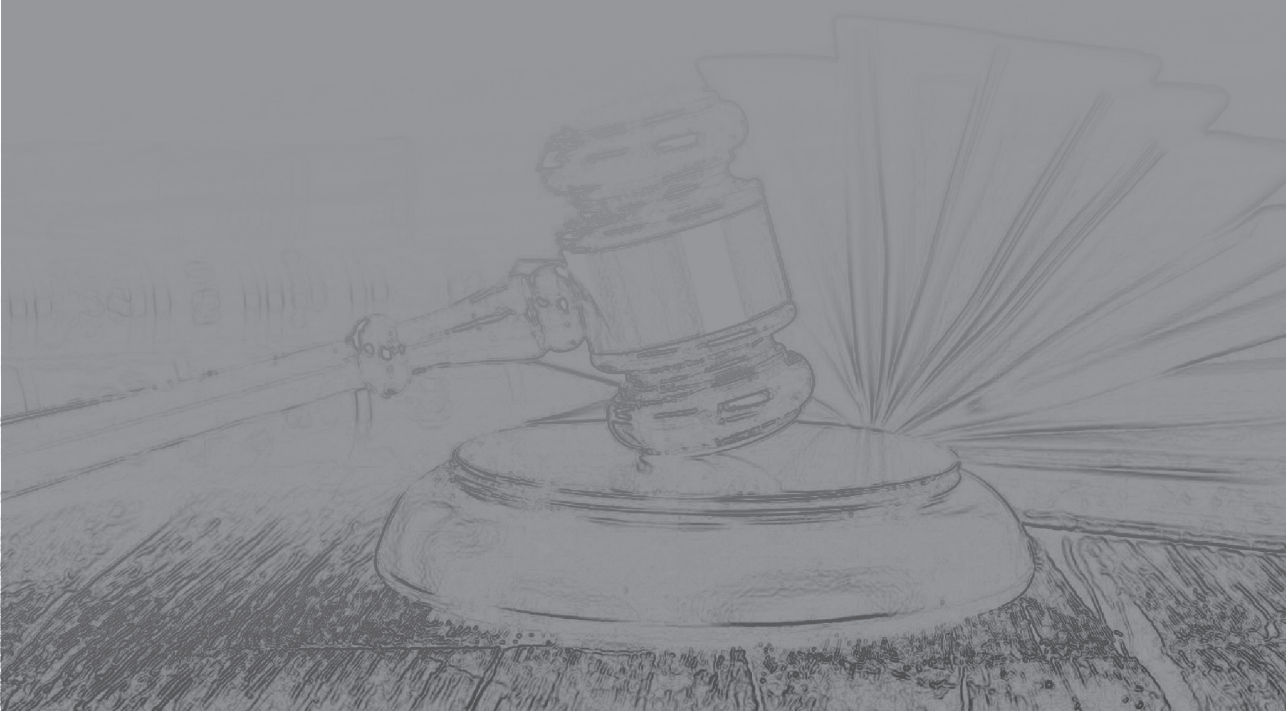

Preface

The study offered for the readers is the final part of the Research Project 'Ways of Implementation of the Right to Civil Proceedings within a Reasonable Time', funded by the Research Council of Lithuania. The Project took place between 1 March 2014 and 31 December 2016. The study is the result of the two-year analysis and research undertaken by the authors in exploring the institutional performance of the judicial system, the procedural provisions of the civil procedure and the existing case-law in order to answer the question how effective the Lithuanian civil justice is in ensuring the right to civil proceedings within a reasonable time as required by Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. Although Lithuania is among the leading Member States in the European Union by the length of proceedings, this in no way implies that there is no need for analysing the existing situation in order to highlight the good sides and pinpoint the areas for improvement in the civil justice system.

Considering the limited time and both human and financial resources available for the research project, the study was limited only to the analysis of contentious proceedings, excluding non-contentious proceedings, enforcement proceedings or the provisions of international and EU civil procedure out of the research scope. The authors have made efforts to support their research not only on the doctrine of civil procedure and comparative analysis, but also on the official statistics, the opinion of judges, and case-law. We therefore hope that the study will be also of interest for practitioners of law.

The research very extensively used comparative material, therefore, we would like to express our sincere gratitude to the Research Council of Lithuania for the opportunity to collect information in Max Planck Institute Luxembourg for International, European and Regulatory Procedural Law, as well as to thank the management of this Institute for their willingness and cooperativeness. We are also grateful to the National Courts Administration for the information and necessary assistance provided.

The study consists of several core sections – the analysis of performance efficiency of the judicial institutional system and procedural laws. The study also includes a supplementary component of foreign authors dealing with the analysis of the situation in their states. The principal emphasis in the analysis of performance efficiency of the judicial system was placed on the efficiency and expediency of

the reform of courts undertaken by consolidating local courts. Unfortunately, the results of the existing situation indicate that the reform undertaken is likely to lead to considerable confusion without attaining the objectives set. The research of the procedural part of civil procedure focused on the study of the principal procedural institutes designated to ensure procedural efficiency (duty of the parties to bring matters to court in good time, the court>s right to refuse to accept belated evidence, decision by default, summary proceedings, forms of appeal against court decisions, etc.). The study also provides an extensive analysis of the survey of judges on the performance efficiency of these institutes, and offers an overview of the existing case-law and experience of foreign countries. It should be noted that legislation or drafts of laws which came into effect or were published till 31 March 2016 are mostly invoked in the study.

The research was based on the understanding that the length of proceedings is not the only and overriding goal of proceedings. Of no less importance is the quality of the administration of justice and proper implementation of the principles of the autonomy of the parties, adversarial and dispositive proceedings, as well as other key procedural principles. In this light, an effort has been made in our recommendations and conclusions to see the whole picture of civil procedure goals and principles and ensure harmony in their implementation.

We sincerely hope that the study will be interesting and valuable as 'food for thought' not only to students of law, but also to practitioners and politicians who follow the developments in the civil justice system and its efficiency.

The Authors

I. Structural Elements of the Judicial Reform Facilitating Civil Proceedings within a Reasonable Time

The fundamentals of the present-day judicial system of Lithuania have been established in the Constitution adopted in the Referendum of 25 October 1992 – in its Chapters VIII and IX, dealing specifically with the activities of the Constitutional Court and courts. Article 111(1) of the Constitution states that the courts of the Republic of Lithuania shall be the Supreme Court of Lithuania, the Court of Appeal of Lithuania, regional courts, and local courts. Paragraph 2 of that same Article provides that for the consideration of administrative, labour, family, and cases of other categories, specialised courts may be established according to the law. Finally, paragraph 4 of this Article lays down an imperative provision that all issues related to the formation and competence of courts shall be established only by the Law on Courts. As this study analyses the right of individuals to a case hearing within a reasonable time in civil proceedings, it will cover only the system of courts of general competence, its performance efficiency and operational framework.

It is utterly obvious that the four-tier system of general competence courts has been taken over by the drafters of the Constitution from the inter-war Lithuania, where it was formed in the Law on the Judiciary of 1933 (local courts and regional courts, the Chamber of Appeal and the High Tribunal)[1]. The essential new feature introduced by this Law into the judicial system, which had functioned since 1918, was the establishment of the Chamber of Appeal, necessitated by the fact that both justices of peace and regional courts in the three-tier judicial system that had existed until that time functioned as courts of first instance (where a case was dealt with by a regional court at first instance, it could only be appealed against to the High Tribunal). The Chamber of Appeal, as the appeal instance for decisions rendered by regional courts under the first instance, was specifically founded in order to make it possible to review court decisions in all civil matters both under the appeal and cassation procedures. We will not explore the issue of how effective the road of reforms chosen at that time was. This issue apparently has also hardly been analysed by the 'fathers' of the Constitution – otherwise we would most likely live with the three-tier system of general competence courts today. In any case, the

[1] Dziegoraitis, A. *Lietuvos valstybės teisės aktai* [Legal Acts of the State of Lithuania]. Vilnius, 1996, p. 709.

drafters of the Constitution granted absolute priority in their decisions regarding the framework of the system of general competence courts to the historical transferability and tradition whereby it was sought to demonstrate the continuity of the State of Lithuania. It must be acknowledged that the idea of continuity of the State in restoring and reinforcing the independence of the Republic of Lithuania was highly important and significant.

We believe that this historical heritage should be respected and the improvement of the institutional system of the judiciary should be discussed with reference only to the existing system of courts, in particular, considering that amending the Constitution is a rather complex process. Moreover, whenever we speak about any reforms of the judiciary, we should also take into account the fact that the judicial authority is rather conservative by its nature. Its conservatism is determined by both its function to ensure proper application and interpretation of law and by the independence of courts and judges, as well as by the statutory and constitutional guarantees securing their independence (detailed grounds for releasing judges from office, irreplaceability of judges, prohibition of changes of the work place of judges without their consent, etc.). Thus, as far as the system of courts is concerned, it is certain that it should not be 'a testing ground' in experimenting with success of reforms – instability and uncertainty in this system can feed in directly to judges, which can in its own turn lead to highly negative effects in terms of quality of the administration of justice. Hence, reforms of the judiciary should be undertaken only when they are unavoidable, well thought and justified both by economic and quality criteria. Otherwise stated, reforms of the judicial system should be underpinned by the approach that they should be administered only when this is indispensable.

There are 49 local courts in Lithuania at present with 481 judges and 438 assistants to judges as of 1 May 2016. Although the effective Law on Courts of the Republic of Lithuania does not prescribe any minimum number of judges in a local court, the established practice is that there should be at least three judges in a local court. Such approach is supported by procedural rationale (the Code of Civil Procedure allows forming a panel of three judges for hearing complex disputes in local courts; necessity to ensure proper carrying out of the functions of the pre-trial judge during pre-trial investigation, etc.).

The existing statistics proves that there are virtually no major problems in civil proceedings in local courts of the Republic of Lithuania regarding the right of persons to a case hearing within a reasonable time. All the courts surveyed annually dispose of not less than 98 per cent of the annual caseload of the specific court. Not less than 90 per cent of all cases from this number are, in principle, disposed of

within the first six months[2]. Hence, there is no basis for statements that Lithuania encounters serious issues regarding lengthy proceedings in first instance courts. This fact is also confirmed by the 2014 Report of the European Commission 'Efficiency and quality of justice' (CEPEJ) where Lithuania is among clear leaders in Europe as its annual clearance rate of cases is between 100 and 110 per cent and cases are disposed in less than 100 days[3]. It may also hardly be claimed that there is a serious issue of disproportion in the workload of judges in local courts. The annual workload of a judge in the meantime is around 370 civil cases. In smaller towns, this average is around 300 civil cases per year. The comparison of these figures, however, cannot disregard the fact that the judge/assistant ratio in major towns is, on average, 0.8, while in smaller towns – only between 0.3 and 0.5 assistant to one judge. Given the fact that assistants draft procedural documents for judges, such disproportion compensates the existing slight difference in the workload of judges.

It certainly happens in the practice of courts that a civil case hearing takes long, however, such cases are the exceptions most often predetermined either by the complexity of a dispute or bad-faith conduct of a party protracting the proceedings, by hesitation of the court to make use of available measures of procedural concentration or by several reasons taken together. The legislator should undoubtedly aim to prevent opportunities to protract proceedings and create favourable conditions for courts to resolve disputes between the parties, however, this is not only the legislator's problem. High-quality and prompt resolution of disputes equally depends on the personality of (a) judge(s) and advocates, their skill, experience and wisdom. It may be safely assumed that in the absence of a 'good' judge the State will never ensure a high-quality administration of justice. On the other hand, even if there are rather considerable shortcomings in the judicial system and procedural laws, but intelligent and wise judges in office, it is likely that proper quality of the administration of justice will be ensured. It was early in the 20th century that one of the most prominent scholars of civil procedure of the empire of Russia, Jevgenij Vasiljevic Vaskovskij (who also was a long-term lecturer at the University in Vilnius) stated that fair and impartial administration of justice is secured by[4]: a rational recruitment system of court staff and judges; independence of the judicial power; the system of career of judges characterised by the irreplaceability of judges, a rational system of incentives and promotion within the internal system of judicial instances, material

[2] 2014 Report of the European Commission on efficiency and quality of justice (CEPEJ). Online access: <http//www.coe.int/t/dghl/cooperation/cepej/evaluation/default_en.asp>.

[3] Ibid.

[4] Васьковский. Е. В. *Учебник гражданского процесса*. Москва, 1917, переработанное издание, 2003, p. 40.

provisions; the system based on instances, and a rational supervisory system. These thoughts may seem already outdated in some regards, although, in principle, they are completely valid. There is no doubt that the principal factor ensuring an effective and quality performance of the judiciary of any state is the judge who is independent both economically and by his inner convictions, highly skilled and honest, with sufficient life experience. If this component is missing in the judicial system, no reforms will ensure a good quality performance of the judiciary. An analysis of the Lithuanian experience of the recent decades clearly shows how much effort has been made in order to guarantee that as many judges with the above-referred qualities work in courts. And, as far as strengthening of the independence of the judiciary is concerned, a particularly significant input has been made by the Constitutional Court of Lithuania, which has formulated an extensive constitutional doctrine on this issue.

On the other hand, as regards the financing of courts, it is worth recalling the global economic crisis of 2008 when the financing of the judiciary was rather drastically cut down. Although the present-day economic situation in Lithuania has substantially changed, the financing of courts is still inadequate. It is, in particular, the driving force of searching for a more rational model for the use of allocated funds. The ambition to improve the existing systems of general competence courts is also fuelled by the willingness to have no obvious disproportion of the workload of judges in local courts, to implement the opportunities for judges to specialise more effectively and make use of the good practice of other countries.

Thus, irrespective of sufficiently good situation in terms of case disposition time in courts of first instance, the necessity for optimising the system of local courts is among the topics discussed in Lithuania. In 2014, the Ministry of Justice received a package of draft laws on the reform of the judiciary of the Republic of Lithuania, which was submitted to the Seimas of the Republic of Lithuania after lengthy discussions. On 22 December 2015, the Seimas of the Republic of Lithuania adopted Resolution No. XII–2209 'On the Reorganisation of Courts'; the Resolution provides that there will be only 12 local courts instead of 49 existing in the meantime from 1 January 2018[5]. It has been proposed to consolidate the courts and, at the same time, leave judicial units without the status of a legal entity (court chambers) to function in the same locations where the courts under reorganisation operate. Such units would constitute the structural components of a consolidated court. The explanatory letter to the drafts submitted refer to the following reasons justifying the necessity of the reform:

[5] Resolution of the Seimas of the Republic of Lithuania "On the Reorganisation of Courts". Register of Legal Acts (hereinafter – *TAR*) identification No. 2015–20269.

- uneven workload of judges in different local courts. The draft authors (the Judicial Council, the National Courts Administration and the Ministry of Justice) note that the workload in some courts is higher, proceedings take longer, the promptness of proceedings is compromised as a result of high workloads;
- better conditions must be created for one of the measures underpinning the efficiency of judicial activities – specialisation of judges. More than half of local courts have between 3 and 5 full time positions of judges in the meantime, therefore, specialisation is impossible;
- limited and inadequate economic, financial and human resources necessitate the most rational use of the resources currently available to individual courts. A large number of institutions with autonomous arrangements of their activities lead to irrational and inefficient use of economic, financial and human resources;
- the drafting of these laws was also highly motivated by the success of the merger of certain courts that took place on 1 January 2013 and by information on the experience of other EU Member States (Poland, the Netherlands, Denmark, Estonia and others). The number of first instance courts of general jurisdiction in 2006 in Estonia, for example, was decreased from 16 to 4 local courts (each of them consisting of several court chambers). Two years after the merged local courts had commenced their activities, it was stated that the consolidation of local courts was fully justified in terms of efficiency in the administration of justice.

The explanatory letter also notes that the drafts sought the following objectives: (1) increase the effectiveness of case hearings, equalise workloads and working conditions of judges and court staff; (2) facilitate access to court for persons by enabling procedural actions as close to the place of residence of the person as possible; (3) utilise human and material resources of courts more efficiently through the concentration of resources allocated for the administration of courts; (4) broaden the self-governance of judges by legitimising a new level of self-management in courts; (5) expand the possibilities of specialisation for judges by increasing the number of judges employed in one court.

Let us try to analyse potential *pro and cons* of the proposed reform. First, potential arguments against the reform will be explored.

The authors of the reform state that the reform aims at equalising the workload in courts and resolving the problem related to the length of proceedings. It can be seen from the research carried out when the project was being implemented that there is no major disproportion between the workloads of judges in major cities

and smaller towns in civil matters; approximately 97 per cent of all civil cases are disposed of within the first six months as of the day of submission of a statement of claim to the court[6]. Hence, a real disproportion in workloads and the problem of the length of proceedings in civil justice when administered in first instance courts does not exist. On the contrary, we may be proud that we are among the leaders in Europe according to the ratio of hearings completed within a reasonable time. The analysis also shows clearly that the courts with higher workload allocate an assistant to each judge, thus, higher workload is compensated by making more members of support staff available.

The reform designers note that when drafting the law, they found guidance in the Estonian and Dutch experience in the implementation of the optimisation reforms of the judiciary and in the Lithuanian experience in consolidating courts. Several comments should be made in this regard. As far as the reform implemented in Estonia is concerned, we should take into account the fact that two thirds of the Estonian population live in two cities (Tallinn and Tartu). Given such population density in the territory of the state, the consolidation of courts is logical. Meanwhile the situation in Lithuania is different, therefore, an automatic take-over of the Estonian experience would hardly be well-founded. In the Netherlands, as already mentioned, the liquidated courts were no longer in existence after the merger of the courts – it was a reduction in the number of the courts in its truest form (although certain case hearing locations have been preserved). Considering the wide-spread use of IT in the society and the understanding that lawyers should assist in legal disputes, the reform results achieved offer a reason for Dutch scholars to rejoice over the reform success and its effectiveness. These two factors are not naturally inherent in Lithuania – older people use information technologies to a limited extent and many of them do not think that a lawyer's assistance is necessary to resolve a dispute. Therefore, such consolidation of courts as in the Netherlands would be likely to cause rather serious problems for older people to exercise their right to effective legal remedies. In terms of the Lithuanian experience in consolidating local courts, it may be noted that such experience can hardly justify the necessity of the proposed reform. After the adoption of the Law on Reorganisation of Local Courts by the Parliament of the Republic of Lithuania on 11 September 2012 (No. XI–2208),[7] it was decided to merge the local courts of the district and the city of Vilnius, the district and the city of Kaunas, and the district and the city of Šiauliai. The merger was based on the fact that the aforementioned courts functioned either in the same building (in Vilnius) or were close to each other. In this regard, there was an apparent

[6] The statistical data have been obtained in cooperation with the National Courts Administration.

[7] Law on the Reorganisation of Local Courts. *TAR*, identification No. 1121010ISTA0XI-2208.

rational need to simplify the administration of these courts and merge the areas of their activity. There were no court chambers or other units in the new local courts after the reorganisation. Moreover, it should be noted that the idea of reorganising some local courts was suggested to the legislator as an alternative to the mechanical consolidation of courts, as proposed at that time, and was accepted by the legislator. There are no doubts regarding the justification of the reorganisation of specific local courts in 2013 – the system has been simplified and become clearer to persons (e.g., it is clear to everyone in Vilnius which court hears civil disputes) and its administration has become simpler and cheaper. Hence, the reform implemented proves that it is possible to achieve substantial positive results in the area of the judiciary without any mechanical large-scale restructuring of the entire system.

Another argument the reform authors advance to support the necessity for the consolidation of courts is an opportunity to optimise the number of support staff in courts (merger of accounting departments would make it possible to cut down the number of employees; the same is applicable to maintenance personnel). This argument is also highly doubtful. Firstly, nobody has estimated whether and to what extent the concentration of, for example, the accounting department in the central office of a court would be justified in financial terms, what the cost of communication between the court chambers would be, how long the dispatching of papers would take, etc. If it is decided to leave several out of the above-referred employees in the court chambers, the economy of costs would most likely be so insignificant that it would hardly justify the proposed reform. It may be asked eventually whether the same goal cannot be achieved by other much milder means.

The initial draft proposed to establish the rule that it would be possible to have the case heard by a judge attributed to another court chamber if this means a more rapid and economic hearing. It means that, following the principle of prompt and economic proceedings, it will be possible to refer a case hearing from one court chamber to another. It should be noted that a similar procedure to refer the proceedings from one local court to another had already existed in the Code of Civil Procedure before 1 October 2011 when it was revoked after the coming into force of the amendments to Article 35 of the Code of Civil Procedure. This provision was cancelled on the grounds that a rather easy possibility of the transfer of proceedings without more extensive argumentation poses a risk of abuse and facilitates potential violations of the right of individuals to have access to court as guaranteed by law. When such a rule exists, a guarantee that a civil case will be heard at the court expressly identified by the law becomes easy to circumvent. The comments were taken into consideration by the authors of the draft who improved the proposed innovation by detailing an extensive list of cases when it should be held that a case

hearing by another court chamber would be more cost-effective and prompt (based on the location of most of the evidence or the place of residence /domicile of the parties or the majority of participants in the proceedings, or based on the location of the real estate of direct relevance to the proceedings at issue or the place where the disputed decision was rendered and/or the event/action, to which the disputed decision directly relates, took place). These criteria add much more clarity to the draft and considerably reduce the opportunity to move the hearing place 'back and forth' justifying that by workload only. There is a negative side in such rationale – it is the workload in a court rather than the right of access to court as guaranteed by law that are among the primary reasons why a case hearing is referred to another chamber of the court.

The proposed regulation implies that, in case the Judicial Council identifies a major difference in the workload in the constituent chambers of the court and none of the judges of the court agrees to be relocated to work to another court chamber, a judge with the least years of service in the position of the judge from the court chamber with the lowest workload should be transferred. The rule as such may exist, however, the drafters have not discussed the whole range of issues related to such transfer. It remains utterly unclear whether the relocated judge retains a possibility of return to the court chamber from which he has been transferred after the workload becomes normal; whether it will be possible to transfer him for the second and third time as well in case there are no new judges in the court and he remains the only with the least years of service; whether he gets a compensation for the costs of relocation, whether his spouse gets a compensation for the loss of employment, etc. It follows that all these questions must be addressed in order to establish the possibility of the transfer of judges to other court chambers without their consent.

We also consider as strange the argument of the drafters that the proposed consolidation of courts aims at adapting the activity territories of courts to the changed territories of prosecutor's offices and police offices. It seems to us that, based on their significance and position within the structure of state authorities, it is in particular the prosecutor's office and the police who should adjust the aspects of their territorial activities with the activity territories of courts and not to the opposite.

And, lastly, there is a goal which has not even been stated although presumably existed – an easier procedure for liquidating court chambers. In the Draft Law on the Establishment of Local Courts and Determination of Activity Territories thereof, the authors of the draft also indicated the court chambers which will constitute the local courts that will function after the reorganisation. Hence, from the formal perspective, in order to liquidate a local court or individual court chambers an amendment to the law would be necessary. From the psychological point of view,

however, it is always easier to wind up a structural unit of an organisation than the whole organisation. Furthermore, it should be noted that, once the concept of a court chamber is established, most likely it will no longer have such strong constitutional protection as a local court because Article 111 of the Constitution does not refer to any court chambers.

An important new element suggested the authors of the draft is the system of administration of court chambers. According to the authors of the reform, a court chamber had to be led by the senior judge appointed by the chairperson of the court. It is provided for in the draft that the senior judge of a court chamber should, with his consent and approval of the Judicial Council, be appointed for the term of five years from the judges attributed to that chamber by the chairperson of the relevant court upon advice of the Meeting of Judges. Senior judges of court chambers should assist the chairperson of the court in organising the administration in the court chamber. As in the case of the situation discussed above, the draft authors virtually deconstitutionalise the entity administrating the court because Article 112 of the Constitution refers only to the procedure of appointment of chairpersons of the court by providing that they shall be appointed by the President of the Republic upon advice of a special self-governance body of judges (Judicial Council). Article 74 of the Law on Courts stipulates that the same procedure as that followed for the appointment of chairpersons of local courts shall be used to appoint their deputies. Apparently, the court chambers constituting a local court will have to carry out virtually all functions of the court, therefore, it is reasonable to ask why it has been suggested to change substantially the appointment procedure of the officials administrating the court and to deviate from the existing tradition that not only the judicial power has been involved in the appointment of these officials. Moreover, it is provided for in the draft that the senior judge does not receive any remuneration for the duties he holds. It only envisages that the workload for the senior judge should be reduced accordingly. In our view, such regulation is likely to lead to a number of issues. Firstly, an increase in the powers of the chairperson of the court will mean a considerable deviation from the principle that the chairperson of the court is not so much a superior but *primus inter paris* (first among equals) who carries out certain functions of administrative nature delegated to him by law. It was the implementation of this principle that has been consistently strived for during all years of the independence, at the same time seeking to renounce finally the soviet administration tradition of the judiciary and ensure genuine independence of judges. The right of the chairperson of the court to appoint senior judges undoubtedly increases his administrative powers, which may be exercised depending on the chairperson's opinion about one or another judge of the court. The imple-

mentation of the system proposed would pose a risk that the power vertical and its centralisation would be put in place through the chairperson of the court. For example, it would not be very difficult for the President of the Republic to appoint 12 loyal chairpersons of local courts who, in their own turn, would appoint loyal senior judges in court chambers. On the other hand, it is provided for in the draft that the senior judge shall be appointed by the chairperson of the court taking into account the opinion of the meeting of judges of the court. This new feature, in our view, would be at least a partial safeguard against the above-referred risks, however, the regulation proposed is not flawless in this regard as well. Whereas it intended to have more than one chamber in the court, it is hardly likely that the judges of one chamber will know the judges of other court chambers well. Therefore, there is a realistic risk that the advice of the meeting will become a formal assent to the chairperson's will. In order to reduce the risk of formalisation of the approval process, it should be envisaged that advice to the chairperson should be given by the meeting of judges of the relevant chamber and that voting should be secret. Lastly, the concept of a senior judge used in the draft law does not seem proper to us. This may lead to an impression that this judge is more important compared to others, with more powers and authority, which in its own turn would mean a deviation for the principle of the equal status of judges. Hence, it would more correct to devise and suggest a different name and a different procedure of appointment of this judge in order not to increase the administrative powers of the chairperson of the court (it would be possible, for example, to establish that this judge is appointed only by the meeting of judges of the relevant chamber). With reference to the observations made by a 'senior judge', the authors of the draft completely set aside this position when refining the draft and, in our view, this solution is considerably better. According to the proposed structure of chambers, all administration of support staff would be transferred to the registry of the court and, considering the independence of courts, each judge would make arrangements of his work on his own according to the principle that the working time of a judge depends on his workload. Any issues of organisational nature as regards the work of judges would be solved with the assistance of the Meeting of Judges of the relevant chamber.

A discussion of the arguments 'for' the reform proposed should, first of all, explore better opportunities of specialisation for judges in larger courts. A specialisation is often perceived as a means to achieve higher efficiency at lower costs. That is in particular relevant if the resources used to generate the product used are limited. Therefore, debates on the system of the administration of justice, which often receives criticism for expensive and lengthy proceedings, often looks at the specialisation of judges as a means to speed up and cut down the cost of case hearings,

as well as improve the quality of the administration of justice. This proves that the need for dispute resolution in a quality, prompt and economic manner when resources are limited is highly relevant.

The specialisation of judges may be achieved in different ways. An analysis of the experience of Lithuania and other countries points to the following principal methods:

- *Specialised courts*. It should be noted that there are only specialised administrative courts in Lithuania for hearing disputes in the area of public administration. Serious initiatives to set up other specialised courts in Lithuania have not been voiced. This, in our view, is utterly reasonable considering the number of the Lithuanian population and courts, the size of its territory[8], and the nature of litigation.[9]
- *System of judicial instances.* The existence of a hierarchical system of courts implies that judges of the relevant tier of courts specialise in civil matters to be heard under a particular procedure.
- *Specialised divisions, panels, departments and similar units of courts.* Setting up and forming of structural units is among the most popular means of specialisation of judges. The Law on Courts does not provide that, apart from the divisions of criminal and civil cases, any other structural units may be formed in courts in Lithuania. Therefore, a greater specialisation of judges within an individual Lithuanian court as a result of the matters deal with by that court is usually achieved through an internal specialisation of judges.
- *Special jurisdiction of a court*. Legal acts may establish a special jurisdiction for specific courts for civil matters of a certain nature or category (*ratione materiae*). For example, applications for recognition and enforcement of foreign judgments and arbitration awards in Lithuania are dealt with only by the Court of Appeal of Lithuania, while Vilnius Regional Court, *inter alia*, has exclusive jurisdiction over disputes specified in the Law on

[8] Only eight out of 49 Lithuanian local courts have more judges than 10, thus, specialised courts for civil matters of a specific category with an adequate workload would most likely be necessary in larger territories and this would mean a larger distance of courts from people in geographic terms. Guidelines on the Creation of Judicial Maps of the European Commission for the Efficiency of Justice (CEPEJ) note that the highest productivity is attained in courts with an approximate number of judges between 40 and 80. Online access: <Guidelines on the Creation of Judicial Maps European Commission for the Efficiency of Justice>. CEPEJ(2013)7. p. 8. On-line access: <http://www.coe.int/t/dghl/cooperation/cepej/quality/2013_7_cepej_Judicial_maps_guidelines_en.pdf>.

[9] For example, labour cases constituted as little as 0.8 per cent of all cases received in 2013. The share of family cases amounted to 11.8 per cent of all the cases received.

Patents and the Law on Trade Marks of the Republic of Lithuania, as well for as cases regarding adoption under applications of citizens of foreign countries to adopt a citizen of the Republic of Lithuania.

- *Specialisation of specific judges within a court (internal specialisation).* This method is used to determine and/or approve the specialisation of a specific judge under a certain procedure. Such specialisation is taken into account when allocating cases to this judge. As of 1 March 2016, a judge of a local or regional court of Lithuania may hear all cases falling within the jurisdiction of the relevant local or regional court, however, this is not linked with the judge's specialisation. Cases may be referred for hearing to judges of another court due to considerable differences in the workload of the courts of the relevant tier. There is also a rather inflexible possibility of the transfer of a judge to work from one court to another in the cases provided for in the law[10].
- *Functional specialisation of judges.* It may be specified in legislation that certain functions in a court may be carried out only by a specific judge. For example, decisions on challenges made against judges are usually made by chairpersons, deputy chairpersons, chairpersons of civil cases divisions or a judge they designate (Article 69(1) of the CCP).
- *Referral of a specific category of cases for hearing to (a) specific court(s).* The specialisation of judges may also settle when a mechanism or rules are developed to refer a case for hearing to a predetermined court although the rules in force attribute it to the jurisdiction of another court. Although the laws provide for a possibility of referring a case within the jurisdiction of one court to another in Lithuania, these possibilities are either somewhat limited[11] or not yet utilised (for example, as regards the referral of applications for the issuance of a court order made by means of electronic communications to hearing to specific courts.

[10] The need to transfer a judge must be identified by the Judicial Council and it is also normally required to get consent from the judge. Such consent is not necessary when a transfer takes place in the same residential location and the Judicial Council takes the view that the transfer is necessary as a result of major workload differences in the courts. In such a case, a judge with the least years of judicial practice from the court with the lowest workload is transferred. The judge's consent is likewise not required when the Judicial Council holds that the transfer is necessary due to temporary reasons to ensure the functioning of the court, however, the transfer on this basis is possible for no longer than one year and no less frequently than once in 3 years. See Article 63 of the Law on Courts.

[11] For example, Article 34(2)(1) of the CCP provides that a case may be referred for hearing to another court, if it is held that the other court will hear the case more rapidly and cost-effectively, and considering the location of most of the evidence, except in cases of exclusive jurisdiction.

- *Case swapping among judges*. Judges may swap the cases assigned to them by the court's administration in some states. This is the case in Denmark, England and Wales, as well as in the Netherlands[12]. Such approach creates preconditions for a factual specialisation of judges, if judges swap cases so that most often they hear only the cases of a certain category. Such possibility is not provided for in Lithuanian laws.
- *Personal specialisation*. Alan Uzelac, who singles out this form of specialisation, notes that the court is an institution composed of individuals who possess different competencies and skills or knowledge. Every chairperson of a court knows that some of their judges are more apt for hearing certain cases. Judicial systems, however, differ as to whether such personal qualities may or may not be taken into account when assigning cases to judges and their panels[13]. For example, a personal specialisation of a judge, unless it is an internal specialisation approved under the established procedure, has no relevance, in principle, when distributing cases in Lithuania.

Marcus B. Zimmer notes that litigants have more confidence in the abilities, knowledge and expertise of specialised judges, therefore, counsel feel less compelled to make extensive submissions on legal or other related issues, which implies a reduction in the cost and time necessary to assess the case-file[14]. Moreover, a specialised judge is far less susceptible to various tricks of the parties to proceedings when they try to protract the proceedings, as well as to the pressure to which they can be exposed when hearing cases[15].

One of possible advantages of specialisation noted is that specialised judges, considering their expertise, experience and the fact that they are fewer in numbers, are in a better position to form a consistent case law. The consistency of case law increases the clarity and predictability of law and this can potentially reduce the number of claims in the relevant area.

The Consultative Council of European Judges (CCJE), despite of its somewhat sceptical view to the development of judicial specialisation in general, acknowledges

[12] Marco, F., Langbroek, P. "Is There a Right Judge for Each Case?" A Comparative Study of Case Assignment in Six European Countries. (2007), *European Journal of Legal Studies*, vol. 1–2. On-line access: <http://cadmus.eui.eu/handle/1814/7713>.

[13] Uzelac, A. "Mixed Blessing of Judicial Specialisation: the Devil is in the Detail". (2014), *Russian Law Journal*, vol. 4. p. 149.

[14] Zimmer, M. B. "Overview of Specialized Courts". (2009), *International Journal fo Court Administration*, Volume 2 No. 1 On-line access: <http://www.iacajournal.org/index.php/ijca/article/view/URN%3ANBN%3ANL%3AUI%3A10-1-115882>.

[15] Arnold, R. "Case management, judicial specialisation and intellectual property litigation". (2010), *Civil Justice Quarterly*, vol. 29(4), p. 489.

that specialisation often stems from the need to adapt to changes in the law rather than from any deliberate choice. The constant adoption of new legislation, whether at the international, European or domestic level, and changing case law and doctrine are making legal science increasingly vast and complex. It is difficult for the judge to master all these fields, while at the same time society and litigants demand more and more professionalism and efficiency from the courts. Specialisation of judges can ensure that they have the requisite knowledge and experience in their field of jurisdiction. Specialisation through greater expertise in a certain legal field may help improve the court's efficiency and case management, taking into account the ever growing number of cases[16].

As it can be seen from the opinion of the CCJE, the specialisation of judges in itself does not automatically speed up proceedings. This effect may be yielded by specialisation only if judges indeed have required knowledge, skills and competence allowing fast solution of the issues coming up in the proceedings. Otherwise stated, efficiency is a result, while expertise is an attribute that might produce certain results[17].

There is another aspect important in order to actually tap the potential of the specialisation of judges for the acceleration of proceedings – introduction of the specialisation of judges, in particular, internal, should not lead to major disparities in the workload of judges, namely, to the caseload that a specialised judge would not be in the position to handle effectively. Conversations with some judges of Lithuania create an impression that there are issues in this area. For a specific specialisation, there are probably too few judges in certain courts; due to excessive workloads they are unable to dispose of the cases so that all statutory time limits for judicial procedural actions are complied with[18].

Specialisation, which is too narrow, can also have a negative impact on the speed of proceedings. The judge who has been for a long time specialising in the category where there are relatively few cases might find it more difficult to resolve other complex matters related to other areas of law. Complaints cutting across a variety of fields are the norm rather than the exception,[19] in particular bearing in

[16] The specialisation of judges (Opinion No. 15). Adopted at the 13th plenary meeting of the Consultative Council of European Judges (Paris, 5–6 November 2012). On-line access: <http://www.coe.int/t/dghl/cooperation/ccje/textes/Avis_en.asp>.

[17] Baum, L. "Probing the Effects of Judicial Specialisation" (2009), *Duke Law Journal*, vol. 58, p. 1676.

[18] For example, the time limits set by the CCP of Lithuania in labour matters are 30 days to get ready for the case after the claim has been accepted and 30 days to dispose of the case after the end of preparatory period.

[19] Posner, R. "Will the Federal Courts of Appeals Survive until 1984? An Essay on Delegation and Specialization of the Judicial Function" (1983), *Southern California Law Review*, vol. 56, p. 787.

mind the tendencies of the constitutionalisation of law,[20] and the expansion of internationally recognised and protected human rights[21].

The specialisation of judges is often linked to the ensuring of the quality of judgments, in particular in complex cases, effectiveness (which embraces not only the promptness of proceedings, but also micro- and macro-procedural economy and other aspects), as well as the consistency of case-law; likewise, that implies an increasing confidence of society in the decisions made by a professional who has more knowledge in a certain field. The research in law, however, shows that the system of the administration of justice, willing to apply the specialisation of judges extensively, can be exposed to challenges and problems:

- Risk of an excessively narrow approach of the specialised judge, one-sidedness and isolation. It is contended that highly specialised professionals too often fail to appreciate the big picture and cannot adequately integrate their expert perspective into the larger framework necessary to generate optimal solutions[22];
- Risk of stagnation in the case-law, interpretation and development of law[23];
- Risk to the independence and impartiality of the judge as a result of a potential familiarity or polarisation of the specialised judge with the litigants or lawyers in this area;
- Decrease in the mobility and flexibility of the specialised judge;
- Burdening of access to justice, if cases of a certain category are concentrated in one or several courts, which can be far away from the parties to the dispute;
- Inequality of courts and judges if specialised courts or divisions have better financial and other provisions;
- Potential inequality in terms of the quality of judicial remedies – not all courts are in the position to have the judge specialised in the relevant area;

[20] According Gediminas Mesonis, a review of constitutionality becomes a permanent, rather than accidental or exclusive reality of the functioning of the system of legal norms. See Mesonis, G. „Teisės konstitucionalizavimo dinamika" [The Dynamic of the Process of the Constitutionalization of Law]. *Teisė*, 2014, vol. 92.

[21] For example, the case law of the European Court of Human Rights leads to a consistent development and expansion of the area of operation and protection of human rights set out in the Convention for the Protection of Human Rights and Fundamental Freedoms. As a result, a large number of civil cases are related to the rights guaranteed by the above-referred Convention, which implies the court's obligation to be careful in this regard.

[22] Oldfather, C. M. "Judging, Expertise, and the Rule of Law" (2012), *Washington University Law Review*, Volume 89, Issue 4, p. 848.

[23] The specialisation of judges (Opinion No. 15) [interactive]. Adopted at the 13th plenary meeting of the Consultative Council of European Judges (Paris, 5–6 November 2012). On-line access: <http://www.coe.int/t/dghl/cooperation/ccje/textes/Avis_en.asp>.

- Likely duplication of the work of other experts by the specialised judge[24];
- Potential violation of the right to be heard. Specialised judges tend to advise their colleagues on the relevant technical issues without presenting them for discussion of the parties[25];
- Specialised judges can find it more difficult to seek promotion if such specialisation does not exist in a higher court;
- A narrow specialisation can deter talented and qualified lawyers from standing as candidates to the judge's position related to such area.

In conclusion, it can be seen that decisions to expand the specialisation of judges should take into consideration all the relevant circumstances and, if possible, be tested in pilot projects or in assessments of the status and results of the existing specialisation of judges.

The description of the procedure for the specialisation of judges and its grounds in Lithuania are approved by the Judicial Council (Article 34(4) of the Law on Courts), which is an executive self-governance institution of the judiciary. The fact that the specialisation of judges has not been reserved only to the exclusive competence of court management and is formally regulated, in our view, facilitates effective and consistent administration of courts. Paragraph 2 of the Description of the Procedure for Establishing the Specialisation of Judges for Hearing of Cases of Specific Categories as approved by Resolution of 13 November 2008 of the Judicial Council states that the purpose of introducing the specialisation of judges shall be improvement in the quality of hearing of specific case categories. It means that the judicial community of Lithuania perceives specialisation, first of all, as an instrument to improve the quality of case hearings rather than as a means to accelerate proceedings.

The designers of the reform contend that the development of judicial specialisation is hindered by the small size of local courts – there are between 3 and 5 full-time positions of judges in more than half of all local courts. The problem is that the proposed consolidation of courts will not help solve the problem in any way – if court chambers are retained and the same rules of jurisdiction apply to them, the situation will, in principle, remain the same. The same three judges will continue hearing the same disputes of the persons who reside in the same territory. The authors of the draft note that, to facilitate specialisation, cases to be heard under the written procedure could be distributed to all court chambers which constitute a local court. The CCP in force provides that the following categories of civil disputes may

[24] Gramckow, H., Walsh, B. "Developing Specialized Court Services. International Experiences and Lessons Learned" (2013), The World Bank. *Justice & Development working paper series*, vol. 24, p. 7. Online access: <https://openknowledge.worldbank.org/bitstream/handle/10986/16677/819460WP0Devel00Box379851B00PUBLIC0.pdf?sequence=1>.

[25] Op. cit., 17, p. 155.

be heard, or heard when there are specific conditions, under the written procedure. Article 235(4) of the CCP provides that the court has the right to hear a case under the written procedure when the parties consent to this in writing; also in the cases when preparations for a judicial hearing took the form of preparatory documents and both parties requested written proceedings. Paragraph 6 of that same Article states that a case may be heard under the written procedure when one of the parties expresses such a request and the other party does not submit an objection within the time limit set by the court.

It will hardly be possible to invoke all the above-referred grounds for hearing cases under the written procedure when distributing cases to all chambers of the court because the issue regarding the written procedure is always decided after the claim has already been assigned to a specific judge. The specialisation of judges, as a basis to transfer the case from one judge to another, is not provided by the laws in force. Moreover, the number of such cases is very low and will certainly have no major impact on the development of the specialisation of judges:

- Article 423(4) of the CCP provides that public procurement cases shall be heard under the written procedure. This category of cases, considering the proposed amendments, could be assigned for hearing to specialised judges. It should be noted, however, that the cases where higher amounts are claimed are dealt with by regional courts, which are not impacted by the reform proposed in terms of their structure in any way.
- The claims to be heard under the documentary procedure. The claims of this category would hardly fall into the group discussed because only part of the case hearing takes place under the written procedure, i.e., only the proceedings until rendering of a preliminary decision.
- Cases regarding the issuance of a court order. This is probably the most important category of cases that should be heard under the written procedure. Applications for the issuance of a court order represent between 25 and 30 per cent of the entire number of civil cases. Moreover, all these cases are heard at local courts irrespective of the amount claimed (Article 431(6) of the CCP). In this regard, the rule proposed could help concentrate the proceedings regarding the issuance of court orders in the hands of specialised judges. On the other hand, such cases are very simple and judges do not need to specialise here at all. Moreover, it has already been provided for in Article432[1](2) of the CCP that the Minister of Justice, with agreement of the Judicial Council, may order when necessary that the cases under applications for the issuance of court orders submitted by means of electronic communications shall be heard by one or several specific local courts.

- Small claims provided for in Article 441 of the CCP. As in the first case referred to above, a decision as to the hearing of a small claim is made by the judge to whom the case has already been assigned, therefore, the rule proposed will be hardly applied.
- Non-contentious civil proceedings of some categories (e.g. writ proceedings). The number of such cases is very low, therefore, they will hardly have any significant impact on the development of specialisation in courts.

As it can be seen, the measures suggested will hardly have any significant effect to the development of specialisation in local courts. In order to achieve real judicial specialisation, it is necessary to implement a real consolidation of courts as it has been done (in Vilnius, Kaunas, Šiauliai) without retaining any court chambers. Such consolidation should be effected only where that would be possible, considering the existing short distances between/among the local courts being merged in order not to detach the administration of justice from people. The implementation of the reform proposed will hardly achieve one of its objectives – to create more favourable conditions for the specialisation of judges.

Another argument of no less importance for the reform suggested is a more rational and efficient use of economic, financial and human resources. As regards to a more rational and effective use of economic and financial resources, it could be assumed that the merger of public procurement would possibly make them more efficient because a larger quantity purchased should make it possible to buy the same goods for a lower amount, according to the economies of scale. A breakthrough elsewhere, considering that the court chambers will remain, will hardly be possible in the implementation of the objectives set because saving in one place will mean spending in another (e.g., one single court registry will demand more costs for logistics, etc.). The same also applies to a more rational use of human resources. This objective can be objectively achieved only through a real merger of courts, however, in this case other issues mentioned above will come up. Retention of the existing structure of local courts will save several full-time positions of the chairperson (this will, accordingly, increase the number of deputies of chairpersons) or accountants, but any substantial breakthrough seems very doubtful to us. The question remains whether it is necessary in general.

To sum up, it may be concluded that the system of courts of Lithuania guarantees proper implementation of the right to a case hearing within a reasonable time as laid down in Article 6(1) of the European Convention of Human Rights. The stability of this system is an unquestionable value, which also ensures a steady development of societal relations. Therefore, any reforms of the judiciary should be undertaken only when there is clear evidence that they are unavoidable and generate added value.

II. Procedural preconditions for civil proceedings within a reasonable time

2.1. GENERAL PRECONDITIONS IN ALL INSTANCES

2.1.1. DUTY TO BRING MATTERS TO COURT AND COURT'S 'DUTY OF CLARIFICATION'

Analysis of the question whether implementation of the right to a case hearing within a reasonable time implies obligations not only of the court but also of the parties to the proceedings shows that the position of two-fold. The proponents of one approach who support their position on the ideas of liberal civil procedure contend that the parties should be concerned when and how to present evidence and formulate their arguments in the proceedings (in this case, the principles of dispositive and adversarial proceedings are in operation) etc., because the proceedings mean the 'contest' of the parties and nobody else. The proponents of the other view, who base their position on the ideas of social civil procedure, affirm that the proceedings and their course is not only a matter of the parties – there is also a clearly expressed public interest in having the cases disposed of as soon as possible. It depends on the parties whether to apply to court or not, enter into peaceful settlement or not, etc., but when they apply to the State regarding a solution of their dispute, they must take into account not only their personal but also public interests in the outcome of the proceedings. In the Lithuanian civil procedure, as in the absolute majority of European states, the second opinion predominates and, as a result, the legislator has imposed an obligation on the litigants to bring matters to court in good time. This obligation implies that the parties must provide the court with the procedural material available to them so as necessary for careful and prompt conduct of proceedings[26]. It follows that the duty to bring matters to court in good time implies a certain conduct of the parties during the hearing of their dispute. They have to assess on their own the timeliness and need of their evidence in a specific stage of the proceedings. Such assessments should be underpinned by two criteria – the timeliness necessary to achieve the concentration of proceedings and a careful conduct of the case. The scope to which the procedural material, which satisfies pre-defined criteria, should be submitted is assessed by the parties taking into account a specific procedural

[26] Kallweit, U. "Die Prozessförderungspflicht der Parteien und die Präklusion verspäteten Vorbringens im Zivilprozess nach der Vereinfachungsnovelle". Frankfurt am Main, 1983, p. 10.

situation of proceedings, which, understandably, changes depending on changes in the situation of the parties in the proceedings. Clarification of the procedural situation in this sense normally does not pose any major problems as that may rather easily be done with reference to procedural documents or to the course of the oral hearing. Usually it is more difficult to ascertain what procedural material should be provided by the parties to the court in a specific stage of the dispute hearing as required by procedural duty of care. It must be admitted that the diversity of procedural situations during one single proceedings make it possible to outline only somewhat general recommendations. In that sense, it is for the case law to define more precisely what the notion of 'the procedural duty of care in a specific situation in the proceedings' means in different case categories.

A final decision whether the parties properly comply with their obligation is made by the court, which, if it is held that any of the parties to the dispute has breached this obligation, has the right to take certain procedural measures – refuse to treat the evidence provided by the parties as admissible, render a decision by default or, in some cases when it is held that the party has abused of procedural rights, impose a fine on the party or deviate from the general rules of distribution of litigation costs between the parties. The duty of the parties to bring matters to court in good time is also a component of the principle of cooperation – otherwise the spirit of cooperation between the court and the parties in pursuit of prompt and just adjudication as declared by this principle would seem impossible. The obligation of the parties to bring matters to court in good time applies both to oral hearings and written proceedings as well as to the stage of preparation for judicial examination.

This duty and focus on the conformity of actions of the litigants to what is necessary in a specific procedural situation of the dispute hearing, in the opinion of many authors, implements two objectives of high importance[27]:

- in this way, in order to accelerate the case hearing, the parties to the dispute are encouraged to take into consideration the procedural situation and provide the procedural material necessary as soon as possible. The intention is to avoid the situation when the party keeps submitting new evidence and thereby protracts a decision in the case;
- on the other hand, the parties must attentively observe the course of the proceedings and provide only such evidence which is necessary considering the specific procedural situation of the dispute hearing. It is thereby thought to avoid that the parties attempt to foresee all potential options immediately and 'overload' the case-file with redundant evidence, which would mean delays in the proceedings.

[27] Ibid., p. 31.

As regards the duty to bring matters to court in good time, the CCP of Lithuania is already in line with the best European examples. This, first of all, derives from a clear formulation of the objectives of civil procedure and certain new principles. Article 2 of the CCP states that one of the objectives of civil procedure is restoring of legal peace between the parties to the dispute as soon as possible. Article 7 (procedural economy and concentration) stipulates a clear and unambiguous indication that due care of this objective is an obligation not only of the court but also of the parties. This article also defines the duty of the parties to bring matters to court in good time: 'the persons involved in the proceedings shall take care of prompt hearing of the case and submit the evidence and arguments on which their claims or objections are based carefully and in time, taking into consideration the course of the proceedings'. In this case, the above-referred obligation of the parties to use their procedural rights in good faith as established in Article 42(V) of the new CCP becomes different in nature. It also means proper fulfilment of the obligation to bring matters to court in good time. This obligation is further detailed in some other Articles of the CCP. Article 226, for example, states that during the preparation for the case hearing at court, the parties shall submit to the court all available evidence and explanations with relevance to the case as well as specify the evidence they are unable to present to the court, at the same time indicating the circumstances preventing them from doing so and shall formulate finally their claims and objections to the claims asserted. The duty of the party to submit all evidence it has should not in any way be understood as the obligation to provide everything what the party believes to be relevant to the case. Such interpretation of this Article would mean overloading of the court with entirely redundant procedural material. The given rule should be interpreted in conjunction with the obligation imposed by Article 7 of the CCP on the parties to bring matters to court in good time, that is, the parties should submit only such evidence which is necessary considering the specific procedural situation and the court should take care of proper fulfilment of this duty by the party and provide assistance in its performance.

It should be noted that the assessment whether the party has properly complied with its obligation to bring matters to court in good time is a highly important part of the assessment at the European Court of Human Rights when deciding whether the party behaved properly and did not protract the case hearing in specific proceedings. When it is held in a specific case in the ECHR proceedings that the party has abused its procedural rights and, as a result, the proceedings have been considerably delayed, it becomes difficult to hold that the right of this person to the case hearing within a reasonable time has been breached. On the other hand, the ECHR will always consider the procedural measures in place in the legislation of the state to prevent any abuse of procedure effectively.

A general discussion of the duty to bring matters to court in good time may be logically followed by an overview of the rights and obligations of the court in this area because the principle of cooperation in proceedings implies not only co-operation of these two procedural subjects, but also the existence of their mutual rights and obligations for the sake of fast and just decision in the case. The principles of cooperation and procedural concentration imply the existence of quite clear obligations of the court. As regards procedural concentration, F. Klein multiple times referred to an example of the case when the issue of award of maintenance to the child was resolved when the 'child' was already sixty years old[28]. It is beyond doubt that 'justice' of this or similar kind is not only unnecessary to anybody, but also violates the right of individuals to a case hearing within a reasonable time. A condition precedent for reconciling these two goals is an active role of the court and opportunity to act so as to ensure focused presentation of the case-file material, formulation of claims and objections to them. On the other hand, it is necessary to ensure that the court is active within the limits specified in order to render decisions which conform to the substantive truth. The limits of the court's activity are, first of all, defined with reference to 'the duty of clarification'.

Such duty of the court to promote clarification as it exists in the current civil procedure has not been known to the classical Roman law. But even at that time, when there were important reasons, the court seised had the right to suggest at its discretion to a party to supplement the case material. Indications of more specific rights of the court to provide clarification in proceedings in order to assist one of the parties already existed in the post-classical and Justinian civil procedure. Today the court's duty of clarification exists, in principle, in all codes of civil procedure of the continental Europe. That is undoubtedly the outcome of the impact of the theory of social civil procedure and the Austrian civil procedure codes. This duty of the court also existed in Article 82 of the Law on Civil Proceedings of the inter-war Lithuania from as early as 1934. The primary objective of this obligation of the court is to implement the principle of equality of the parties, i.e. to avoid such situations when the party does not express its position on the issues essential for the case or does that improperly due to its legal illiteracy or inability to state its thoughts expressively. The science of German civil procedure also recognises that this obligation of the court is a prerequisite for proper implementation of the principle of the right to be heard – only through understanding which circumstances of the case are essential, a party to the dispute is in the position to express its opinion on them[29]. Therefore, the court must turn the attention of the parties to all circumstances essential for the

[28] Baudenbacher, C. *Rechtsverwirklichung als oekonomisches Problem.* Zuerich, 1985, S. 22.

[29] Novak, E. *Richterliche Aufklärungspflicht und Befangenheit.* Bochum, 1991, p. 12.

case. The court's duty of clarification also implies the necessity to indicate to the parties unclear and incomplete statements for the proof of which additional evidence should be provided. In this regard, it is being argued whether the court may indicate specifically what additional evidence is necessary in the case[30]. Likewise, there is disagreement whether the court has to request to supplement the case material, if it believes that the supplementary evidence provided by the party is insufficient. Otherwise stated, the issue whether the court has to step in with its duty to clarify repeatedly is controversial. In any case, the opinion prevails that the court has the right rather than the obligation to use the above-referred measures if it believes that this is necessary for a prompt and fair adjudication of the case. The court, on the other hand, must ensure that the facts of the case are as clear as possible[31]. The court should be released of this duty only if it resorts to all the rights held, but the parties still fail to provide their opinion on the issue disputed. The CCP of Lithuania provides for the following rights of the court in relation to the 'duty of clarification':

- Article 160(1) of the CCP states that the court may address questions to the persons involved in the proceedings, request clarifications from them, indicate the circumstances to be ascertained for the sake of a correct decision in the case, suggest to provide additional evidence to the persons involved in the proceedings. The court may also *ex officio* order an expert examination in the proceedings, as well as collect evidence on its own initiative in the cases provided for by law and when necessary for the public interest (in the light of the concept of public interest as defined by the Constitutional Court and the Supreme Court, courts should exercise this right in extremely rare cases); obligate the persons involved in the proceedings to provide the court with the evidence they have and rely on; suggest to take care of appropriate representation in the proceedings. Article 225(1) of the CCP notes that, upon admission of the statement of claim, the court, where necessary, shall specify more precisely or distribute the burden of proof of the parties.

The court may use its obligation of clarification in a variety of ways – address questions to the parties to the dispute, discuss the actual and legal situation of the dispute with them, etc. To be able to hold that the 'duty of clarification' has been duly implemented, it is not at all necessary for the court to resort to all the measures referred to. It is held that the court has implemented this duty, if it is clearly seen from the case material that the court has made use of the statutory measures it has chosen to indicate the essential circumstances of the case, the existing gaps in their interpretation

[30] Ibid., p. 57.
[31] Ibid., p. 63.

and possibilities of eliminating them to the parties. The court must always provide sufficient time to the parties to a dispute to consider the recommendations made and make their own decision. When it seems that the party needs an advocate's advice, the court should suspend the proceedings. Not to hinder the principle of concentrated case hearing, the court should foresee potential outcomes and resort to its duty of clarification as soon as possible in order to avoid delays in the case hearing.

The court's duty of clarification stems not only from the necessity to resolve disputes correctly and figure out substantive truth, but also is to a large extent dictated by the principle of concentration of proceedings and procedural economy. Only the court with the above-referred powers is in the position to influence the course of proceedings so that all the material relevant to the case and claims of the parties are submitted in due time and as soon as possible thereby ensuring examination of the case already during the first court hearing.

The existence of the court's duty of clarification for the purpose of fair and fast disposition of the case must be unambiguously established in the CCP. This obligation of the court stems from the principles of procedural concentration, economy and cooperation as set out in Articles 7 and 8 which require the court to take care that the case is disposed of in a proper and prompt manner. This duty of the court is detailed in Articles 159 and 160 of the CCP where it is stated that the chairperson shall take care of a proper and as fast as possible examination of the case, take measures to ascertain the relevant circumstances of the case. Proper examination of the case means that the court shall ascertain the substantive truth in the case, therefore, the chairperson has the duty of care over thorough examination of the case circumstances. A standard of proof in civil matters should be complete or almost complete certainty of the court about the existence or non-existence of the case circumstances. The Supreme Court of Lithuania has held that 'the CCP does not detail what the level of certainty of the court should be. The CCP establishes the social civil procedure model, therefore, a higher standard of proof should be applied in regard of proof. Such concept of proof implies that the criterion for the scope of proof should be reference to a reasonable person and a fact shall be held as proved when there is full or almost full inner conviction of the court. When there are doubts as to the existence (non-existence) of a certain fact, the court should revise the burden of proof of the parties and perform its duty of clarification (Article 159, Article 179(1), Article 225 of the CCP) [32].

Hence, it may be stated that the court's 'duty of clarification' as established in Article 159 of the CCP is not only a means to guarantee proper implementation of

[32] Panel of Judges of the Civil Division of the Supreme Court of Lithuania. Ruling of 10 May 2010 in civil case *E. R. v. DNSB „Eglutė"*, No. 3K-3-206/2010.

the principle of equality of the parties and ascertain substantive truth in a specific case, but also a very important measure providing the court hearing the case with real possibilities for conducting the proceedings so that the right to a case hearing within a reasonable time is secured.

2.1.2. PROHIBITION OF ABUSE OF PROCEDURE

Male enim nostro jure uti non debemus – we ought not to abuse our lawful right, proclaimed the Institutes of Gaius[33], written about the year AD 161. According to the medieval and later Roman-Canon law, parties could be ordered to take an oath declaring that they would not undertake particular procedural steps or ask for postponements in order to delay their case. This oath not only shows that delay was perceived to be a problem, but also that the abuse of procedural rules was counted amongst at least one of the reasons that lay at the root of delay[34]. Recommendation of 28 February 1984 of the Committee of Ministers emphasises that some rules of civil procedure used in member states may prove an obstacle in obtaining effective justice because they may be abused or be manipulated to cause delay[35]. Thus, abuse of procedure remains one of undoubtedly important factors that can unreasonably delay proceedings even today. In accordance with Article 7(2) of the CCP of the Republic of Lithuania, the persons taking part in the proceedings shall make fair use and not abuse the procedural rights they have, take care of a prompt disposition of the case, submit the evidence and arguments they use to support their claims and objections in a diligent and timely manner, taking into account the course of the proceedings. The fact that the prohibition of abuse of procedure appears next to the obligation to bring matters to court in time is an obvious indication that the Lithuanian legislator considers absence of abuse of procedure to be intrinsically linked with an expeditious disposition of the case.

The need to fight abuse of procedure, as a factor capable of delaying judicial proceedings in Lithuania, is recognised both on the statutory and jurisprudential

[33] Yiannopoulos, A. N. "Civil Liability for Abuse of Rights: Something Old, Something New". (1994), *Louisiana Law Review* [interactive]. Vol. 54, p. 1179. On-line access: < http://heinonline.org>.

[34] Van Rhee, C. H. "Introduction. In Within a Reasonable Time – The History of Due and Undue Delay in Civil Litigation", p. 2. On-line access: <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1799845>.

[35] Recommendation No. R(84)5 of the Committee of Ministers of the Council of Europe of 28 February 1984 "On the Principles of Civil Procedure Designed to Improve the Functioning of Justice". On-line access: <https://wcd.coe.int/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=603496&SecMode=1&DocId=682030&Usage=2>.

level. The concept and elements of abuse of procedure were for the first time unfolded in sufficient detail in the case-law of the Supreme Court of Lithuania in its ruling of 24 October 2001[36]. The Court has noted that 'the purpose of civil procedure is to ensure a prompt and fair resolution of private disputes as well as the determination of civil rights and obligations. Article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms provides that, in the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. This right is secured to the claimant, the respondent and other persons involved in the proceedings. Thus, all persons taking part in the proceedings, must, in order not to violate the rights and interests of other persons involved in the proceedings, in particular, those with opposite interests, exercise their procedural rights (the right to make requests, provide evidence, appeal against procedural decisions of courts, etc.) in good faith <...>. The CCP <...> imposes an obligation of the persons taking part in the proceedings to take interest in the course of the proceedings at issue, act for the sake of prompt and fair disposition of the case. This ensures the implementation of the goals of civil procedure as well as reveals one of the fundamental elements of the purpose of procedural rights – to ensure prompt and correct adjudication. Where a procedural right is exercised so that the rights and legitimate interests held by other persons are restricted unjustifiably, contrary to the sense of this right, this is considered an abuse of right – unlawful conduct'. Subsequent case-law elaborated and developed the notion of abuse of procedure. The analysis of the most recent case-law of Lithuanian courts makes it possible to distinguish the following features and main aspects of abuse of procedure:

- abuse of procedural rights is a violation of law, i.e. the conduct expressly ruled out by civil procedure law which may incur legal liability;
- abuse of a procedural right manifests itself in a breach of the conditions for the exercise of a specific individual right;
- exercise of a statutory right may be considered abuse only in exceptional cases when such right is apparently used not according to its purpose.[37] Refusal to satisfy the request or claim stated in the statement of claim or any other procedural document does not in itself confirm abuse;
- abuse is such conduct, which, although seemingly lawful in appearance, has

[36] Panel of Judges of the Civil Cases Division of the Supreme Court of Lithuania. Ruling of 24 October 2001 in civil case *G. K. v. AB „Turto Bankas"*, No. 3K-3-999/2001.

[37] Panel of Judges of the Civil Cases Division of the Supreme Court of Lithuania. Ruling of 16 October 2013 in civil case *J. G. v. V. G.*, No. 3K-3-486/2013.

a concealed unlawful objective (e.g., protract proceedings[38]; cause inconvenience to the other party, exert pressure on it in legal relations, influence the commercial or personal conduct of other party[39]; delay the approval of a creditor's claim[40], the decision on the winding-up of the company[41], limit the major creditor's participation in bankruptcy proceedings[42]);

- not each non-compliance with the obligation to make use of procedural rights fairly as such means a breach of law likely to result in the application of legal liability measures, i.e. not in each case disregard of the obligation to use procedural rights in good faith should be considered as a breach of law, although in specific cases this may be held to be an improper implementation of the right[43]. Otherwise stated, not every unfair action as such in the proceedings also means abuse of procedural rights. The relationship between abuse of procedural rights and the general imperative of good faith corresponds to the relationship between a part and the whole. Abuse of procedural rights is a specific failure to fulfil the obligation to exercise procedural rights in good faith, which is expressed in an individual violation of procedural law with specific features;
- abuse may also be manifest in an omission (silence, concealing specific information relevant to the case hearing) [44];
- abuse can also take the form of one-off actions or omissions (e.g. clearly groundless application for the institution of bankruptcy proceedings); systematic character[45] or continued inappropriate conduct[46] is not a pre-

[38] Panel of Judges of the Civil Cases Division of the Supreme Court of Lithuania. Ruling of 25 June 2015 in civil case *A. N. v. J. K.*, No. 2-815-157/2015.

[39] Panel of Judges of the Civil Cases Division of the Supreme Court of Lithuania. Ruling of 9 October 2014 in civil case *UAB VSA Vilnius v. UAB „Naujininkų ūkis"*, No. 2-1475/2014.

[40] Panel of Judges of the Civil Cases Division of the Supreme Court of Lithuania. Ruling of 12 December 2013 in civil case No. 2-2740/2013.

[41] Panel of the Civil Cases Division of the Supreme Court of Lithuania. Ruling of 5 March 2015 in civil case *P. V. v. UAB RVN*, No. 2-540-330/2015.

[42] Panel of the Civil Cases Division of the Supreme Court of Lithuania. Ruling of 11 August 2015 in civil case *AB Swedbank v. TŪB J.D*, No. 2-1485-241/2015.

[43] Op. cit., 37.

[44] Op. cit., 39.

[45] Panel of the Civil Cases Division of the Supreme Court of Lithuania. Ruling of 4 June 2012 in civil case No. 2-497/2012. On the other hand, the Court of Appeal of Lithuania noted on 30 June 2015 that it should be ascertained that the right to submit a separate appeal has been repeatedly resorted to clearly groundlessly (Panel of the Civil Cases Division of the Supreme Court of Lithuania. Ruling of 30 June 2015 in civil case No 2-1361-302/2015). However, there are no grounds to support such position.

[46] Panel of the Civil Cases Division of the Supreme Court of Lithuania. Ruling of 16 August 2012 in civil case No. 2-988/2012.

requisite. A systematic nature in general (e.g., constant challenges of the judge hearing the case regarding his procedural decisions unfavourable to the person), however, is the circumstance relevant in deciding whether the person does not abuse his/her right[47];

- in deciding whether a person abuses his rights, assessment is necessary of the court's role in the mechanism of exercising procedural rights. Whereas the exercise of procedural rights is possible only with participation of the court to a greater or lesser extent, as a result of the procedural rules applied by the court and the infringements of these rights by persons, conduct may not be qualified as abuse of procedural rights even when it is ascertained that they use their procedural rights improperly[48];
- subjects of abuse may be all persons involved in the proceedings, including present and former[49] representatives[50], attorneys at law[51], as well as the persons who make certain claims, regardless that they do not hold a procedural right to address such requests to the court (e.g., a person who has no right to submit an appeal does so[52]; a person who does not hold the right appeal against a resolution of the meeting of creditors of a company under bankruptcy brings an action for its annulment[53]). Considering whether the person's conduct has been qualified as abuse of challenge justifiably, the fact whether the person is a professional lawyer is an important circumstance.[54]

The examples of the case law of Lithuanian courts mentioned above, in principle, conform to the principles and doctrine of civil procedure. However, in the opinion of the authors of the study, there are also elements in the practice

[47] Panel of Judges of the Civil Cases Division of the Supreme Court of Lithuania. Ruling of 2 March 2015 in civil case No 2-281-370/2015.

[48] Panel of Judges of the Civil Cases Division of the Supreme Court of Lithuania. Ruling of 16 October 2013 in civil case *J.G. v. V.G.*, No. 3K-3-486/2013.

[49] Panel of Judges of the Civil Cases Division of the Supreme Court of Lithuania. Ruling of 5 March 2015 in civil case No 2-540-330/2015.

[50] Panel of Judges of the Civil Cases Division of the Supreme Court of Lithuania. Ruling of 2 December 2013 in civil case No. 2-2740/2013.

[51] Panel of Judges of the Civil Cases Division of the Supreme Court of Lithuania. Ruling of 2 March 2015 in civil case No 2-281-370/2015.

[52] Panel of Judges of the Civil Cases Division of the Supreme Court of Lithuania. Ruling of 4 April 2005 in civil case No 3K-3-224/2005.

[53] Panel of Judges of the Civil Cases Division of the Supreme Court of Lithuania. Ruling of 23 May 2013 in civil case No. 2-1485/2013.

[54] Panel of Judges of the Civil Cases Division of the Supreme Court of Lithuania. Ruling of 16 March 2016 in civil case *UAB Agerona v. AB Klaipėdos jūrų krovinių kompanija*, No. 3K-3-159-421/2016.

of application of the prohibition to abuse procedure that are questionable and open for discussions.

First of all, it should be noted that the Court of Appeal of Lithuania holds that a lawful and reasonable exercise of procedural rights by a person, if no deliberate bad-faith conduct has been identified, may not be considered as an abuse of procedural rights[55]; bad faith of the person who submits an unfounded procedural document means that the person understands that his claim is, in fact, groundless, that the person does not have a right to claim remedies for his rights because they have not been violated in reality[56]. It follows from the examples mentioned above that decisions on abuse should be based on the doctrine of personal fault/guilt which implies the necessity to establish a person's mental (intellectual and will-driven) relationship with the act performed and its consequences (subjective legal capacity). The person has to perceive that what he is doing, although allowed formally (e.g., submission of a statement of claim to the court or challenging a judge), cannot in fact be granted because the person knows that there are no prerequisites necessary to achieve the outcome desired (e.g., the person is aware that his statement of claim is indeed unreasoned or that there are no adequate reasons to doubt the judge's impartiality). Moreover, the person's intent should be established, i.e. the person understands that his action or omission is objectively against a reasonably prompt, economic and fair disposition of the case and is willing to act in this way, also foresees that this can cause unjustifiable damage to the system of administration of justice and/or other participants in the proceedings and seeks such effects or recklessly allows them to occur.

On the other hand, it is underlined in the most recent case law of the Supreme Court of Lithuania that, following the case law developed by the court of cassation, the exercise of this statutory right may be considered as abuse only in exceptional cases when such right is apparently misused. The court does not mention that for abuse intent is necessary. In support of its position regarding the understanding of abuse, the Supreme Court, first of all, refers to the ruling of 4 April 2005 of the Supreme Court[57] where the court has held that 'abuse of procedural rights means actions undertaken by the party in the exercise of such rights not according to their purpose, against the goals of civil procedure or when such actions cause deliberate substantial damage to the other party of the proceedings. The exercise of procedural

[55] Panel of Judges of the Civil Cases Division of the Supreme Court of Lithuania. Ruling of 10 September 2015 in civil case No 2-1247-180/2015.

[56] Panel of Judges of the Civil Cases Division of the Supreme Court of Lithuania. Ruling of 24 November 2014 in civil case No 2-2051/2014.

[57] Panel of Judges of the Civil Cases Division of the Supreme Court of Lithuania. Ruling of 18 February 2015 in civil case *V. N. v. Č. B.*, No. 3K-3-52-313/2015.

rights by one of the parties may not justify any restriction of the rights of the other party or the aggravation of its situation to a considerably larger extent compared to a lower interest to exercise such procedural right. One party to the proceedings must show legal respect to the other party and its legitimate interests. In the pursuit of its goals and the exercise of its procedural rights, the party may not abuse them, i.e. use excessive, disproportionate measures that cause damages to the other party'[58].

It follows from the above that the case law of courts of Lithuania does not provide a clear answer to the question what concept of fault/guilt should be followed in order to state the presence of abuse. Such situation does not contribute to the fight against this negative phenomenon and its consequences, which can often manifest themselves in an additional length of the proceedings. Such situation, however, may partly be explained by the fact that abuse can manifest itself in different actions and in very different circumstances. Abuse is possible of the rights of different nature and significance. For example, the right of access to court is considered to be a fundamental right in the absence whereof other procedural rights and their implementation is impossible in general. The State must ensure that the right of access to court is real. It means that the measures which can potentially dissuade from seeking access to courts, such as the application of sanctions (fines or obligation to compensate damages) for a groundless action, should also be applied with caution. Thus, it may not be ruled out categorically that in some cases a finding of abuse will be based on the presence of intent and deliberate conduct and, in other cases, gross manifest carelessness will suffice. This opinion is also supported by the doctrine of law.

In their analysis of abuse of procedural rights, Loîc Cadiet and Philippe le Tourneau pointed out that the traditional approach to this issue is focused on the question whether, for a finding of the existence of an abuse, any fault in the exercise of the right is sufficient or, on the contrary, whether it is necessary to ascertain the presence of malevolence (intent) or a gross error which is equivalent to intent (malevolence). In their opinion, however, what matters is not so much the content of fault (and, in particular, the degree of its severity), but the burden of obligations imposed in individuals and the required level of care deriving from them in the light of specific circumstances. These are not steady and depend on many factors (substantive law, amount of damages, procedures chosen, etc.). It is not surprising, therefore, that in some cases malevolence is a prerequisite and, in others, the presence of carelessness is sufficient. Irrespective of whether a qualified or simple fault is required, to establish the presence of abuse, there should be inadequacy between the measures (even lawful ones) and the objectives (even lawful ones) sought. This

[58] Panel of Judges of the Civil Cases Division of the Supreme Court of Lithuania. Ruling of 4 April 2005 in civil case No 3K-3-224/2005.

issue may be treated differently in case of the initiation of proceedings, defence against claim submitted, judicial review procedure or enforcement[59].

In case the Lithuanian courts follow the above-described procedure, in the opinion of the authors of the study, they should expressly state that. The reasoning in a procedural decision of the court may not be considered to be of proper quality when, in a description of the subjective side of abuse, it lists all the likelihoods possible, from intentional, deliberate conduct to simple carelessness or disproportionate use of statutory rights, without explaining that a specific assessment depends on the circumstances of the situation at issue and without indicating what factors in the given case are decisive for the choice of one or another approach to the requirements necessary to state the existence of abuse. In any case, in our opinion, it should not be excluded that it is possible to assess the person's conduct according to substantially objective criteria deriving from the standard of conduct followed in such circumstances by a reasoned and careful participant to the proceedings who takes into consideration the public interests of effective functioning of the justice system, gives heed to rights and legitimate interests of other parties in the exercise of his rights, i.e. uses the procedural rights strictly according to their purpose, adjusting them according to individual circumstances or personal qualities (education, experience, age, etc.) in the relevant cases. A major and obvious deviation from this objective standard in certain cases would be sufficient to state the existence of abuse. Similar trends, i.e. objectivisation and expansion of the concept of abuse to embrace some cases of carelessness, are also noticeable in other states[60].

Courts not always turn the attention to the fact that any procedural rights can, in principle, be abused in civil procedure, hence, it is important to determine precisely what abuse is under scrutiny.[61] For example, when the claimant withdraws the claim asserted without any explanation, he exercises his procedural right to a withdrawal of the claim and such conduct may not be usually treated as an abuse of the above-referred right. However, if the claimant submits a manifestly unfounded statement of claim and requests interim measures in order to create an additional pressure on the respondent and later, e.g., after the court removes the interim measures, withdraws the claim without any explanation of the reasons of his behaviour, it seems to be justified to presume an abuse not of the right to withdraw the claim but of the right to submit the statement of claim. It follows that the fact that

[59] Cadiet, L., Tourneau, P. "Abus de droit" (2015). *Repertoire de droit civile*, p. 128, 129, 132. On-line access: <www.dalloz.fr>.

[60] For example, Anglija. Andrews, N. "Abuse of Process in English Civil Litigation". (1998), *Zeitschrift für Zivilprozess International*, vol. 3, p. 33.

[61] Panel of Judges of the Civil Cases Division of the Supreme Court of Lithuania. Ruling of 5 July 2012 in civil case No. 2-932/2012.

the person exercises or not a specific procedural right may be one of the relevant circumstances in assessing whether the person does not abuse the procedure by his other conduct. Moreover, the fact that no abuse of a specific right has been established does not mean that another right was exercised correctly because an assessment is necessary of all the circumstances related to the exercise of the latter right. Thus, the argument of the Court of Appeal of Lithuania that, in the absence of the finding that the claimant has submitted a groundless statement of claim in bad faith, there are no grounds to believe that the application for interim measures was made in bad faith, is questionable[62]. On the other hand, the Court of Appeal of Lithuania correctly states that, if the court of appeal instance accepts a piece of evidence, although the provision of evidence is usually limited at the court of appeal instance, the presentation of evidence only to the court of appeal instance may not be considered to be an abuse of procedure[63].

The existence of abuse may be established only when it causes damage. Damage, however, may not be understood narrowly and treated as identical to the losses of property nature. We consider that the Court of Appeal of Lithuania holds correctly that abuse exists not only when an action causes material damage, but also when it is detrimental to the legal system[64]. The doctrine of law notes that an abuse of procedural rights can inflict economic, organisational, ideological and personal damage. Economic damage can manifest itself in pecuniary losses of the court and of the persons involved in the proceedings. Organisation damage is inflicted on the normal development of procedural legal relations and manifests itself in the unnecessary drain of procedural resources for the hearing of groundless claims or complaints, for the taking of court decisions based on unreliable evidence, for the preparation of other procedural documents, etc. The system of justice in such a case simply works 'in vein' in this way wasting the precious time that could be used for the resolution of real disputes. Ideological damage means a decrease in the authority of the court, as the justice administration body, as a result of abuse of procedure. Personal damage resultant from an abuse of procedural rights implies moral sufferings and other non-material losses of the person involved in proceedings and aggrieved due to the abuse of procedure[65].

[62] Panel of Judges of the Civil Cases Division of the Supreme Court of Lithuania. Ruling of 17 November 2014 in civil case No 2A-1291/2014.

[63] Panel of Judges of the Civil Cases Division of the Supreme Court of Lithuania. Ruling of 15 April 2015 in civil case No 2A-390-186/2015.

[64] Civil Cases Division of the Court of Appeal of Lithuania. Ruling of 16 August 2012 in civil case No 2-988/2012.

[65] ЮДИН, А. В. *Гражданское процессуальное правонарушение и ответственность*. Санкт-Петербург: Изд. Дом Санкт-Петербургского гос. ун-та: Юридическая книга, 2009, p. 221–224.

As far as the impact of abuse of procedure on the length of proceedings is concerned it should be, first of all, noted that a violation of law at issue can directly aim at protracting the proceedings (e.g., by non-appearance at court without a valid excuse; avoiding the service of summons; providing false data or groundlessly challenging the judge who decides the case; making a request to order the presence of a witness, suspend the hearing or any other request aimed at postponing the court hearing; submitting an appeal or an application to review the court's decision in default, an objection against the court's order or preliminary decision in case of the documentary procedure in order to delay the enforceability of the court's decision; submitting a statement of claim or an appeal with the view of delaying the enforcement of the decision, etc.). In such cases, the effects of abuse on the duration of the proceedings, first of all, are displayed on the micro-procedural level,[66] capable of impacting the course of a specific case and the time taken to resolve it if the court does not take or has no possibilities for taking the measures to prevent the negative effects.

On the other hand, abuse does not necessarily aim at delaying proceedings. An abusing person can have completely different intentions – to pressure the party, cause additional concerns, time and financial losses to the party as not all litigation costs may be reimbursed and a monetary compensation for time and other inconveniences can be very complicated and difficult to achieve; the person can also seek to profiteer or satisfy another person's interests (e.g., by submitting too low amounts of creditors' claims in bankruptcy proceedings for approval or inflated, unsubstantiated invoices for representation costs, unfounded applications for court orders, expecting that the debtor will not object for some reasons, providing misleading information so that the applicant is appointed bankruptcy administrator, etc.). However, both in case abuse is against a prompt disposition of the case and in case other goals are pursued, a negative impact on the duration of the procedure always has the potential to manifest itself on the micro-procedural level. In micro-procedural terms, the State, as a form of organisation of the entire society, is interested in the fairest proceedings possible, i.e. in finding out the truth in the case in a prompt and cost effective manner[67]. As the achievement of procedural goals (both lawful and unlawful) is impossible without an active or passive involvement of the court, any abuse, in principle, means unjustifiable wasting of limited resources of

[66] On the micro-procedural level, each good-faith participant in the proceedings expects that the case will be heard promptly, simply, without causing any unjustifiable restraints and inconveniences, without major financial expenses. Storme, M. L. "Over het tergend geding voor een roekeloze vriendschap". In *Liber Amicorum Jan Ronse*. Brussels: Story-Scientia, 1986, p. 31. On-line access: < www.jura.be>.

[67] Ibid. p. 31.

the judiciary that could be used for the resolution of disputes of good-faith litigants, likely to add indirectly to delays in resolving other matters and cases on the waiting list. Otherwise stated, abuse of procedure takes advantage of the system of the administration of justice at the cost of other litigants because their proceedings are delayed as a result. This necessitates the introduction of the relevant measures in the law of civil procedure how to fight this negative phenomenon.

The CEPEJ Guidelines for Judicial Time Management point out that all attempts to willingly and knowingly delay the proceedings should be discouraged. There should be procedural sanctions for causing delay and vexatious behaviour. These sanctions can be applied either to the parties or their representatives[68]. Rules become powerless not only if they are ignored, but also if effective sanctions are lacking or if sanctions are not imposed[69].

According to Piet Taelman, rules of procedure that are clear and simple, without procedural gaps and pitfalls, offer the most reliable guarantee against abuse of procedure. Where the law *de facto* excludes the possibility of abuse by including guarantees against unjustified use of the proceedings, abuse of procedure will disappear of its own accord[70]. Thus, in order to avoid abuse, it is important to improve the rules of procedural law and procedural remedies. Procedural laws should grant adequate powers to the court to prevent abuse or at least minimise its negative effects, including those on the length of the proceedings. In may be acknowledged, in our opinion, that the Lithuanian civil procedure is sufficiently modern in this regard although, probably, recommendations how to improve it can always be offered and continue to be made.

Article 93(4) of the CCP of Lithuania provides that the court may deviate from the customary rules for the distribution of litigation costs taking into account whether the procedural conduct of the parties was proper and considering the reason which gave rise to the litigation costs. The procedural conduct of the party is considered proper, if it exercises its procedural rights in good faith and carries out its procedural obligations honestly. Thus, an improper procedural behaviour of the party may predetermine the fact that it will be ordered to reimburse more litigation

[68] European Commission for the Efficiency of Justice (CEPEJ). Steering Group of the SATURN Centre for judicial time management (CEPEJ-SATURN). Revised SATURN Guidelines for Judicial Time Management. CEPEJ (2014)16 On-line access: https://www.coe.int/t/dghl/cooperation/cepej/Delais/default_en.asp.

[69] Van Rhee, C. H. "The law's delay; an introduction". In *The law's delay: essays on undue delay in civil litigation*. Antwerp: Intersentia 2004, p. 17.

[70] Taelman, P. "Abuse of Procedural Rights. Regional Report: Belgium-The Netherlands". In *Abuse of Procedural Rights: Comparative Standards of Procedural Fairness*. The Hague: Kluwer Law International, 1999, p. 146–147.

costs. Differently from, e.g., Finland, however, the civil procedure law of Lithuania does not provide for an opportunity to award part of the litigation costs from the party's representative, jointly and severally with the party[71]. Given the fact that abuse is usually practised or initiated by persons who have the relevant knowledge of law, acquired through professional training or constant litigation and that they are in the position to undertake procedural manipulations, it should be considered whether this possibility could be established in the civil procedure of Lithuania.

Following the civil procedure law of Lithuania, the party is usually represented by a person with a degree in law who may be, *inter alia*, subjected to higher standards of prudence, care and good faith; hence, it is natural that in case of an abuse of procedure he could be ordered to contribute to the compensation of the litigation costs resultant from his actions. Article 95 of the CCP of Lithuania makes it possible both to impose a fine (up to EUR 5 792) for abuse of procedure (50 per cent of the fine may be awarded to the other aggrieved party) on the representative of the litigant and obligate him to compensate the resultant damages. However, litigation costs, which fall into the scope of regulation of procedural law rules, in principle should not, in our view, be the object of the claim to compensate damages due to abuse, which is treated as the application of substantive contractual civil liability in Lithuania[72], as that would encourage satellite litigation and would distort the meaning of litigation costs. Part of the fine referred to in Article 95 of the CCP, no less than 50 per cent, should be in all cases awarded in favour of the state – its principal purpose is to sanction rather than compensate, thus, the compensation by the abusing representative of the litigation costs sustained by the party would be conceptually flawed. It should be noted, however, that the Supreme Court of Lithuania has held that a fine under Article 95(2) of the CCP may, depending on the case circumstances, be imposed both on the representative of a legal entity who is a natural person, if abuse stemmed from his personal conduct in the proceedings, and on the legal entity, if its benefits and interests were abused of or if abuse stemmed from inadequate supervision and control by the legal entity, as well as on the natural and legal entity, if both of them may be considered liable for actions[73]. As the representative's personal conduct lends itself to proof most easily, it is likely that the fine at issue will usually be (and should be) imposed on the representative who carried out specific actions.

[71] Niemi, J. *Civil procedure in Finland*. Alphen aan den Rijn: Wolters Kluwer, 2010, p. 58.

[72] Panel of Judges of the Civil Cases Division of the Supreme Court of Lithuania. Ruling of 1 December 2008 in civil case *J. G. v. V. G.*, No. 3K-3-576/2008.

[73] Panel of Judges of the Civil Cases Division of the Supreme Court of Lithuania. Ruling of 28 April 2016 in civil case No. e3K-3-256-915/2016.

In the context of the fine at issue it is also important to note that the Supreme Court of Lithuania has held that a fine, which is paid for the benefit of another person involved in the proceedings, is not meant only for covering the losses of that person. The purpose of a fine in Article 95 of the CCP is, *inter alia*, to deter against abuse and compensate the losses of non-property nature of the other party because proving the losses suffered as a result of abuse is complicated and, as a result, not always a sufficient preventive measure against abuse[74]. The Court of Appeal of Lithuania has, in its own turn, eliminated the uncertainty which had existed in the case law and added clarity to conflicting case law as to whether the fine for abuse imposed by a final act of the court has to be reviewed when an application for its revocation or reduction is submitted under a separate procedure to the court seised (Article 107 of the CCP), or whether it may be appealed against by filing an appeal concerning the subject-matter of the dispute. The court pointed out that the first instance court had imposed a fine for abuse of procedural right to file a claim after hearing the case on the merits in its final procedural decision – in the decision of the first instance court to dismiss the claim. In such as case, as noted by the court, the procedure provided for in Article 107 of the CCP for revision of the fine should not apply and the court's decision, including its part to impose a fine, may be appealed under the procedure for appealing against the decisions rendered by first instance courts[75]. All this, firstly, creates preconditions for a more effective fight against abuse and for compensating the other party for the harm inflicted and, secondly, enables a more prompt and economical disposition of the issue regarding the fine imposed by abuse.

Another example of the fight against abuse of procedure when the court interprets the rules of law so that there are no avenues for misusing them is the most recent case law of the Supreme Court of Lithuania regarding the possibility of public legal entities to act as representatives at court. With a view to ensuring qualified representation at court, the law of civil procedure of Lithuania limits the range of persons who may act as representatives on the basis of an assignment, hence, attorneys at law and assistant attorneys at law may usually act as representatives. The law, however, provides for several exceptions from this general rule. For example, the representation of natural persons on the basis of an assignment at court may be carried out by associations and other public legal entities, if their incorporation documents indicate the defence and representation in court of a specific group of persons as one of the objectives of their activities and if they represent members of the association or another public legal entity in the matters related to the activity

[74] Ibid.

[75] Panel of Judges of the Civil Cases Division of the Supreme Court of Lithuania. Ruling of 10 March 2016 in civil case *BUAB „Bankroto valdymas" v. I. G, L. P.*, No. 2A-131-236/2016.

objectives provided for in the incorporation documents of these legal entities. In the light of this, the persons who do not have the right to engage in the practice of an attorney at law, aiming at bypassing the restrictions imposed on them for representation at court, started setting up associations, in principle, limiting themselves to the statement in their articles of association that the objective of activities of the association is to represent its members in the defence of their rights at court by providing legal consultancy to them, and started inviting people who envisage litigation to become members of the association. Hence, such associations have, in fact, become instruments to defend and implement not the public interests of the association and its members, as provided for in the Law on Associations, but a cover for fictitious law firms to engage in commercial legal services for nominal members of the association or its leaders or related persons. This had artificially created preconditions for persons without a qualification in law and/or the status of an attorney at law (assistant attorney at law) to undertake representation at courts. The Supreme Court of Lithuania has interpreted that a public legal entity should usually represent its members (participants) free of charge[76] and has established in the case law that an association or any other public legal entity, with the only objective to consult its members and represent any interests they have at court, may not be considered to be proper representatives entitled to represent their members because representation at court is not meant to achieve other goals of the association. Otherwise stated, the right of an association to represent its members may only be a subsidiary function in the achievement of other, principal public goals of the association rather than its primary function and a self-sufficient objective to justify the right of representation[77]. Although the Court has not pointed out in this case that it drew the above-mentioned inferences taking into consideration the prohibition of abuse of procedure, we believe that, in fact, by this interpretation, the Court has prevented the attempts of bad-faith persons to bypass the law and profiteer from that unlawfully.

2.2. PRECONDITIONS IN FIRST INSTANCE COURTS

Everybody can, probably, agree that the first instance is a pivotal instance for hearing cases at court, while the appeal and cassation instances are only the opportunities, resorted to rather rarely, to appeal against the decision rendered by a

[76] Panel of Judges of the Civil Cases Division of the Supreme Court of Lithuania. Ruling of 24 February 2015 in civil case *"Leonhard Weiss RTE AS" v. AB „Lietuvos geležinkeliai"*, No. 3K-3-84-248/2015.

[77] Panel of Judges of the Civil Cases Division of the Supreme Court of Lithuania. Ruling of 29 May 2015 in civil case *"BTA Insurance Company SE" v. UAB „Litaksa"*, No. 3K-7-334-687/2015.

first instance court when a litigant is convinced that the court's decision is unreasoned and unlawful. Such approach is also confirmed by statistics – higher instance courts varied the decisions of first instance courts only in 1 per cent of civil cases in 2015, although the number of civil cases before first instance courts has been increasing[78]. Thus, it is highly important to facilitate the hearing of civil matters in first instance courts within a reasonable time and, at the same time, ensure the lawfulness of proceedings and the quality of the actions undertaken. Although the above-referred statistics allows the conclusion that civil matters in Lithuania appear to be heard fast and the average length of proceedings in first instance courts, from the submission of a procedural document initiating the action to the court until a final procedural decision of the court is only 96 days,[79] it may not certainly be stated that there are fully suitable conditions for fast disposition of all civil cases. This section of the study will offer a brief overview of all key stages of civil proceedings before first instance courts and the focus will be on major problematic aspects and potential solutions.

It is understandable that for a civil dispute to be resolved at court, first of all, a statement of claim has to be properly drawn up in contentious proceedings or an application in non-contentious proceedings for the court to be able to accept a procedural document and institute civil proceedings. This stage of civil proceedings has been clearly regulated in Lithuania – specific grounds for refusal to accept a statement of claim by the court are laid down in Article 137(2) of the RL CCP and they are very similar in many states. Moreover, the court must institute civil proceedings or refuse to accept the statement of claim within a reasonable time limits of ten days after the day of registration of the relevant statement of claim at the court. Where a statement of claim requests to apply interim measures, the issue of acceptance of the statement of claim shall be resolved within three working days. If the court, nevertheless, delays its decision on the acceptance of the statement of claim, from 1 October 2011, the claimant may avail himself of the opportunity provided for in Article 72(3) of the RL CCP to apply to a court of appeal instance with a request to set the time limit to accept the statement of claim; such request, however, is submitted via the court of first instance, therefore, normally the court of first instance should deal with this issue on its own.

This stage of civil proceedings is complicated when a statement of claim contains deficiencies. Some deficiencies are obvious and it is indeed necessary that the claimant corrects them (for example, failure to pay the stamp duty); yet other

[78] 2015 Annual Performance Report of Courts. On-line access: <http://www.teismai.lt/data/public/uploads/2016/03/teismu_ataskaita_2015_su-turiniu_sumazinta.pdf>.

[79] Ibid.

deficiencies can be only formal, possible to rectify during the preparatory stage, and should not become the basis for passing a ruling regarding elimination of deficiencies in the statement of claim. We can only agree with the most recent case law of the Supreme Court of Lithuania that the court, when addressing the issue whether there is a basis to apply the institute of elimination of claim deficiencies in a specific case, has to assess the claimant's possibility of having such data in his disposal, hence, also the possibility of eliminating the particular shortcoming in the statement of claim[80]. Thus, the approach of courts to each individual statement of claim should not be formal and any single deficiency should not lead to a ruling to eliminate the deficiency. At the same time, the attention should be drawn to the fact whether the claimant is represented by a lawyer or not.

Case hearing at court can also be delayed by the fact that the court's ruling to eliminate the shortcomings of a procedural document may be appealed against under a separate appeal according to Article 115(5) of the RL CCP in the meantime. We consider that it would be sufficient to have the opportunity to appeal only against the ruling whereby the procedural document is returned because of failure to eliminate its shortcomings.

Lithuania does not verify so far whether a claim is well-founded at the moment of institution of civil proceedings. The court verifies at this stage whether satisfying the statement of claim can objectively generate legal consequences. If the claimant asserts a claim, which cannot lead to any objective legal consequences, the court should set the time limit to eliminate the deficiencies on the ground that the subject-matter of the claim is inaccurate or, depending on the nature of the claim, refuse to accept the statement of claim as inadmissible[81]. A preliminary verification of justification of the claim at the outset of the civil case hearing is foreseen by the law only where interim measures are requested – Article 144(1) of the CCP stipulates that that the court may apply interim measures upon request of the parties and other persons concerned, if such persons substantiate their claim reliably and if failure to apply such measures can aggravate or make the enforcement of the court's decision impossible.

There are certainly cases when manifestly unfounded claims are submitted and courts are convinced of that from the very beginning (for example, a claim is filed against the person who has no legal basis to respond to it). Lithuania has not addressed the issue of such civil cases so far, and this only places a burden on

[80] Panel of Judges of the Civil Cases Division of the Supreme Court of Lithuania. Ruling of 29 January 2016 in civil case *I. V. v.* National Land Service under the Ministry of Agriculture, No. 3K-3-20-313/2016.

[81] Panel of Judges of the Civil Cases Division of the Supreme Court of Lithuania. Ruling of 29 April 2015 in civil case *P. U., O. L v. A. P., J. P.*, No. 3K-3-231-695/2015.

courts and other persons involved in the proceedings to hear the civil case, draw up procedural documents, take part in the case hearing at court; apart from that, this also protracts the hearing of other cases. Some other states have simplified procedures established in laws to dismiss claims as soon as possible in such cases: Article [82]1052 of the Finnish Code of Judicial Procedure provides that the court may dismiss an action that is manifestly unfounded without even giving the summons to the respondent; likewise Chapter [83]42, Section 5 of the Swedish Code of Judicial Procedure states that if the claimant's statement does not constitute a legal basis for the case, or if it is otherwise clear that the case is unfounded the court may, however, immediately enter judgment in the case without issuing a summons. Lithuania should also think about a certain simplified procedure to deal with or dismiss utterly unfounded claims as quickly as possible.

The preparatory stage for judicial hearing of the case is among the civil procedure stages most modified after the coming into force of the RL CCP in 2003. Until that time there had been little understanding and legislative-level efforts to establish the approach that only the quality of preparedness for the case hearing or the final fleshing out of the claimant's claims and the respondent's objections, the timeliness of submission evidence to or collection of evidence by the court to be examined in the case will determine whether it will be possible to dispose of the case during the first hearing and, at the same time, within a reasonable time. The so-called preparatory stage for the main court hearing has been in place for thirteen years already in Lithuania. Moreover, only after the adoption of the Code of Civil Procedure, reconciliation of litigants became one of the cornerstone objectives of the preparatory stage.

Preparations for a judicial hearing may take place in the written or the oral form in Lithuania. Pursuant to Article 225(7) of the CCP, after the receipt of responses from the respondent and third parties or at the expiry of the time limit to submit responses, the court determines the place, date and time of the hearing and notifies this to the persons involved in the proceedings, indicating the consequences of failure to appear at the preparatory hearing, or orders that preparations for a judicial case hearing will be made by preparatory documents, or passes a ruling to refer the case for hearing if additional preparatory actions for a case hearing are unnecessary. Thus, the quality of a statement of claim and responses, the nature of a civil case, the opportunities of lawyers to take part in the hearing, the possibility

[82] The Finnish Code of Judicial Procedure. On-line access: <https://www.finlex.fi/fi/laki/kaannokset/1734/en17340004.pdf>.

[83] The Swedish Code of Judicial Procedure. On-line access: <http://www.government.se/contentassets/the-swedish-code-of-judicial-procedure-ds-1998_65.pdf>.

of reconciliation in a dispute and other circumstances determine which preparatory form will be chosen.

Preparation by means of preparatory documents must be normally ordered, if both parties to a dispute are represented by lawyers or assistant lawyers or if legal entities are represented by their employees or civil servants with a higher university degree in law. Moreover, preparation by means of preparatory documents is, for example, applied in public procurement cases. In all other cases the court has the right rather than the obligation to choose the written preparatory form, if it believes that both litigants are able to state their position in writing in a proper and timely manner and that such preparatory form will allow preparing for a court hearing better and faster. In such cases, the court has to assess all circumstances known in the case attentively and get certain that both parties to the dispute will be in the position to express their position in writing in a qualified manner. Otherwise this can lead to problems during the preparatory stage, in particular, bearing in mind that Article 228(3) of the CCP does not allow moving from the written to the oral form of the preparatory stage in Lithuania in the meantime.

Where a peaceful settlement can be made in civil proceedings or where the law obligates the court to take measures to reconcile the parties, or where this can facilitate and ensure more thorough preparations for a case hearing, the oral preparatory form has to be chosen – a preparatory hearing should be ordered. The importance of reconciliation of litigants in civil proceedings implies that, irrespective of the fact that both parties are represented by lawyers, if the court believes that a peaceful settlement is possible in the case, it may order a preparatory hearing in accordance with Article 228(1) of the CCP. It is understandable that it can be difficult for the court to foresee if peaceful settlement may be achieved in the proceedings. Consideration should be given to the nature of the case and the interests of the parties or even other potential mutual legal relations of the parties outside the court, as well as to the complexity of the standard of proof, potential attitude of the parties to the conflict and to other relevant circumstances[84]. It should be noted that in the meantime both the claimant and the respondent should, if desirable, state in the statement of claim or in the response their opinion regarding the possibilities of peaceful settlement. Moreover, considering the importance of conciliation and the necessity for the court to be active, a preparatory hearing must be ordered in family matters heard under the contested procedure and in labour matters.

It is important to note that Article 229 of the Code of Civil Procedure states that one preparatory hearing may be arranged and only in exceptional cases or when

[84] P. Collin, "Judging and Conciliation – Differentiations and Complementarities". (2013), *Max Planck Institute for European Legal History Research paper series*, t. 4, p. 11.

the possibility of peaceful settlement can be expected, the court may order the second preparatory hearing, which has to take place not later than within thirty days. There cannot be more than two preparatory hearings. One of the major issues in the preparatory stage is that, unfortunately, a preparatory hearing is simply postponed because none of the litigants can appear to the hearing or they submit new evidence or requests and both the court and other parties involved in the proceedings need time to get familiar with new aspects of the civil case. It means that in reality not two but considerably more preparatory hearings take place.

The survey of judges shows that judges are still not fully convinced that the preparatory stage contributes effectively to ensuring civil case hearings within a reasonable time. Only around 27 per cent of the judges surveyed are fully certain of that. The same percentage of judges has a completely opposite position and think that the preparatory stage does not contribute at all to prompt disposition of cases. It is interesting to note that the responses give the impression that judges do not see any advantages inherent in the form of preparatory documents and believe that the hearing that follows preparatory documents becomes somewhat of a 'quasi-preparatory' hearing where parties have an array of requests. Furthermore, it has been emphasised in additional responses that the preparatory stage is effective only in case of qualified representation.

We believe that it may be held that rather stringent rules are at least formally set out in the law in Lithuania for the preparatory stage and the court does not enjoy full discretion to decide in this stage how preparation for a case hearing at court will take place, how many preparatory hearings there will be, and there is no possibility of combining both preparatory forms. Moreover, litigants themselves are almost unable to influence the method of preparation for the case hearing. Most likely such rules have been laid down taking into account the level of legal culture in the society and the intention that the preparatory stage in civil proceedings should take a reasonable time and exclude preconditions for protracting case hearings. It is time to consider, however, whether it would not be possible to allow the court to decide on its own whether it would be better to use only the written form or combine both forms and thereby prepare for a case hearing better. This would, probably, make it possible to prevent potential delays in the proceedings during the hearing. Such examples are available in other countries, for example, Germany or Sweden, where the court is usually rather free to decide the manner of preparations for case hearings and combine the written and oral preparatory forms when necessary.[85] Moreover,

[85] Zivilprozessordung der Bundesrepublik Deutschland. On-line access: <http://www.gesetze-im-internet.de/zpo/BJNR005330950.html>; The Swedish Code of Judicial Procedure. On-line access: <http://www.government.se/contentassets/the-swedish-code-of-judicial-procedure-ds-1998_65.pdf>.

more flexible intermediate time limits during the preparatory stage could also be considered. For example, Article 227(2) of the CCP states that the time limits of maximum fourteen days from the day of service of a court's notice may be set for the submission of preparatory documents. It would be possible to take a more flexible approach that the court, considering the substance and complexity of the case, determines the time limit to submit preparatory documents, which may not exceed, for example, thirty days as of the day of service of the court's notice. More flexible application of intermediate time limits should not mean that only the overall maximum time limit of the preparatory stage should be set in law and that courts would be free to arrange preparations for case hearing at their own discretion.

As far as the preparatory stage in Lithuania is concerned, it is important to note that from 1 October 2011 an amendment to Article 225 of the CCP came into force in Lithuania, providing that the court, believing that additional actions to prepare for a case hearing are unnecessary, may immediately after the receipt of responses render a ruling to refer the case for hearing. Such legislative amendment has been viewed rather negatively at least in the doctrine of law right after its coming into force. It is contended that, in the absence of any objective criteria as to when the court may exercise this right, it can lead to skipping preparatory arrangements in inappropriate manner and to cause hearing delays[86]. We believe that in such cases it is considerably more effective to simply apply the oral form of preparations for judicial hearing and, if no additional preparatory actions are necessary, move straight to an oral hearing or, if a dispute is up to EUR 1 500 in value, simply apply the specifics of small claims proceedings as set out in Article 441 of the CCP. It should be noted, however, that it was very unexpected during the survey of judges undertaken during the research that only 25 per cent of the respondent judges replied that they avail themselves of this option very rarely. Even 26 per cent of the judges replied that they avail themselves of this option in more than 50 per cent of the cases heard. It is likely that such responses were influenced by the fact that the judges also implied in their responses non-contentious proceedings that take place under the written procedure.

A more positive amendment to the CCP of 2011 is established in Article 231(5) pursuant to which, in the cases when it turns out during a preparatory hearing that additional actions to prepare for the case hearing at court are unnecessary, the court has the right to commence an oral hearing and hear the case on the merits rights after the preparatory hearing. Earlier, case hearing on the merits after the preparatory hearing was possible only with consent of the parties. This means that there

[86] Nekrošius, V., Vėbraitė, V. "Reform of Lithuanian Civil Justice in 2011". (2011), *Zeitschrift für Zivilprozess International*, vol. 16, p. 181.

are fewer opportunities at present to try to delay a case hearing without legitimate reasons – prior to the amendment of the law, the parties could simply disagree to start an oral hearing irrespective of readiness for the case. Moreover, the Supreme Court of Lithuania has rightly pointed to the fact that, in case a party fails to appear at the preparatory hearing on the day scheduled due to the reasons, which are not held as important by the court, the party assumes the risk that the court may hear the case on the merits in its absence[87]. The survey of judges mentioned on a number of time already show that judges try to make use of this right and 36 per cent of the respondents noted that in more than 50 per cent of civil cases they avail themselves of the right to move straight to a case hearing. They noted, however, that the main reason why they cannot resort to this option is the workload of judges and other court hearings long ago pre-scheduled for that day. It may be agreed that, indeed, judges in Lithuania tend to schedule a large number of hearings for one and the same day, making it impossible to apply some of the provisions of civil procedure to their full extent. On the other hand, judges are not prohibited from planning their time differently and, for example, allocate the whole day or several days only for one civil case. If such form of working arrangements were applied in courts, representatives of the parties would not be planning multiple court hearings on the same dates, believing that a preparatory court hearing would be brief or that it would not be moved to a case hearing.

As has already been mentioned, the conciliation of the parties is also one of the primary goals of the preparatory stage. Unfortunately, the number of peaceful settlement agreements is still really low. According to statistics, 2.4 per cent of civil cases in first instance courts ended in peaceful settlement agreements in 2015; the situation was also similar in, for example, 2013 when peaceful settlement was achieved in 2.6 per cent of civil cases[88]. Thus, although the provisions of CPP appear to establish clearly that the court must be active in the process of conciliation and take measures to reconcile the litigants, our view is that the situation is not so good in reality. This is not facilitated by a progressive legislative norm that, in case of a peaceful settlement agreement, the litigants get 75 per cent of the stamp duty reimbursed. We believe that this situation can be explained by the fact that judges are not active in the conciliation process and, unfortunately, only a brief part of the preparatory hearing means an attempt to reconcile the parties and at the same time the litigants and their representatives are often not the proponents of conciliation

[87] Panel of Judges of the Civil Cases Division of the Supreme Court of Lithuania. Ruling of 10 June 2015 in civil case *V. M. v. G. J, UAB „Profitas“*, No. 3K-3-364-916/2015.

[88] Statistics on the Performance of Courts. On-line access: http://www.teismai.lt/lt/visuomenei-ir-ziniasklaidai/statistika/106

and the mentality of litigation gets more and more settled in Lithuania. A conciliation procedure should certainly be construed not only as a question about the possibilities of amicable settlement and leaving the litigants and their representatives to negotiate on their own or, simply, as the adjournment of a court hearing. Judges in Lithuania, following the provisions of the CCP, have all the powers to be active in conciliation, use different methods to promote amicable settlement in civil proceedings. It should be acknowledged that conciliation at court shows the extent to which judges and other lawyers can think creatively, take a flexible approach to formalised judicial procedures[89].

The judicial survey results show that at least judges themselves think that the actions they take to reconcile the parties are sufficiently good. For example, 45 per cent of the respondent judges noted that they seek to reconcile the parties as actively as possible by stating the relevant reasons why it is useful to enter into a peaceful settlement agreement; 32 per cent contended that the measures depended on the specific situation to a large extent; quite a large proportion, 23 per cent, of the respondents stated that they offer potential terms and conditions of peaceful settlement, when appropriate. The attention was drawn to the fact that conciliation was highly dependent on lawyers; it was noted that 'for those with a reasoned approach, even a specific version of a peaceful settlement agreement can be offered and a likely preliminary judgment may be prompted in the context of the existing situation – this considerably helps restore legal peace'.

Judicial mediation has been trying to make its way into judicial proceedings and help litigants to reconcile in Lithuania since 2005. The results, unfortunately, are not yet very successful and there are still few efforts to apply judicial mediation, although at the same time even a slight grow in numbers is gratifying. In 2013, for example, there were only 37 judicial mediations proceedings, while in 2015 this figure reached 123[90]. We believe that judicial mediation cases will increase in number in future because the number of mediators has been growing – the impression is that both the Ministry of Justice and the Judicial Council make more active efforts to promote mediations processes, trainings of judges and other lawyers on the issues of mediation have been on the increase. Furthermore, the new Draft Law on Mediation[91] under discussion should also contribute to this procedure and, probably, to the advancement of conciliation

[89] Schramm, L. *Richterliche Pflichten und Haftung beim Prozessvergleich der ZPO*. Berlin, Duncker & Humbolt, 2015, p. 84.

[90] More statistics on judicial mediation is available here: http://www.teismai.lt/lt/visuomenei-ir-ziniasklaidai/teismine-mediacija/teismines-mediacijos-taikymo-apibendrinimai/1679

[91] More information about the Draft Law is available here: http://www.teismai.lt/lt/visuomenei-ir-ziniasklaidai/teismine-mediacija/teismines-mediacijos-taikymo-apibendrinimai/1679 <https://www.e-tar.lt/portal/lt/legalAct/de40368099c711e58fd1fc0b9bba68a7>.

in Lithuania in general. It has been acknowledged that different forms of mediation help reduce the workload of courts and at the same time case hearing time, increase the efficiency of courts, demonstrate the flexibility of courts[92].

To sum up the insights on the impact of the preparatory stage on a civil case hearing within a reasonable time, it could be stated that a proper preparatory stage is most of all hindered by improper understanding of the substance of this stage by the court and persons involved in the proceedings rather than by legal regulation. It has not been perceived completely that it is most important for the preparatory stage to formulate the claimant's claims in a statement of claim and the respondent's objections, to submit evidence for the parties or to collect the evidence necessary for the court, and make an effort to reconcile the parties. In this way, the whole case hearing at the first instance will be smooth and most likely rather quite fast. It follows that the training of judges, advocates and other lawyers on the concept and goals of the preparatory stage, including the possibilities of conciliation and mediation in civil proceedings, is still relevant.

It would, probably, be difficult to argue that the most important is the third stage of civil proceedings where the majority of principles of civil procedure come into play and the dispute of the parties is solved on the merits. This stage is designated for examining all the evidence collected in the case, hearing the closing arguments of the persons involved in the proceedings where they assess the interrelation, admissibility and adequacy of the evidence for ascertaining specific circumstances of the case, express their opinion to the court regarding justification of claims in the statement of claim and objections to the statement of claim, offer their version of resolving the case to the court, and the court assesses the evidence in the deliberation room, states what circumstances with relevance to the case have been verified and which have not been ascertained, which law should be applied and renders a decision regarding the validity of the statement of claim or a ruling to close the case without a decision of the court[93]. It is not possible to discuss in this study all aspects of the judicial case hearing stage, thus, it will be limited only to the most problematic aspects of this study in Lithuania, for example, refusal to accept the evidence that has been filed late, rendering a judgment by default, adjournment of court hearings, i.e. the aspects that would facilitate civil case hearings within a reasonable time.

Our view is that general legal regulation of the case hearing stage facilitates adjudication of civil cases within a reasonable time, in particular when the court

[92] Esplugues, C. "Civil and Commercial mediation in the EU after the transposition of Directive 2008/52/EC". (2014), *Civil and Commercial Mediation in Europe: Cross-Border Mediation*, vol. II., p. 489.

[93] Driukas, A., Valančius, V. 'Civilinis procesas: teorija ir praktika' [Civil Procedure: Theory and Practice]. Vol. III. Vilnius: Teisinės informacijos centras, 2007, p. 252.

properly exercises the rights conferred and litigants submit matters to court in time, does not attempt to abuse their rights. The legal regulation in place is, mostly, in line with the most recent trends in the European Union as, for example, recommended in the Principles of Civil Procedure launched by the European Law Institute where it is stated that the court should have powers to play an active role in managing the procedure and ensuring the cooperation between litigants, their representatives and the court[94]. It is understandable that it would be idealistic to expect that the principle of cooperation will work and that conditions will be ensured for proper and prompt hearings in all civil proceedings; nevertheless, efforts should be made that there should be more of such cases and that courts should not forget certain provisions of the CCP.

One of rather rarely applied CCP provisions, which should provide good conditions for avoiding delays in hearing civil cases in practice, is Article 181(2) of the CCP, where it is stated that the court shall have the right to refuse to accept evidence, if it was possible to submit such evidence earlier and if their later submission will protract the case hearing. Moreover, a similar situation also applies to Article 245(2) establishing that, in case it was possible to submit applications of the persons involved in the proceedings to the court earlier, the court may dismiss them where granting such applications would delay a decision in the case. It is still relatively easy to submit evidence during a court hearing expecting that they would be held admissible by the court. This normally leads to adjournment of the court hearing and the whole proceedings are protracted. Rarely courts take a principled stand and, considering the purposes and principles of civil procedure as well as provisions of the CCP, refuse to accept belated evidence. For example, Panevėžys Regional Court has recently held in a civil matter that in case a party fails to comply, or improperly complies with, the burden of proof thereby infringing its obligation to bring matters to court in good time, the court has the right to take certain procedural measures – to refuse to accept belated evidence. As can be seen from the case-file, the preparation for the proceedings was finished on 5 March 2014 and the case hearing on the merits commenced. However, the claimants subsequently revised the claims in the statement of claim twice, filed a request regarding the collection of evidence under the Hague Convention, produced new items of evidence eleven times, thought it had been possible to do that during the preparatory stage[95] . This

[94] Kramer, X. "The Structure of Civil Proceedings and Why It Matters: Exploratory Observations on Future. ELI-UNIDROIT European Rules of Civil Procedure". (2014), *Uniform Law Review*, vol. 19, p. 228.

[95] Civil Cases Division of Panevėžys Regional Court. Ruling of 23 October 2015 in civil case *IĮ V. S. v. V. M., AB „Lietuvos draudimas"*, No. e2A-807-425/2015.

example is not the best to consider, as the party manifestly and in a biased manner kept submitting evidence and applications over a long period of time. Delayed submission of several new items of evidence to the court is certainly much easier.

Even 42 per cent of the respondent judges of first instance courts noted in the survey, as many times mentioned above, that the right to refuse to accept delayed evidence and submissions is not an effective instrument against the protraction of proceedings, while 42 per cent replied that this measure works effectively against delaying proceedings; however, it has not been used or is difficult to resort to. A number of judges also added their own comments to their replies to this question. They noted that, in most cases, the refusal to accept belated evidence constitutes a basis for an appeal; then the court of appeal instance revokes the decision of the first instance court on the grounds of failure to disclose the merits of the case and accepts such evidence as admissible. The responses of the judges from the first instance courts create the impression that refusal to accept belated evidence would seem reasonable to them, however, fearing a potential quashing of the court's decision they rather accept such evidence and somewhat delay the proceedings. It may indeed be admitted that the courts of appeal or cassation instances are often rather flexible in allowing belated evidence; at the same time, it should be noted that this approach is undergoing changes and the number of cases when higher instance courts refuse to accept belated evidence has been increasing[96]. Hence, it may be expected that the dismissal of belated evidence will be resorted to more extensively as a very important instrument to deal with civil matters within a reasonable time. This is supported by the above-referred recommendations on the Principles of Civil Procedure being drafted by the European Law Institute, where, after the first round of discussion, it is established that courts should have discretion to refuse late presentation of evidence, if the party has had the opportunity to submit it earlier and has been duly notified to this effect. At the same time, efforts are made to legitimise the provision that advocates, as representatives of the parties, have a professional obligation to ensure proper collection and presentation of evidence in civil proceedings[97].

A similar problematic situation exists in terms of the opportunity to vary the basis or subject-matter of a statement of claim and thereby protract proceedings. Although it can be clearly understood from Article 141(1) of the CCP that

[96] E.g., Civil Cases Division of the Supreme Court of Lithuania. Ruling of 9 January 2015 in civil case *"Plass Investments Limited" v. group of companies „Alita", AB, FR & R Invest, IGA S. A., V. J*, No. 3k-3-66/2015; Division of Civil Cases of the Court of Appeal of Lithuania. Ruling of 5 May 2016 in civil case *UAB MK „Laivyba" v. P. K*, No. 2A-606-407/2016.

[97] On-line access: http://www.europeanlawinstitute.eu/projects/current-projects-contd.

the subject-matter or the basis of a statement of claim may be changed during the preparatory stage in particular, and any later changes are possible only in case the necessity for such a change comes to light later, or in case the consent of the opposing party has been received, or in case the court holds that it will not protract the case hearing. In addition, paragraph 3 of that same Article emphasises that the court may refuse to satisfy an application regarding a change in the subject-matter or basis of a statement of claim where this would protract the proceedings and if the claimant has been given the time limit to formulate the subject-matter and basis of the statement of claim and was in the position to invoke the circumstances stated in the statement. Claimants, however, still attempt changing the subject-matter or basis of their statements of claim and submit so-called revised statements of claim during the judicial case hearing, and the courts often allow this thereby also permitting dilatory conduct[98]. In our view, the law should introduce more restricting rules regarding changing of the subject-matter or basis of a statement of claim allowing the claimant to resort to this right only in exceptional cases after the preparatory stage.

Adjournment of a case hearing, in general, is a highly important factor, which predetermines proper time limits of civil proceedings. Rather strict rules exist on the legislative level in Lithuania when a case hearing may be adjourned and it is also clearly defined what is excluded from valid reasons justifying non-appearance. Article 246 of the CCP clearly states that holidays, business trips, any other engagements and similar cases are not considered as a valid excuse; likewise, failure to appear due to illness and the representative's business in other proceedings are also excluded from reasons justifying non-appearance. It means that the parties must bring matters to court in good time and inform the court properly and timely when hearings should not be scheduled. In the opposite case, this can lead to a decision by default, leaving of the statement of claim unconsidered or to a case hearing under the general rules of contentious procedure.

It certainly happens in practice that courts quite easily adjourn hearings or appeal courts quash the rulings where first instance courts resort to Article 246 of the CCP and disagree to adjourn a hearing, but shelve the statement of claim or render a decision by default, if the party fails to appear at the hearing after being duly notified of the court hearing. For example, Vilnius Regional Court has held in one of the cases that 'failure by the claimant's representative to appear in one case hearing does not form a basis to presume that the claimant is not interested in the case, protracts the proceedings and acts against prompt disposition of the case.

[98] E.g., Civil Cases Division of Vilnius Regional Court. Ruling of 12 March 2015 in civil case *J. S., G. S. v. R. R., A. R.*, No. 2A-1335-585/2015; Civil Cases Division of Kaunas Regional Court. Ruling of 21 September 2016 in civil case *A. A. S. "Gjensidige Baltic" v. E. L., S. S.*, No. e2A-2027-658/2015.

Moreover, it should be agreed with the arguments stated in the separate appeal that leaving the statement of claim unconsidered does not prevent the claimant from re-applying to the court – this would further protract the dispute hearing, increase the costs of litigants and the court, breach the principles of cost-effectiveness and concentration of proceedings'.[99] The survey of judges reveals that judges apply the institute of adjournment of a hearing quite diversely. 26 per cent of the respondent judges noted that they adjourn hearings in more than 50 per cent of the cases. 31 per cent replied that they defer court hearings very rarely. Unfortunately, the survey does not show the specific first instance courts where the respondent judges worked. Hence, it may not be concluded whether judges from larger courts tend to adjourn court hearings more or less.

One of the likely reasons behind more frequent deferrals of court hearings is, probably, the institute of judgment by default, which is somewhat questionable and problematic in Lithuania in the meantime. Judgement by default was established in Lithuania with the entry into force of the new CCP in 2003 and, as in many other states, became one of the key instruments to fight against abuse of process and the protraction of proceedings. The Constitutional Court has also held that no prohibition arises from the Constitution to establish the legal regulation of civil procedure whereby in cases when a party to the proceedings withdraws from the participation in the civil case hearing of its own will and refuses to cooperate in the proceedings, the court would enjoy the powers to consider the civil case and adopt a decision also in the absence of the party, which has withdrawn of its own will and does not cooperate with the court. Decision by default seeks constitutionally justified objectives – to prevent the protraction of proceedings and abuse of procedural rights by the parties[100]. At the same time, it has recognised that the provisions of the CCP, which do not allow the court to review the decisions rendered by default in the cases when it gets evidence proving that the decision has been manifestly unlawful, that it has obviously violated the rights of an individual, when the court is provided with evidence that the court has clearly erred in its decision by default or that the decision had been manifestly wrong, conflict with the Constitution. As a result, it was necessary to change the provisions of the CCP regarding decisions by default to some extent, unfortunately, after the amendments of the CCP in 2011, the application of the institute of the decision by default has become considerably complicated.

Unexpectedly, it was laid down in Article 285(2) of the CCP that a decision by default should be rendered only where there is evidence in the case provided only

[99] Civil Cases Division of Vilnius Regional Court. Ruling of 29 April 2016 in civil case *UAB „Singlis" v. UAB „DPD Lietuva"*, No. e2S-1186-577/2016.

[100] Constitutional Court of the Republic of Lithuania. Ruling of 21 September 2006, No. 5/03-11/06.

by one party. When there is evidence provided by both parties, the court hears the case under general rules of contentious proceedings. It means that the law allows a decision by default only if there is no response to the statement of claim submitted by the respondent. In all other cases, there will be at least some evidence presented by the respondent in civil proceedings. The situation is practice is that some judges are apprehensive of rendering decisions by default if there is evidence submitted by both parties, yet some others render decisions by default regardless of this legislative provision. The survey of judges also shows that judges are somewhat cautious, follow the rules of law – only 43 per cent of the respondents stated that they do not opt for decisions by default when there are procedural documents submitted by both parties and only 11 per cent replied that they would render a decision by default in such cases, with 34 per cent of the respondents noting that their decision depends on the situation. In addition, one judge added a note that 'this norm is almost defunct after the amendments to the procedural laws, however, I try using it at times'.

It is acknowledged in many states that judgment by default is an effective measure encouraging the parties to bring matters to court in good and ensuring a smooth course of the proceedings, provided that the parties have been duly notified of the case hearing[101]. For these reasons, it is necessary to amend the regulation of the institute of judgment by default in Lithuania so that judgment by default could again become an effective instrument promoting the hearing of cases within a reasonable time.

Thus, it is commendable that a draft law on the amendment and supplement of the CCP[102] has been submitted to the Seimas of the Republic of Lithuania and, *inter alia*, aims at amending the regulation of judgment by default and make it effective again. It is aimed to ensure that a decision by default may be rendered in case of failure by one of the parties to appear at the preparatory hearing or a hearing, if it has been duly notified of the time and place of the hearing, has not submitted a request to hear the case in its absence and the party present requests to pass a decision by default, also if the party fails to submit a response to the statement of claim or a preparatory document within the time limit specified and the other party requests a decision by default in its response to the statement of claim or preparatory document. Instead of a decision by default, the active party may request the court to hear the case on the merits based on the material on the case-file. The request is not granted by the court, if it holds that the essential circumstances of the case have

[101] Gottwald, P., Schwab, H. K., *Zivilprozessrecht.* Auflage. 16. München, C.H. Beck Verlag, 2004, p. 705.

[102] Draft Law on the Amendment and Supplement of the Code of Civil Procedure of the Republic of Lithuania. *TAR*, identification No. 15-4735.

not been ascertained. Moreover, efforts are made to regulate that, when rendering a decision by default, the court shall carry out a formal assessment of the evidence submitted and adduced by the party, which is present (or has submitted a procedural document), i.e. make sure that there would be a basis to render such decision, if the content of these items of evidence is confirmed. The court shall refuse to hold that the circumstances stated by the active party have taken place, if the evidence it has submitted and invoked poses reasonable doubts to the court.

It follows that it is sought to legitimise in Lithuania the well-known in the theory of procedural law genuine (when the evidence provided only by the present party is assessed formally) and non-genuine (all the evidence submitted is assessed, however, the absent party simply loses the opportunity to supplement the material of the case) decision by default. It is difficult to assess so far whether such model would be viable in Lithuania, but it is obvious that the regulation of judgement by default must be changed as soon as possible.

Effective implementation of the right to a case hearing within a reasonable time in the 21st century is no longer conceivable without modern information and communication technologies (hereinafter – ICT) to accelerate judicial proceedings. The penetration of ICT into judicial proceedings and a resultant change in judicial proceedings and procedures is witnessed all over Europe, as in many other countries of the world. Some initiatives appear to be very successful when modern technologies are smoothly integrated into the daily activities of courts and help save time and funds, activate judicial processes and move them to a new quality level. Unfortunately, exposure to failures is not excluded when the penetration of modern technologies and the tapping of their potential gets impeded, the modern tools developed do not filter through into practice or are not properly used. We would think that Lithuanian is indeed quite a good example where ICT are rather effectively used in many areas of civil procedure.

ICT technologies can be used at three levels: (i) personal (judges, their assistants, court clerks, administrative staff, etc.), (ii) institutional (individual courts and the whole system of courts) and (iii) inter-institutional (relations of courts with other participants in proceedings, state registers and information systems).[103] For the highest effect, ICT development on all these levels must be strategically planned and balanced, adequate computerisation of courts, efficiency and interoperability of information systems of courts, compatibility with the systems of external users, attractive and user-friendly interfaces are necessary. The development of the

[103] Velicogna, M. *Use of information and communication technologies (ICT) in European judicial systems*. European Commission for the efficiency of justice (CEPEJ), 2007 Strasbourg, On-line access: <http://www.coe.int/t/dghl/cooperation/cepej/ser.ies/Etudes7TIC_en.pdf>, p. 21-30.

technologies of all three types, as distinguished by Marco Velicogna, would yield the best result if that would not compromise the reliability and fairness court processes and procedures, if external users know how to use electronic services, develop their usage skills, get encouragement and ongoing training on their use, if these technologies of courts are handy and interoperable with the technologies held by external individual and group users.

The use of ICT technologies in the activities of courts in Lithuania began at the beginning of the last decade of the last century. First of all, the objective was to equip courts with computer equipment with standard application packages and access to the internet. For this reason, basic technologies were installed. This process was highly centralised; only between 1994 and 1996, continuing the computerisation of courts a full-time position of a consultant for IT found its way in courts and one computer for each of the courts was purchased from centralised budget funds. A certain level of progress in computerisation was followed by more advanced technologies for the administration, organisation and support for courts. A special application 'BYLOS' (PROCEEDINGS) was developed and launched to automate the work of court registries, register incoming correspondence, partly automate and calculate statistics by different cross-sections and generate hearing schedules.

Along with the computerisation of courts and development of special applications, the development of electronic data bases of legal acts with electronic search tools began. Over several years, they rapidly evolved, were filled with the relevant information from the previous periods, received prompt updates with the most recent legal information and became accessible online. Moreover, separate institutional information systems, more or less related to the activities of courts, were developed and launched. In 2002, the Register of Property Seizure Acts with the supporting information system became operational[104]. In 2002–2003, when moving from public bailiffs to the model of private bailiffs, the information system of bailiffs was developed and launched[105]. Likewise, the development and improvement of other e-government tools started[106].

A quality leap in the development of ICT in Lithuanian courts took place between 2004 and 2005 when the unified information system of Lithuanian courts, LITEKO was launched. The development of the unified judicial information system in Lithuania received the financial basis in the form of EU financing through the

[104] Website of the Central Mortgage Office, on-line access: < https://www.hipotekosistaiga.lt/index.php>.

[105] Website of the information system of bailiffs, on-line access: <http://www.antstoliai.lt>.

[106] E-government means the set of information and electronic communications technologies (ICT) implemented in public administration activities, organisational changes and new skills in these activities in order to improve public and administrative services, democratic processes and public policy.

PHARE Twinning Project 'Strengthening the Capacities of Lithuanian Courts'[107]. In 2004, as a result of implementation of this project, local computer networks were implemented in all Lithuanian courts. After each court was equipped with local servers and routers and the central server was set up in the central node of the system, these networks were connected into a closed institutional network of courts. In this way, the infrastructure of the unified judicial network has been developed. Along with the development of the network infrastructure, the development of applications for the registration of cases and information related to the proceedings as well as for the automation of court work was undertaken. These applications were based on the application 'BYLOS' (PROCEEDINGS), which had been previously used in courts.

The initial development stage of LITEKO yielded only six modules programmed and implemented out of the thirteen planned at that time due to the lack of financial resources and time as well as various organisational problems[108]:

- Registration and accounting of cases;
- Exchange of case-related information among courts;
- Search of similar cases and information in the data bases of LITEKO;
- Templates of court documents;
- Generation of statistical reports;
- Publishing of procedural decisions of courts online.

Subsequent development stages of LITEKO planned deploying the following remaining application modules:

- Automated generation of court hearing schedules;
- Tracking of procedural time limits;
- Automatic distribution of cases to judges;
- Automatic calculation of caseload for judges;
- Drawing up and registration of incoming-outgoing documents (electronic management system of court documents)
- Monitoring and control of unavailability of the parties to proceedings;
- Information search engines in external registers and data bases[109].

The second group modules were expected to guarantee a higher level of automation of the workload of judges and their assistants, start developing the

[107] National Courts Administration. Judicial information system LITEKO, on-line access: <http://www.teismai.lt/lt/LITEKO>.

[108] Ibid.

[109] Regulations of the Information System of Lithuanian Courts as approved by Resolution No. 13 P–435 of 11 February 2006 of the Judicial Council, online access: <http://www.teismai.lt/dokumentai/tarybos_nutarimai/20060211-435.doc>.

technologies of electronic support for judges. Failure to develop them during the first stage brought further development of the LITEKO software framework to a standstill. Moreover, issues surfaced out regarding the failure by LITEKO to come up to user expectations as they expected a more intensive development of help tools during this stage.

The implementation of LITEKO and the deployment of the above-referred six initial modules in Lithuanian courts revealed a number of deficiencies in the applications. Apart from purely technical faults and imperfections, it was found out that the expectations of final users were not satisfied as expected. The first version of the LITEKO application, as its predecessor application 'BYLOS' (PROCEEDINGS) was mostly tailored for automating the work in court registries, some processes in the registries and for automated generation of statistics. The applications also lacked accuracy and ergonomics. For this reason, during the system testing and over the first years of its use, little praise was received even from the registries of courts; there was much more criticism that, in order to ensure proper functioning of LITEKO, multiple input of the same data was required in several places, that 'manual' and computerised registration of cases was necessary and there were instances of programming errors, etc. Much criticism was addressed by the new system users – judges and their assistants. They had to tackle with new functions: registering and uploading the procedural decisions issued by them to the system, classifying them and checking whether the classification of cases by court clerks was correct, giving instructions regarding the main procedural events. For this reason, the benefit of LITEKO for the functions of judges and assistant judges at that time seemed limited to them. There was a clear lack of adequate training of court staff.

In order to increase the usefulness of and user satisfaction about the system LITEKO, the module of automated schedule generation was promptly developed and implemented in 2005. The modules for the automated workload estimation and case distribution for courts and judges also underwent active development. They were finally completed and actually installed only after the Seimas of the Republic of Lithuania demonstrated political will and stipulated in the amendment to Article 36 of the Law on Courts,[110] which was adopted on 3 July 2008, that starting with 1 September 2008, cases should be distributed and panels of judges should be formed in courts by means of the computerised application. In 2008–2009,

[110] The Law Amending and Supplementing Articles 33, 34, 36, 38, 39, 42, 43, 47, 51, 55-1, 57, 61, 63, 64, 69-1, 81, the title of Chapter IX, Articles 83, 84, 85, 86, 90, 98, 101, 103, the title of Section Two of Chapter XII, Articles 106, 107, 108, 119, 120, 122, 124, 127, 128, 129 of the Law on Courts, Invalidating Articles 89, 109, 110, 111, 112, 125 and Supplementing the Law with Articles 53-1, 53 and Section Three of Chapter IX. *Official Gazette*, 2008, No. 81-3186.

the refinement of the case distribution system was completed, actually integrated into the information system and put into practical application. This highly sophisticated model undergoes further improvements with updated versions deployed.

Between 2005 and 2006, the implementation of LITEKO and corrections of the errors identified was followed by a more thorough analysis whether the remaining modules that were planned to be developed were the only possible means of automation for courts activities at that time. Both positive and negative experience with the development and implementation of LITEKO also made question whether the functionality and ergonomics of the intended remaining LITEKO modules would be adequate and acceptable to users. Review of the international practice showed that the functionality of the software part of LITEKO planned was inadequate; moreover, priorities were set incorrectly. As each module of LITEKO was being planned and developed quite autonomously, a decision was made to propose corrections to the LITEKO development plans, expanding the functionality of the modules planned to be developed, changing priorities, envisaging new modules and information system functions.

On 10 May 2006, the Judicial Council approved the LITEKO Development Plan by its Ruling No. 13P-462[111] envisaging the development of six additional software modules:

- Automation of the issuance of court orders and other summary proceedings;
- Electronic exchange of procedural documents and information between courts and other participants to proceedings;
- Secure electronic communication between courts;
- Electronic accounting of the stamp duty;
- Unified case numbering;
- Electronic workbenches for judges and court staff.

Moreover, the Development Plan of LITEKO envisaged the use of this system for audio recordings of court hearings, processing and storing of digital records, video-conferencing related to judicial proceedings (questioning of witnesses and other persons, etc.).

An effective and prompt implementation of these plans, however, was hindered again by the lack of financing and political will. As the maintenance of the information system implies quite significant costs and compute equipment gets outdated fast, the majority of the funds allocated for LITEKO was spent for upgrading

[111] Resolution No. 13P-462 of 10 May 2006 of the Judicial Council "On the Development Plan of the Information System of Lithuanian Courts (LITEKO)", online access: <http://www.teismai.lt/dokumentai/tarybos_nutarimai/20060510-462.doc>.

the information system hardware and for the maintenance of the system itself – as a result, the deployment of new functions by means of internal financing sources of the courts was slow. Quite a long time after the development of LITEKO and its integration into new modules, with an increase in the volume of data and in the number of users and operations, the problems of limited efficiency and slow operation of this information system surfaced out quite sharply.

Out of the second group modules, the modules for automated generation of hearing schedules, automated case distribution for judges and automated forming of panels of judges, estimation of the workload of judges, monitoring and control of unavailability of the parties to proceedings have been programmed and actually set up to date. The module for tracking procedural time limits was competed and its implementation began in 2013. The operation of this model, however, had to be slowed down due to the limited efficiency of the LITEKO system.

As far as the third group modules are concerned, the fastest was the development and deployment of the module of unified case numbering. Its development and implementation necessitated numerous internal rearrangements of the information system, the development and approval of the procedure for unified numbering of judicial cases, changes to the document management rules in courts[112]. A prototype of the module for automating the issuance of court orders was competed and underwent tests in 2009. It was actually implemented and entered into application in 2011[113].

One of the major shifts towards increasing the efficiency of ICT use and accelerating the development of available ICT technologies took place when the Seimas demonstrated political will and adopted a package of amendments to the Law on Courts and the CCP on 21 June 2011.[114] The package contained an ambitious undertaking to start moving to the information infrastructure of judicial proceedings from 1 January 2013 (subsequently this time limit was extended to 1 July 2013).

Namely, it was laid down in Article 37[1] of the Law on Courts that the electronic data related to judicial and enforcement proceedings shall be managed, registered and stored using information and communication technologies. It legitimised the

[112] Resolution of 9 June 2006 of the Judicial Council 'On the Approval of the Rules for Allocating Numbers to Judicial Proceedings in Courts of the Republic of Lithuania, the List of Codes of Courts and on the Amendment of Resolution No. 280 of 8 October 2004 of the Judicial Council 'On the Approval of the Rules for Document Management in Courts of the Republic of Lithuania (except the Supreme Court of Lithuania)', on-line access: <http://www.teismai.lt/savivalda/nutarimai/20060609-475.doc>.

[113] Electronic ordering system of court orders TĮEUS, on-line access: <http://liteko.teismai.lt/tieus>.

[114] Law Amending and Supplementing the Code of Civil Procedure of the Republic of Lithuania. *Official Gazette*, 2011, No. 85-4126; Law Amending Articles 36, 37, 93, 94, 120 of the Law on Courts of the Republic of Lithuania and Supplementing the Law with Article 37[1]. *Official Gazette*, 2011, No. 85-4128.

digitalisation of 'paper' files and procedural documents. It provided for the opportunity to avoid the duplicating of the paper-based and electronic management of case-files and move to only to electronic management of case-files in judicial proceedings. The right of the parties to proceedings to get remote access to electronic case-files and the right to submit procedural documents to courts electronically by remote communication means was introduced and the use of electronic procedural documents and electronic signatures in the procedural activities of courts were legitimised. Whereas electronic signatures were not widespread, in order to facilitate remote access to electronic case-files and submission of electronic procedural documents for litigants, the possibility was ensured for external users to get authentication in the LITEKO system by different methods, not only by means of electronic signatures when submitting electronic procedural documents to courts. With a view to promoting the presentation of documents in the electronic form to courts and, at the same time, a faster shift to electronic case-files, Article 80(7) of the CCP provided for a stamp duty reduction of 25 per cent applicable in the cases when an electronic procedural document is submitted.

In order to move to the information infrastructure faster, Article $175^1(9)$ of the CCP stipulated that advocates, assistant advocates, bailiffs, assistant bailiffs, notaries, state and municipal enterprises, institutions and organisations as well as insurance undertakings had to ensure the submission of procedural documents by electronic means as of 1 July 2013. Following Article 175^1 of the CCP, where a procedural document is served by the court by means of electronic communications, the day of service to the person involved in the proceedings is the next working day after the day the procedural document has been sent. It means that, in case of sickness, business trips, holidays or any other absence at work or in the place of professional practice of specific addressees, correspondence must be, nevertheless, accepted and analysed. This must be ensured by technical and organisational measures of external users. Although at the initial stage this caused dissatisfaction of external users, they eventually adapted quite promptly and implemented their technical and organisational changes necessary.

While implementing the package of amendments to the Law on Courts and the CCP, the data bases of LITEKO were modernised and expanded, the centralisation of the functions of LITEKO was completed, the subsystem of public electronic services of LITEKO (E-Service Portal of Lithuanian Courts[115]) was developed and launched from 1 July 2013, and LITEKO was partly modernised by enabling to conduct proceedings electronically, use electronic signatures from the side of courts and form as well as view ADOC format documents. The system of electronic

[115] E-Service Portal of Lithuanian Courts, on-line access :<https://e.teismas.lt/lt/public/home>.

services functioning at present covers drawing up procedural documents and their submission to the court by parties to proceedings, the management of information on the stamp duty, the management of information on the fines imposed and the litigation costs awarded in favour of the State by the court, access to case-files for external parties to the proceedings, service of procedural documents of the court and provision of audio recordings of hearings to the recipients of services. The implementation of the third group of LITEKO modules is further continued in this way. It should be welcomed that the new electronic services have been used quite intensively – over the first years of system operation, the courts have received more than 36 000 electronic procedural documents and sent almost 300 000 thousand electronic documents. The number of external users of the portal exceeds 14 000 already. More than 10 million electronic messages about the course of proceedings have already been sent to their accounts[116]. Moreover, quite recently the electronic management service of judicial mediation procedures has been launched.

Unfortunately, highly ambitious plans of the legislator to move to the information infrastructure of judicial proceedings in a couple of years have not been achieved to their full extent. The courts have not been and still are not prepared to digitalise all procedural documents. The reason is both inadequate quantity and efficiency of technical equipment in courts and low efficiency of LITEKO; moreover, the human factor also comes into play – inadequate organisational preparedness and insufficient trainings. The issues in the efficiency of LITEKO have also recently highlighted the element of convenience of this system for courts. Moreover, they made it impossible to activate all the functionalities programmed in the project of public electronic services of courts (e.g., printing of electronic case card data to indexed portable (PDF) format files, which would be transferable easily and fast to tablets, laptops, other mobile devices and handy to use during court hearings). It should also be noted that the development and implementation of the module the LITEKO documents management system module takes place considerably slower than planned and has not been completed to date, which is a serious impediment for a continued transition to the information infrastructure of proceedings because the existing document management functionalities of the LITEKO system, which were modernised in 2013, are not in line with the minimum functionalities of document management systems.

The difficulties encountered in tapping the potential of ICT for accelerating the Lithuanian judicial proceedings and making them more effective indicate that one of the first objectives to be currently addressed is the substantial modernising

[116] National Courts Administration. Awards to the most active external users of the portal e.teismas.lt, on-line access: <http://www.teismai.lt>.

of increasing the efficiency of this system, its convenience for courts and interoperability with external information systems, registers and the data management systems held by external litigants, stepping up the development of the hardware infrastructure to facilitate moving from paper-based case files. This objective is intended to be addressed over the next two years, by implementing the project of the National Courts Administration 'Modernization of the Courts Information System (System for Case Handling and Audio Recording for Courts Hearing)' within the framework of the Programme of the Norwegian Financial Mechanism 'Efficiency, Quality and Transparency in Lithuanian Courts'. This project will implement a major modernisation of LITEKO and its integration with other information systems[117].

It could also be mentioned that acceleration of civil proceedings is also, to some extent, facilitated by the shift from publication of information about the place and time of hearings and about the statements of claim received at the court from newspapers to the electronic space – a special website.[118] This, starting with the autumn of 2011, saves the time and money that litigants and the court had previously to spend for ensuring such publication in newspapers. Lastly, mention should be made of the progress achieved in Lithuania in moving to the recording of court hearings by electronic means and in introducing video conferencing into civil proceedings.

The wording of Article 168 of the CCP in force as of 1 January 2014 lays down an obligatory audio recording of all court hearings using the equipment specified in the order of the Minister of Justice. This completely eliminates the use of 'paper' records as it is established that an audio recording shall be considered to constitute the record of the hearing and shall constitute an integral part of the proceedings. This amendment has been followed by considerable concerns about safety and reliability. The entry into force of the relevant wording of this legislative provision had been postponed for a year as the courts were not sufficiently prepared technically. The preparing of courts to move to the audio recording of hearings took several years, the funds of the Norwegian Financial Mechanism were also used for this purpose. The development of the audio recording infrastructure has not yet been finalised. Not all courts have stationary audio recording equipment with special applications installed to ensure a more advanced quality and structuring of recordings, facilitate more convenient listening to recordings, automatically transfer

[117] Description of the project "Modernization of the Courts Information System (System for Case Handling and Audio Recording for Courts Hearing)" within the framework of the Programme of the Norwegian Financial Mechanism 'Efficiency, Quality and Transparency in Lithuanian Courts', *o*n-line access: <http://www.teismai.lt/lt/nor/>.

[118] National Courts Administration. "Reports of courts about ongoing lawsuits", online access: <http://pranesimai.teismai.lt/teismu_pranesimai>.

them to LITEKO storage facilities from where recordings are broadcast to LITEKO electronic case cards. In a large number of courts, audio recordings are still made by mobile equipment (digital dictaphones) and are not structured. The audio recording system, however, is under improvement and development[119]. The technical issues encountered at present are quite effectively solved by additional organisational and technical measures[120]. The elimination of traditional taking of minutes allows avoiding additional work involved in minute-taking. That saves time for secretaries of court hearings and often also for judges, reduces the workload of court registries.

In general, the quality of recording of hearings has been improving. Although the development of infrastructures is still unfinished, the time saving effect is already noticeable. In order to increase this effect, it is necessary to finalise developing the audio recording infrastructure as rapidly as possible to help avoid errors and technical failures, ensure a faster and more usable recording and reproducing of the course of hearings, which would contribute to achieving a substantial change in terms of quality and time in recording case hearings.

From 1 March 2013, Article 175[2] of the CCP came into force and legitimised the use of information and communication technologies (video conferencing, teleconferencing, etc.) in questioning witnesses, experts, persons involved in the proceedings and other parties to the proceedings, as well as during site surveys and collection of evidence. The law notes that the procedure and technologies applied have to guarantee the objectivity of evidence capturing and presentation as well as enable a reliable identification of the persons involved in the proceedings. For this legislative norm to become really operational, technical preparations, i.e. the project 'Designing and Installation of the Video Streaming, Recording and Storage System in Courts' under the Lithuanian-Swiss Cooperation Programme must be completed. Within the framework of this project, it is intended to install video conferencing facilities in eighteen courts in the second half of 2014. Integration of video conferencing in civil proceedings necessitates a more thorough regulation of the video conferencing procedure, which should be adapted to the specifics of a particular technology and to the organisational structures of courts, should be user friendly and respond to the underlying principles of civil procedure. Moreover, it is necessary to lay down the procedure for teleconferencing.

[119] Ibid.

[120] Resolution No. 13P-22-(7.1.2) of 14 February 2014 of the Judicial Council "On the Approval of the Description of Procedure for Audio Recording of Court Hearings", on-line access: <http://www.teismai.lt/teismu-savivalda/nutarimai/?f=331&nr=&tipas=1&metai=&menuo=&diena=&metai1=&menuo1=&diena1=&pavadinimas=&criteria1=all&q=teismo+pos%C4%97d%C5%BEi%C5%B3+garso+%C4%AFra%C5%A1%C5%B3+darymo+&criteria=all&type=0&search=1>.

As it can be seen, Lithuania has already been using a multitude of effective ICT measures, which certainly contribute to the completion of civil cases within a reasonable time. Most importantly, we cannot rest on our laurels, but take interest in potential new developments and continuously monitor the economic and quality benefits generated by the progress in digitalising the civil procedure, be flexible in implementing more ergonomic, efficient tools to better satisfy the needs of users, take a more intensive and determined approach in developing the information infrastructure for the performance of courts, carry out more accurate and clearer planning, identify and coordinate the priorities of the ICT development projects ongoing in courts in a more optimal manner, and have no fear of adapting classical procedural standards when implementing ICT. Such developments eventually contribute to ensuring the right of individuals to the faster, fair and proper administration of justice.

2.3. PRECONDITIONS INHERENT IN THE SPECIFICS OF CERTAIN CASE CATEGORIES

The acceleration effect of civil proceedings can be achieved by harmonising dispute procedures and by implementing the acceleration measures applicable to standard procedures for all proceedings in general. Yet there is one more direction – the differentiation of proceedings when a specific procedure applies to cases of certain categories in order to speed up the proceedings of these categories through various acceleration means. This in no way imply undermining of such principles of civil procedure as the equality of parties to the proceedings, adversarial principle, dispositive principle, immediacy, fair proceedings and other fundamental principles of the administration of justice. The civil procedure theory and practice of Lithuania and foreign countries reveal that if special measures are established and applied to individual case categories not only creatively but also responsibly, the effect of acceleration can be achieved in compliance with the above-referred fundamental principles of civil procedure.

On the other hand, procedural differentiation of different forms of litigation should not be treated as absolute. In the opposite case, it would be easy to divert to extremes – the code of civil procedure would become highly complex, casuistic and hardly applicable in practice. The right quantity and quality driven balance should always be sought between the unity of general proceedings and the specifics of cases of different categories when modern up-to-date case hearing rules are constructed and maintained.

It is acknowledged in Recommendation No. R (84) 5 of 28 February 1984 of the Committee of Ministers of the Council of Europe on the Principles of Civil Procedure Designed to Improve the Functioning of Justice and in its Explanatory Memorandum[121] that, for the purpose of more effective administration of justice, civil procedure should always follow uniform rules. The differentiation of procedures applied to different disputes is one of the directions to step up proceedings. Such differentiation in different European states is determined by different criteria:

1) the nature of claims (urgent case procedure and recovery of uncontested debts);
2) the value disputed (small claims);
3) the specifics of the parties (labour disputes, landlord and tenant disputes, family disputes, consumer disputes);
4) the frequency of similar disputes (disputes regarding traffic accidents).

As far as specific methods and measures to speed such proceedings are concerned, they may include simplified methods to start civil proceedings, limitations on the number of court hearings or preparatory hearings, exclusively written or oral form of proceedings, prohibition or limitation of certain exclusions or measures of defence, more flexible rules of proof, limitations or prohibitions of hearing adjournments, use of court experts at the outset of the proceedings, active role of the judge in conducting the case and collecting evidence, other measures. Such measures may be applied as obligatory or may be chosen based on an application of one of the parties or selected by consent of both parties[122].

Modern Lithuanian civil procedure is characterised by a considerable degree of differentiation of contentious proceedings. This is currently acknowledged as a positive feature and was highlighted as a strength of the new CCP when it was being adopted in 2002[123]. The existing CCP provides for seven special proceedings laying down the specifics of proceedings for certain dispute categories. The CCP may not be criticised for being overly casuistic or complex.

An analysis of the special methods and measures for accelerating proceedings in the CCP reveals that the legislator makes an effort to balance and tune up

[121] Council of Europe Committee of Ministers Recommendation R (84) 5 on the principles of civil procedure designed to improve the functioning of justice and explanatory memorandum, on-line access: <https://wcd.coe.int/ViewDoc.jsp?p=&Ref=Rec(84)5&Sector=secCM&Language=lanEnglish&Ver=original&BackColorInternet=eff2fa&BackColorIntranet=eff2fa&BackColorLogged=c1cbe6&direct=true>.

[122] Ibid.

[123] Explanatory Letter on the Draft of Parts IV-VII of the Code of Civil Procedure of the Republic of Lithuania, online access: <https://e-seimas.lrs.lt/portal/legalAct/lt/TAK/TAIS.152966?jfwid=-lrklxcxbf>.

the use of various measures and methods rationally in order to achieve a tangible effect in terms of rapidity and quality of proceedings. Part IV of the CCP provides for limitations of the time limits for procedural actions; restrictions on the subject-matter of cases, their changes, the subject-matter of derivative claims and counter claims; a more active role of the court in conducting the proceedings and collecting evidence (labour, family and public procurement cases); introduction of obligatory dispute resolution out of court (labour, public procurement, class actions); use of the written case hearing form (court order cases, documentary procedure, public procurement cases); use of the elements of exhortative proceedings (court order cases and documentary procedure); more flexible form and procedure of case hearing, and a simplified content of a decision (small claims); accumulation of a group of claimants who have suffered from massive violations into one proceedings (class actions).

As far as a binding nature of the litigation rules for certain case categories at issue is concerned, here the legislator takes a flexible approach again for the sake of higher effectiveness. Some of these special proceedings must be applied obligatorily (in labour, family and public procurement cases). Yet some other rules of special proceedings may be applied as alternatively opted for by the active party – the claimant or a group of claimants (specifics of hearing cases regarding the elimination of property management violations, documentary procedure, cases for the issuance of court orders, class actions). It should also be noted that the court enjoys discretion of a more flexible choice of the rules of form and procedure for the proceedings to be followed when deciding disputes regarding small claims.

Some methods of application cannot prove out immediately or in the longer run with regard of all of the above-referred measures. Procedural norms and their application must be dynamic and adequately adaptable to changing realities of the procedural practice. Developing organisational and administrative solutions designated for the activities of courts, evolving practice in the application of law, activity methods of the parties involved in dispute resolution activities, and introduction of new working instruments require adaptation of the rules of civil procedure and revised methods of their application. To achieve better results, corrections of the legislative provisions regulating differentiated proceedings and the development of corresponding case-law and the doctrine of law could not and should not be avoided in future. As further analysis shows, certain characteristics of special contentious litigation and proceedings, for example, court order proceedings, have been successfully assimilated in practice and become effective instruments saving the time and money of litigants. Yet some other measures, for example, cases regarding possessory remedies (*possessory* defence), documentary procedure and class claims have

not yet demonstrated any tangible accelerating impact for proceedings. Different options for their improvement are under discussion.

It should be noted for completeness that the hearing specifics of different category cases designated for speeding up such proceedings are also laid down by other laws of the Republic of Lithuania (for example, the Law on Bankruptcy of the Republic of Lithuania[124], the Law on Bankruptcy of Natural Persons of the Republic of Lithuania[125], the Law on Restructuring of Enterprises of the Republic of Lithuania[126]) and other parts of the CCP (for example, CCP Part V 'Special Proceedings').

A limited scope of this scholarly study limits the avenues for a complete research of all varieties of differentiated procedures. Therefore, this study will further explore in a greater detail several special procedures: court order cases, documentary procedure, disputes for the award of small claims and the most recent category of special proceedings in the Lithuanian civil procedure –class actions.

2.3.1. COURT ORDER

Proceedings for the issuance of court orders have spread in Lithuania as a popular means to speed up the awards of the debts uncontested by debtors. According to the statistical data on the performance of the courts of first instance in Lithuania, 51 207 civil cases out of the total of 208 852 civil in 2015 cases were completed by issuing court orders; this figure was, accordingly, 196 723 and 49 760 in 2014, 183 062 and 48 369 in 2013 and 181 877 and 46 843 in 2012[127]. Thus, the statistics of courts of the recent years shows that around one fourth of all civil cases are disposed of by means of court orders. This proportion has been stable from year to year and is between 24 and 26 per cent.

Cases for the issuance of court orders have found their way in the civil procedure of Lithuania from the beginning of 1999. Court orders could be used for resolving evidence-based pecuniary claims arising out of contractual obligations. The procedure of issuance of a court order in its initial form was closer to a customary inquisitorial procedure. It had two stages. First of all, after accepting a reasoned and evidence-supported application for the issuance of a court order, the court would send it with a notification to the debtor, encouraging him to pay the debt within 14 days or submit his reasoned objections supported by evidence. If no objections were received or

[124] *Official Gazette*, 11 April 2001, No. 31-1010.

[125] *Official Gazette*, 19/05/2012, No. 57-2823.

[126] *Official Gazette*, 11 April 2001, No. 31-1012.

[127] Reports on the hearing of civil cases (courts of first instance) in 2012–2015, online access: <http://www.teismai.lt/lt/visuomenei-ir-ziniasklaidai/statistika/106>.

if the court found out that they were unreasoned or unsupported by evidence, the court would issue a court order. If the debtor's objections were received and held admissible, the time limit of 14 days was set for the applicant to file a claim following the general procedure. Failure to submit the claim meant that the initial application for the court order was held as not filed and was returned to the application, while the stamp duty paid was not reimbursed. Both the rulings rendered in these proceedings and the court order as such could be appealed against by separate appeals. The law did not provide for any standardisation of the procedural document forms used.

When the new CCP was being adopted, the court order proceedings, which were somewhat new and used only for several years in Lithuania, underwent considerable evolution. The purpose of court order proceedings is to further simplify and speed up the procedure as well as enable the automation of these proceedings, with a view to ensuring a greater distinctiveness of court order proceedings as a procedure of 'clear' claims. From the two-tier court order issuance system a move has been made to a one-tier system. A court order is issued not later than on the next working day after the acceptance of the creditor's application and together with a court's notification is sent to the debtor not later than on the next working day. When issuing a court order, the court does not verify whether the claim is justified – it only ascertains whether the application satisfies the requirements of admissibility and form and whether it is not utterly unfounded. The court's order, differently from the previous model in force before the new CCP, does not become enforceable immediately. It becomes enforceable within 20 days after the day of service of the court's order and notification to the debtor, if the debtor does not submit any objections and does not inform that the debt has been paid voluntarily. If objections are filed, the court's order is revoked and the creditor is granted the time limit of 14 days to submit a statement of claim under the general procedure of contentious proceedings. For the purposes of securing the enforcement of decisions of this type, the creditor has the right to request the court to apply interim measures, which are ordered by a separate reasoned ruling of the court.

It is not required that the application for a court order and the debtor's objections be supported by evidence. The amendments made to the CCP in 2011 in order to make the approach followed by courts more uniform and change their inclination to request evidence, indicated explicitly that an application for a court order shall not be followed by any evidence (Article 433(4) of the CCP). Protection against abuse when clearly unfounded applications for a court order are submitted by creditors in bad faith is secured by the right of the court to refuse to issue a court order when the application if clearly unfounded, as well as the right to impose a fine of up to EUR 289 and order a compensation for damages.

The forms of procedural documents used in the procedure of issuance of court order are standardised. Standard forms are approved by the Minister of Justice[128]. The use of standard forms enable more effective automation of the processing of documents used in these proceedings. The tools implemented in the Information System of Lithuanian Courts LITEKO not only enable creditors to file their applications for the issuance of court orders electronically, but also allow the court to fill out the court order and notification forms automatically. This further accelerates the work of courts in the cases of this category.

Article 432[1](2) of the CCP provides for a possibility of ensuring the specialisation of individual courts in the proceedings for the issuance of court orders. This provision also grants the power to the Minister of Justice, with agreement of the Judicial Council, to order when necessary that the cases under applications for the issuance of court orders submitted by means of electronic communications should be heard by one or several specific local courts. This discretion, however, has not been used recently in order not to disbalance the workloads of courts.

In terms of subject-matter, court order proceedings are limited to pecuniary claims. The list of legal bases to support such claims is restrictive (they may derive from contracts, delict, labour relations, family relations, etc.). Pecuniary claims, however, may not derive from an obligation, which has not been fulfilled by the creditor where that is required by the debtor. Likewise, the performance of an obligation in parts may not be required, when such performance is impossible. The wording of the CCP in force until 1 October 2011 provided that this procedure should also apply to claims to award movable property items, however, this requirement has eventually been withdrawn.

The court order procedure has been set up as a procedure to exhort the debtor. The adversarial principle is implemented by means of actual service of the court's order and notification to the debtor, clarification of his possibility of disagreement and objection, as well as by creating conditions for an effective exercise of this right. The time limit of twenty days to submit objections may be renewed, if exceeded due to valid reasons. A court order may not be appealed by a separate appeal under the present regulation laid down in the CCP. The debtor's objections to the creditor's claims should be presented in the form of an objection to the court's order. For these reasons, court order proceedings are allowed only when the debtor is resident in Lithuania and his residence or place of employment is known, to be able to actually serve court documents to the debtor. Fictional service of procedural documents, such as service through a public notice or via the curator, are not recognised in such cases.

[128] Order No. 362 of 19 December 2002 of the Minister of Justice of the Republic of Lithuania "On the Approval of the Forms of Procedural Documents Used in Civil Proceedings for the Issuance of Court Orders". *Official Gazette*, 31/12/2002, No. 125-5689.

The category of court order proceedings is a form of litigation applicable at the creditors choice. The creditor may opt for submitting the same claims under the contentious procedure or choose the documentary procedure. With a view to encouraging creditors to use this simplified procedure, the legislator has introduced lower litigation costs and negative consequences with regard to the reimbursement of litigation costs. A stamp duty reduction means that an application for a court order is subject only to one fourth of the stamp duty to be payable for filing a claim under the general procedure. As far as negative consequences for the reimbursement of litigation costs are concerned it should be noted that in case the claimant had the right to assert his claims in court order proceedings but has submitted a claim following the general rules of contentious proceedings, the stamp duty and other litigation costs are awarded in favour of such claimant only to the extent disputed by the respondent, unless the respondent's conduct provided the basis for the claimant to believe that the respondent would dispute the claim (Article 434(4) of the CCP).

The rules applicable for the cases of this category, which underwent major changes when adopting the new CCP, were subject only to minor improvements when the new CCP came into force. This indicates that the court order procedure has become a functional, frequently applied and well-proven instrument for accelerating the Lithuanian civil procedure. There are no major discussions in the recent practice and theory of law that the rules of these proceedings should be substantially revised in any way.

2.3.2. DOCUMENTARY PROCEDURE

A slightly different situation is observed in court order cases. Cases subject to this type of proceedings were introduced into the new Code of Civil Procedure of the Republic of Lithuania (CCP) by means of transposing, in part, the German documentary procedure model with some material adjustments.[129] As a court order procedure, the documentary procedure is not mandatory, i.e., it can be chosen at a plaintiff's discretion. Meanwhile, when assessing advantages and disadvantages of each type of the proceedings, respondents (creditors) may select either of the two or opt for lodging a claim through a general procedure for dispute resolution.

According to statistics, cases subject to documentary procedure are far less common than court order cases. The statistical data of first instance courts illustrates

[129] Nekrošius, V. *Civilinis procesas: koncentruotumo principas ir jo įgyvendinimo galimybės* [Civil Procedure: Concentration Principle and Implementation Possibilities Thereof]. Vilnius: Justitia, 2002, p. 190; R. Norkus, *Supaprastintas civilinis procesas* [Simplified Civil Procedure]. Vilnius: Justitia, 2007, p. 150–169.

that in 2013 out of 183,062 civil cases resolved only 2,416 were tried with the adoption of a preliminary decision. In 2012 out of 181,877 civil cases resolved 2,366 were deliberated under a preliminary decision procedure.[130] The figures demonstrate that only as little as over 1 per cent of civil cases are deliberated using the documentary procedure. These indicators may be explained, in part, by a somewhat peculiar competition between proceedings taking place under the court order and documentary procedure. The first stage of documentary procedure (prior to lodging an objection against a preliminary judgement) – is also a stage of encouraging proceeding where the adversarial principle is triggered following the service of the preliminary decision to the defendant, who is then given the possibility to lodge a statement of objection. This type of proceedings is partially overlapping with the court order proceedings. From the subject-matter point of view, documentary procedure is slightly more universal vis-à-vis the court order procedure. The documentary procedure can be applied to a larger number of categories of claims, not limited to claims to award monetary amounts, but also including claims on award of movable items and securities, claims to evict lessee on the basis of immovable asset lease contract.

Perhaps the most vivid difference between the first stage of documentary procedure and court order procedure is that a claim lodged through documentary procedure has to be justified and based on written evidence. Moreover, when adopting a preliminary decision the court performs a reasonability check of a claim. Any objections against the preliminary decision which the defendant is entitled to lodge within twenty days following the date of adoption of a preliminary decision shall also be justified and based on evidence. Therefore, until the stage of statement of objection against a preliminary decision, the documentary procedure contains features of an investigative process, albeit the types of evidential material are limited to written evidence which could be investigated exclusively in written proceedings. On the other hand, elements of an investigative process have only a very limited scope in the court order proceedings.

Finally, plaintiffs' choice is determined by the fact that there is a 50 per cent discount on a court fee for the documentary procedure under Article 425(2) of the Code of Civil Procedure, whereas the court order procedure is subject to 75 per cent discount. It shall be noted that in situations where the plaintiff contests a claim financial reasons may encourage the party to opt for the documentary procedure. When a case under the documentary procedure is reaching a second stage to be concluded with a final decision, the plaintiff is not obliged to pay any additional court fee, nor is he obliged to lodge a new claim. On the other hand, where the

[130] Reports on civil procedure (in courts of first instance) for 2012–2015, on-line access: <http://www.teismai.lt/lt/visuomenei-ir-ziniasklaidai/statistika/106>.

court rejects the court order, the party is obliged to lodge a new claim and to pay the outstanding part of the court fee (Article 439(3) of the Code of Civil Procedure).

Despite the fact that in some rare cases plaintiffs would still opt for the documentary procedure, the necessity and efficiency thereof is now under discussion both in theory and in practice. The results of the survey of judges conducted by the authors of the research demonstrate that in the survey as few as 19.2 per cent of the judges interviewed who deliberate cases in courts of first instance the documentary procedure is the type of proceedings which has stood the test of time. A slightly higher percentage (22.1 per cent) of the respondents believe that this type of proceedings has not proved its worth, with 43.3 per cent of the respondents holding the view that documentary procedure is only partially good. The bulk of criticism is related to the fact that documentary procedure overlaps with court order proceedings and is being abused by plaintiffs willing to save 50 per cent on the court fee. The statistics given above that only one per cent of plaintiffs opt for the documentary procedure show that active parties which are given the freedom of discretion do not consider documentary procedure as an attractive type of proceedings, compared to court order or general dispute resolution proceedings.

In theory some doubts were raised as to whether the current Lithuanian documentary procedure needs not to be adjusted one way or another.[131] At the same time attention has to be drawn to the fact that for the most part discussions on the issue have recently abated. Some ideas have been raised to the effect that the documentary procedure could be reformed so as to enable the plaintiff capable of substantiating his arguments with written evidence already during the initial stage of documentary procedure and rebutting the defendant's defence to obtain a procedural decision with immediate effect. This could be done through a unilateral deliberation of the plaintiff's statement by a judge following a procedure identical to the procedure of notarial enforcement records[132]. Another alternative, supported by prof. R. Norkus, could be to reform the Lithuanian documentary procedure under the German example, wherefrom this type of proceedings have been transferred initially[133].

When deliberating the necessity to reform the Lithuanian documentary procedure which now came in for heavy criticism, it has to be taken into account that in Germany, wherefrom the model of the documentary procedure has been adopted with some adjustments, this procedure has one exclusive characteristic – it allows

[131] Norkus, R. „Dokumentinis procesas: ar teisminė gynyba taps veiksmingesnė?" [Documentary procedure: is legal defence to become more efficient?] (2003). *Teisė*. No. 49.

[132] Mikelėnas, V. "Quo vadis arba ekspertimentuojama toliau" [Quo vadis or Keep on Experimenting] (1998). *Justitia*, No. 6.

[133] Norkus, R. "Supaprastintas civilinis procesas" [Simplified Civil Procedure]. Vilnius: Justitia, 2007, p. 203–213.

for a relatively rapid issue of an enforceable court decision with immediate effect[134]. This happens during the written procedure of expedited proceedings based on investigative and adversarial principles and exclusively on documentary evidence.[135] We believe that the possibility to issue enforceable procedural decision through an expedited investigative procedure in accordance with the fundamental principles of civil procedure should be given serious consideration as a possible way of improving the documentary procedure. As far as modification of documentary procedure into unilateral proceedings for issuing enforcement records is concerned, this possible alternative of the reform would raise more doubts in terms of its compliance with the adversarial and fair trial principles.

Meanwhile, the above mentioned feature of the German documentary procedure, i.e., the issue of an enforceable court decision after an expedited investigative and adversarial procedure, if transposed into the Lithuanian civil procedure, could ensure shorter delays of civil procedure of this type, higher appeal for the disputing parties and a larger degree of efficiency. It shall be noted that an expedited deliberation of disputes in courts of first instance under written procedure solely on the basis of documentary evidence would not in itself constitute a major innovation. This procedure has been applied in practice since 1 October 2011 in all public procurement disputes[136]. On the other hand, though, an expedited enforcement of court decisions that have not yet become effective is not something extraordinarily new either. Relevant provisions had been known even before the adoption of the new Code of Civil Procedure. In accordance with Article 282 of the currently effective CCP, the court is obliged to refer for immediate enforcement court decisions on maintenance, on award of one-month salary, on reinstatement to work of dismissed employees, on reinstatement of previously evicted people back to the living quarters. Moreover, Article 283 of CCP provides for an entitlement of the court to refer for an expedited enforcement of court decisions on other grounds stipulated in the said article.

Naturally, during the phase-in to this documentary procedure model whereby a preliminary court decision adopted after the initial stage of the documentary procedure would become immediately enforceable, arrangements should be made to enable defendants to submit active defence to the claim lodged against them and to have the conditions in place to demand an efficient assurance of restitution of a potential court decision.

From a financial point of view, such a modified documentary procedure should not be promoted with court fee discounts. Quite to the contrary, consider-

[134] Ibidem, p. 164–169.

[135] Ibidem.

[136] Law Amending and Supplementing the Law on the Code of Civil Procedure of the Republic of Lithuania, No. XI-1480, of 21 June 2011. *Official Gazette*, 13 July 2011, No. 85–4126.

ing that statements of claims submitted under these proceedings initiate a much more complex two-stage procedure, these can be subject to an even higher court fee (for instance, higher than 50 per cent). In this way, plaintiffs would think twice about their prospects of winning a case and a real necessity to obtain a court decision with immediate effect, the restitution whereof would most probably require additional measures.

When reforming documentary procedure it shall be born in mind that there is a possibility of improving provisions of *possessory* defence procedure as well (Chapter XXI Cases related to infringements of possession of thing). Here as well provisions shall be put in place to eliminate any violations of possessions of things without delay after an expedited investigative process under written procedure based on adversarial principle. At present, cases in this category are not that common in practice. Plaintiffs are more inclined to opt for more usual general rules of dispute resolution proceedings to such type of disputes.

2.3.3. FEATURES OF SMALL CLAIMS

Features related to small claim disputes evolved in the Lithuanian civil procedure alongside with the new CCP after the adoption of the German free-process model[137]. Article 441 of CCP provides for that cases regarding the award of amounts of money below one thousand five hundred euros shall be tried under general rules of dispute resolution proceedings, except for as otherwise provided for in the article. In this category, the purpose of speeding-up the proceedings is sought in two ways: (i) by giving the court the freedom of discretion to decide on the form and procedure of a trial; (ii) by laying down a simplified structure for awarding court judgements.

Thus, the court may, first of all, select to deliberate small claims either under written or oral procedure. If at least one party to the proceedings so requests, the case shall be tried under the oral procedure. The survey of judges conducted by the authors of research illustrates that a written procedure is chosen rather often. As many as 44.2 per cent of the judges interviewed indicated that disputes related to award of small amounts are tried in written form.

As far as a more liberal procedure of dispute resolution in concerned, the court may decide on the ways to arrange for a trial and try the case. Obviously, the fundamental principles of civil procedure, such as adversarial litigation, discretion, equality of the parties, and fair trial shall be maintained. In this respect Article 441 of CCP does not provide for any exceptions. The court is entitled not to apply the

[137] Op. cit., 129.

rules of preparation for a trial which are typical of general dispute resolution proceedings, i.e., it may decide not to exchange a reply and rejoinder, not to summon a preparatory meeting, etc. In practice this is a rather typical feature of dispute resolution involving small amounts. 26.9 per cent of all responding judges admitted that in cases of this category, the trial date is appointed immediately after receipt of a reply to the statement of the claim.

Yet another simplification speeding up the process is a more simplified structure of a court decision. In accordance with Article 441(3) of CCP, a trial of cases in this category shall be concluded with court decisions which contain an introductory and operative part as well as a list of summarised arguments. As a result, in small claim disputes there is no longer any descriptive part of the court judgement or an elaborate presentation of arguments which are usually required under the general rules for dispute resolution in accordance with Article 270 of CCP. Despite the fact that certain measures aimed at speeding up small claim litigation are successfully used in practice, approximately one fourth of the judges interviewed admitted having tried small claim disputes in accordance with the general rules almost always or in the majority of cases. The court is free to do so because the decision to (not) apply features typical of small claim litigation always falls within the scope of the court's freedom of discretion which it can use at any stage of the trial[138]. The judges participating in the survey noted that such cases are rather rare and are often concluded by default judgements. Bearing in mind the popularity of court order cases, a reasonable presumption can be made that quite a big proportion of small claims are also tried under the court order procedure.

There are no major discussions evolving around cases in this category either in theory, or in practice. All these circumstances make it possible to assume that peculiarities related to small claim litigation constitute one of the tried and tested measures for speeding up the proceedings.

As regards to potential developments in practical application of features typical of cases in this category, it shall be noted that in accordance with the concept of mediation development adopted by the Ministry of Justice and the draft law amending the law on mediation in civil disputes which has been submitted for hearing to the Seimas of the Republic of Lithuania[139], it is planned to introduce a mandatory pre-trial mediation in this category of disputes as of 1 July 2017. Therefore, according to

[138] Nekrošius, V. *Civilinis procesas: koncentruotumo principas ir jo įgyvendinimo galimybės* [Civil Procedure: Concentration Principle and Implementation Possibilities Thereof]. Vilnius: Justitia, 2002, p. 194.

[139] Draft law amending the Law on Mediation in Civil Disputes, No. X-1702. On-line access: <https://e-seimas.lrs.lt/portal/legalAct/lt/TAP/14f75f20230a11e6acbed8d454428fb7?positionInSearchResults=0&searchModelUUID=0968266a-cfe9-4857-b42d-1bf30bdaf966>.

the plans the legislator would stipulate that a peaceful settlement of disputes related to small claims is a priority aim when trying disputes involving small claims and would put the necessary conditions in place to apply mediation for this purpose. This attempt is undertaken in order to develop a culture of peaceful dispute settlement and mediation itself, to ensure a more rapid and cheaper alternative to resolution of disputes of this category at the earliest possible stage. The case law of small claims should be in compliance with and consistently develop the priorities set forth by the legislator in later stages of specific dispute resolution. A liberal procedure model provides for perfect conditions to enable the achievement of this goal. When trying cases of a particular category the court should, at the earliest possible stage and acting proactively, identify whether all the possible remedies for a peaceful dispute resolution have been exhausted and whether the parties, during the time period that has lapsed since the mediation procedure which has not resulted in a peaceful settlement of a dispute, have not changed their minds, and should put all other efforts commensurate with the efforts undertaken by the mediator and the parties seeking a peaceful dispute resolution. During a liberal procedure the court could implement this not only in the form of procedural documents or verbal hearings, but also by applying less formal means of instant communication, i.e., by phone or e-mail. A relevant approach, with a judge willingly devoting a bit more attention to a peaceful settlement, should be supported also in subsequent stages of small claim dispute resolution. On the other hand, application of mandatory pre-trial mediation should create preconditions that would enable a more rapid progress of courts with dispute settlement based on a formal application of rules, thus saving time and efforts for court settlement procedure and focussing instead on minor verification whether there has been no change in the will of the parties as regards peaceful settlement of the dispute and whether minimal efforts by the court would not trigger the delay in the mediation effect.

2.3.4. CLASS ACTION

The beginning of 2015 was important for the Lithuanian civil procedure in that the new amendments to the CCP entered into force[140], introducing class action. A short hint to class action could also be found in Article 49 (5) of the previously effective version of CCP which stipulated that class actions were possible in cases involving defence of public interest; this hint, however, cannot be considered as constituting

[140] Law Amending Articles 49, 80 and 182 of the Code of Civil Procedure of the Republic of Lithuania and Supplemeting the Code with Article 261-1 and Chapter XXIV-1. *TAR*, 1 January 2014, No. 3570.

the true existence of class action as such because the courts were following the well-established practice that until a certain procedure for hearing class actions had been defined in positive law such actions were not possible.[141] Thus, Lithuania has become one of the few European states trying to overcome challenges brought about to the conventional civil procedure by class actions with special procedural instruments available for massive dispute resolution, such as class actions.

Within one year following the adoption of the said amendments not a single class action has yet been lodged with Lithuanian courts on the substance. There have been several attempts to lodge class actions, which were eventually dismissed by courts. Despite the fact that the case-law of class actions is being developed very modestly, this shall not become the source of disillusion as, in principle, there are no, nor there should be that many massive disputes qualifying to be heard as class actions, compared against individual claims. Therefore, one should remain patient and recognise that this institute merits the attention of legal scholars as a significant and huge innovation of the Lithuanian civil procedure. The institute of class actions will be examined from the point of view of its potential to accelerate civil procedure in Lithuania. To perform this analysis the focus will primarily be on the aims of introducing the institute of class action in Lithuania, with individual focus given to acceleration of the proceedings as an end in itself.

The institute of class action developed as an organisational and administrative response to challenges of individual civil procedure. Class actions are special in that they aim at aggregating identical or similar claims held by a large group of individuals into one hearing on account that all claims originate from the same legal infringement violated on a massive scale. Class actions are lodged with courts through one or several individuals – representatives of the class. These representatives have the duty to be pro-active and adequately represent the entire class as well as properly reflect the situation of all class members which is significant for dispute resolution. Pro-activeness of individual class members in relations with the court is not required, except where the court decides to summon some individual members of the class. A sufficient scale of class action proceedings may determine that litigation become more rational, whereas, under a limited model of court fee distribution, the distribution of court fees among the opposing party or parties is rendered bearable and acceptable. Moreover, a class action essentially aims at including as many injured parties as possible in order to ensure enforcement of single proceedings initiated on grounds of one legal infringement committed on a large scale. In the case of the opt-out system the aim is to include all injured parties to the extent possible, except

[141] Division of Civil Cases of the Court of Appeal of Lithuania. Ruling of 2 June 2009 in civil case No. 2-492/2009.

for those who have expressed waived their right to litigation. The institute of class action bearing these features as described above creates the conditions to try and handle various issues related to judicial logistics, equipment of technical proceedings and economic litigation costs of group proceedings.

During the phasing-in stage of the class action institute in the Lithuanian civil procedure system, the following key aims have been pursued since the beginning of 2015: (i) to ensure the right to trial in cases of massive legal infringements; (ii) to shorten the process of civil procedure, (iii) to ensure uniform case-law in identical or similar cases and (iv) ensure the cost effectiveness of the proceedings[142]. In addition to the above listed aims, the comparable legal studies also refer to the goals of ensuring equal resources to parties of the proceedings and equal opportunities to the proceedings which could be equally effective and conducted in quality manner, the individual and special prevention of massive legal infringements, etc[143].

The primary aim of class actions in Lithuania is to ensure the right to defence in cases of massive legal infringements. In this regard it shall be noted that Lithuania opted for such version of the institute of class action whereby a larger group of individuals is composed only of the active part. There had already been sample actions in the case-law of Lithuania. No provisions were made to introduce a large group from the respondents' side, which has not been typical so far in Lithuania. The aim pursued by lodging an action by a group of plaintiffs is to safeguard better opportunities for potential plaintiffs to avail of their right to defence. Plaintiffs may be deterred if forced to act individually, plaintiffs may be deterred to do so due to financial reasons, lack of experience, time constraints, which are inevitable if the duty of active individual participation is applied.

Secondly, the introduction of class action was undertaken in order to shorten the civil procedure. For the sake of truth it has to be mentioned primarily that, in comparison to conventional case tried in individual proceedings, a class action is in principle more complex, involving more stages and usually may be expected to last longer than standard individual proceedings. Unlike in individual proceedings, in class actions the issue of admissibility of a class action is scrutinised under a more complicated procedure because there is an additional stage of group formation and approval (Articles 441^7 and 441^8 of CCP). Where individual claims are lodged,

[142] Resolution No. 885 of 13 July 2011 of the Government of the Republic of Lithuania Regarding the Approval of the Concept of Claim. *Official Gazette*, 1 January 2011, No. 92-4386; Explanatory note on draft law amending Article 49 of the Code of Civil Procedure of the Republic of Lithuania and supplementing it with Article 261(1) and Chapter XXIV(1). On-line access: <https://e-seimas.lrs.lt/portal/legalAct/lt/TAK/TAIS.429220?jfwid=-toik4nhmu>.

[143] World Class Actions. *A Guide to Group and Representative Actions around the Globe*. Oxford University Press: Oxford, 2012, p. 543–545.

the hearing of the case is divided into two stages, one of which is completed with the adoption of an interim court decision on factual circumstances common to all class members, whereas the second stage is completed with individual awards with due account to property claims raised by each and every individual member of the class (Article 441^9 of CCP). Time-saving effect in class actions manifests itself due to the following key elements of the proceedings: (i) joining of potential individual proceedings into one proceedings, (ii) prescribing a mandatory group representation by a member of the group and (iii) at the same time, limiting the opportunities for direct and personal participation of other group members in the proceedings. Therefore, by way of comparison it could be calculated how much time would be needed to hear identical claims lodged by individual members of the group in individual proceedings[144], how many procedural documents had to be issued and procedural actions had to be conducted in individual civil cases in order to guarantee the right to be heard to all individual members, deliberating individual claims lodged by every member of the group following the rules of individualised proceedings. Then, albeit seemingly more complex and slightly longer than standard proceedings, class action proceedings should pay off on account of time savings.

A third aim pursued with class action is to ensure a uniform case-law in identical or similar cases. Concentration in one case of all or most of analogous contested claims is, almost surely, the most effective precaution against the risk of diverging court judgements in similar cases. In this regard it shall be noted that a fine-tuned system of class action is a much better solution against different court judgements than the case-law because during the hearing of all cases subsequent to the genuine case which has set the precedent a dispute may arise as to whether follow-up cases indeed have a matching *ratio decidendi* or might have some material differences[145].

The fourth aim of class actions is to ensure the cost effectiveness of the proceedings and reduce civil litigation costs for plaintiffs and defendants. In this regard cost effectiveness acts similarly to time-saving effect. A more complex and multi-stage class action proceedings, if tried individually, in principle would be much more cost-intensive for all the parties to the proceedings. Meanwhile, concentration of massive legal infringement proceedings into one class action with a mechanism of group representation in the proceedings significantly reduces the costs of individual proceedings compared to potential costs of multiple proceedings.

[144] There may be twenty or more of such cases in view that, under Article 441^3 (2) (1) of CCP, a class action shall have at least twenty members which can be natural or legal persons.

[145] In Lithuania there have been a number of attempts in class action lawsuits to challenge the effect of case-law on subsequent cases (e.g., in cases of pensions, payroll, social benefits, in the defence of interests of holders of BAB bank „Snoras" bonds and deposit certificates, etc.); there have also been instances of overruling the precedent.

Therefore, in view of the potential of class action to speed up the proceedings, acceleration of civil procedure is reasonably considered as one of several independent aims of class actions. Meanwhile, from the point of view of class action proceedings individually and in isolation, there are no obvious guarantees that the proceedings would, indeed, save time. The fact that class actions are less time-intensive can be seen from analyses of challenges and issues faced during hearings of massive disputes in courts tried under general rules of individual claim resolution. In order to grasp the extent by which class actions might benefit resolution of a specific class action, possible alternatives to this type of dispute resolution shall be assessed (for instance, individual cases tried with the help of auxiliary mediation institute, case-law claims, representation claims, etc.). On the other hand, the speed of the proceedings alone is not the one and only aim of introducing class actions. A better access to the right to defence, saving of litigation costs and uniform case-law are no less important aspirations. These stimulate the need to develop the institute of class actions and start applying it in practice.

In 2015 and in the beginning of 2016, only a few attempts were made to bring class actions into Lithuanian courts. All these attempted class actions were dismissed, resulting in conclusion of relevant proceedings. The analysis of the reasons for disqualifying class actions in specific cases showed that in two cases the courts held that at the time of lodging these specific class actions the mandatory preliminary out-of-court procedure had not been fully implemented; in another case the court held that the criterion of commonality of facts had not been met[146]. Therefore, there is no yet an established case-law of class actions in Lithuania. As a result, it is yet premature to analyse the extent to which the theoretical aim of acceleration set for class actions is reasonable and has been attained. Most probably, these topics will be analysed in further research of a still developing case-law.

In the science of law, there are two class action models distinguished on the basis of the principles of a class formation – *opted in*, *opt-in* and *opted out*, *opt-out*.

The opted in class is made up of potential plaintiffs who have expressly stated their will to form a group and participate in class action proceedings. In this way individual members of the group are identified, the personal composition of the group becomes rather clearly defined and individualised to the extent it would be in the case of individual claims. A class may be formed both before lodging a class action as well as during the first stage of the proceedings until the moment when

[146] Division of Civil Cases of the Court of Appeal of Lithuania. Ruling of 10 July 2015 in civil case No. e2-816-157/2015; Panevėžys Regional Court, Division of Civil Cases. Ruling of 31 August 2015 in civil case No. e2-670-227/2015; Division of Civil Cases of the Court of Appeal of Lithuania. Ruling of 7 April 2016 in civil case No. e2-962-407/2016.

a court approves the composition of a class. In the case of opted in class action, attempts are made to include all injured parties of massive legal infringement into the proceedings with the help of pro-active encouragement of class representatives and other members of the class. Every single member of the class shall expressly state his or her willingness to be included into a class action.

What is typical of the opted-out system is that a class is defined solely with eligibility criteria. After the certification of the class by the court, all individuals meeting the eligibility criteria become members of a class action. Actions are taken to create preconditions for potential plaintiffs to receive information about the pending or on-going proceedings and to opt out of it if they do not wish to participate. In the opted-out system all injured parties are included into a class action in the absence of their negative decision, i.e. in the absence of expressed will to withdraw from the case.

In the opted-in systems, concentration of all potential plaintiffs into single proceedings has more complex obstacles to overcome. Even when all the available modern information communication tools (such as internet, social networks, mass media of all kinds, etc.) are used, information about a class being formed may not reach all potential members. Moreover, even after getting access to this information, it may be difficult to understand to individual members of a class. They may find it difficult to express their will to accede to the lawsuit. Psychological, economic and other reasons may impede someone from deciding to get involved into a lawsuit.

Meanwhile, in the opted-out system, joining of individual members into single proceedings is done automatically, thus reaching out a much larger number of potential members of a class action. Contrary to the opted-in system, obstacles related to dissemination of information and psychological determination usually result in a larger scale of a class and a higher degree of concentration of the class in an opted-out system. Moreover, it shall be reminded that possibility to opt out from the class action is guaranteed after the class has been approved by the court. Since the court thus performs some degree of pre-screening, this element adds additional authority and weight for the opt-in option. The U.S. statistical analyses of the *opt-out* model's case-law show that as little as 0.2 per cent members of the class decide to opt out from the class in the proceedings[147].

All the above is to illustrate that in the area of massive disputes larger time savings and concentration is better ensured by the opt-out system. Generally, the opt-out system may, to a larger extent, facilitate the attainment of the earlier mentioned aims expected from class actions. Regardless of a long-term active application

[147] Blackhaus, J. G., Casoone, A., Ramello, G., *The Law and Economics of Class Actions in Europe. Lessons from America*. Cheltengam, UK-Northampton, MA, 2012, p. 60.

of this system in the U.S., European states so far remain rather cautious about the opt-out claim model. This model is being implemented to a very limited extent or is generally not encouraged to be developed for potential contradiction thereof to the principle of proper justice and Article 6 of the European Convention of Human Rights[148]. These misgivings do not, however, deter some European states (such as, Denmark, Norway, Portugal) from experimenting with introduction of one or other alternatives for opt-out class claims in their respective civil procedures[149].

As regards Lithuania, so far we have no established case-law that could signal the issues which come across during hearings of class actions in Lithuanian courts and the final results achieved. Thus, any call upon courts to start experimenting with the opt-out system would be premature as yet. Meanwhile, the probability that this issue could be raised in future discussions may not be dismissed once the relevant case-law in class actions has been established in Lithuania or if general trends of class action hearing developments in Europe might have changed.

In terms of the impact of various models of class actions on the concentration and timeliness of the procedure, it shall be noted that in the case of the opt-in model there may be more than one class developed and represented by different members. Moreover, class actions may be tried in parallel to individual lawsuits. In the latter case, the aim of concentration of the procedure into single lawsuit as well as other aims set for class actions would not be attained in full, unless the courts undertook the initiative to pool (aggregate) cases into a single lawsuit. The Lithuanian civil procedure provides for a possibility to join homogenous cases on the basis of multi-claimant claims against the same respondent in order to hear these cases in a fast and just manner (Article 136(4) of CCP). However, in the absence of the clear position of the legislator on mandatory aggregation of the proceedings into single lawsuit whereupon several statements of claim are lodged against the same defendant by several classes and individuals on the ground of a massive legal infringement, such a possibility is probably more theoretical than a practical one, which the courts are unwilling to apply in order not to complicate already complex cases, were these to be joined, or in order not to distort the case-load balance of individual judges. To the contrary, they may develop an exactly opposite case-law to stop class action procedures pending hearings of individual claims or suspend hearings of some class actions pending the final resolution of other class actions. If that was to happen, the institute of class actions would be 'improved' by the case-law of preceding claims. This potential case-law presumably, albeit formally in compliance

[148] Hodges, Ch. *The Reform of Class and Representative Actions in European Legal Systems. A New Framework in Collective Redress in Europe*. Hart Publishing: Oxford, 2008, p. 118–130.

[149] Ibidem.

with the CCP provisions, could, nevertheless, challenge the primary aims targeted by introduction of class actions in Lithuania. In this regard the current regulation of Article 441^{10} of CCP should be improved to provide for mandatory joinder of homogenous class actions and individual claims into single lawsuit so as to ensure a larger scale of concentration of homogenous proceedings and a more efficient attainment of the aims pursued with class actions.

It would not do justice to say that the rules of individual case hearing fail to address the issue of scale. Auxiliary mediation and representation mechanisms are also applied as solution to various technical problems linked to a larger number of claimants lodging a single claim. For instance, Articles 44(2) and 56(1)(3) of CCP provide for the right of co-claimants to select one member from among themselves to act as their representative in court. Article 120 of CCP entitles the court to appoint one co-claimant as a representative of all co-claimants as a primary addressee of all procedural documents at the expense of and acting in the interest of all co-claimants. Article 118(1) of CCP stipulates that the court shall, as a rule, service procedural documents solely to the representative, save for the cases where the parties have expressly stated their wish to receive procedural documents in person. Various means of electronic communication are regularly developed (electronic communication between courts and parties to the proceedings, video conferences, etc.).

A question arises naturally whether the aims set for class actions could not be achieved through additional improvements of the already existing mediation and representation mechanism. In principle and very broadly speaking, class actions may be treated as peculiar litigation procedures for massive disputes in which various features of mediation and representation are applied, thus transforming class action litigation into procedures significantly different from individual proceedings. Thus, the very abstract question on which of the two – a class action or procedural mediation – is better in facilitating the aims set for class actions, could hardly produce a deplorable answer. From the point of view of a specific situation of a massive class dispute, though, raising this question is a legitimate and reasonable thing to do.

It shall be remembered that the scope of class action is massive legal infringements. Not just any type of infringements, but rather the ones which, due to a potential number of co-plaintiffs and individual lawsuits, might raise serious organisational, administrative, technical and economic problems to courts and other parties to the proceedings. It is namely for this reason that states which have introduced the institute of class actions in their legal systems have defined conditions for admissibility related to scale. For example, in the U.S., one of the admissibility criteria is the quantity of co-plaintiffs which is one of preconditions for a class action

to be admitted for hearing. Namely, when the number of co-plaintiffs within a class action is so big that it would seriously complicate the hearing under individual rules of claim procedure. The same divide could also be found in Lithuanian positive law. In accordance with Article 441^3 (2)(1) of the CCP, a class action may be lodged by a group of at least twenty natural and legal persons, whereas Article 441^3 (1)(2) of CCP provides for that a class action may be tried provided that the court established the class action procedure as a more reasonable, effective and appropriate procedure to resolve a specific dispute than individual dispute resolution. Therefore, when assessing the issue of admissibility of a class action the court has to verify whether in the case of a specific dispute the class action procedure would ensure a more reasonable, effective and appropriate dispute resolution. Article 441^7(1) of CCP stipulates that to be able to decide on this matter the court has to take into account the entirety of various circumstances[150], although it does not specify which of the circumstances listed are the most decisive. When addressing this issue during early stages of the case-law formation in the class action procedure the courts should not be too strict and refrain from prioritising individual claims over class actions. As regards the reasonability of instituting a class action under Article 441^3 (1)(2) of CCP, it shall suffice for a court to ascertain that it has come across a potentially massive legal infringement and that there are at least twenty plaintiffs initially forming a group of injured parties while the size of this initial group of injured parties has a potential to grow to the extent that more than one additional potential plaintiff may join this group. Under the opposite scenario, if courts enjoyed too much of discretion to block class actions, the institute of class actions could be put to rest in no time. In order to tackle the problem, the legislator would have to intervene and limit courts' discretion. For now, in the absence of case-law, it would be premature as yet to set the alarm ringing. Hopefully, courts are going to use their discretion properly as they should.

From the point of view of the given aspect, however, the existing regulatory framework of Lithuania is not entirely relevant for timeliness and concentration purposes. The provisions of Chapter XXIV[1] of CCP Features of Class Action Hearings and secondary legislation[151] do not specify the course of actions to be taken by

[150] According to the law, a court has to assess the class as described, the nature of the law and statutory interests infringed, the relation between the class action and individual claims of members of the class (if any), the size of individual property claims by members of the class (if any) as well as other circumstances.

[151] Order No. 1R-378 of 22 December 2014 of the Minister of Justice of the Republic of Lithuania 'On the Approval of Standard Template for Expressing Agreement to Be Member of a Class Action and Lodge a Claim with the Court, as well as Standard Template for Notifying about New Members of the Group Which Has Lodged a Class Action'. *TAR*, 1 January 2014, No. 20426.

the court during the initial class action if the court was to hold that the condition for reasonability qualifying for the institution of a class action under Article 441[3] (1)(2) of CCP has not been met: whether a claim is to be admitted and heard under the general procedure of dispute resolution by not applying features of class actions; or whether the fact of rejecting a class action shall be considered as the final act and in order for a claim to be tried under the general procedure it would be necessary to institute a new lawsuit.

The existing legal regulation stipulates that were the initial group of plaintiffs in a class action has not expressly stated its will that the action shall be tried under the general procedure of dispute resolution and if the court does not determine the existence of any of the mandatory qualifying terms and conditions for instituting a class action, a court ruling rejecting a class action could signal the end of a specific trial. So far a very modest case-law of class actions, namely several rejected class actions in 2015 on grounds of failure to meet one of the qualifying preconditions for a class action (in two cases – absence of preliminary pre-trial dispute resolution procedure, in one case – insufficient commonality of facts) illustrate that the courts treated their rejection to accept a class action as the end of the given procedures.[152] However, considering an immense amount of work done in preparation by representatives and initial members of a class action, such an end of the procedure could discredit the very idea of class actions and would surely fail to address the idea of acceleration and concentration of the proceedings.

Therefore, only were members or representatives of the class action have expressly stated their will that the action shall be tried either under the general procedure of dispute resolution or, should the court determine the presence of the qualifying terms and conditions for instituting a class action – that the action shall be tried under the class action rules, then the court could not disregard such an expressed will and reject to try the action in general if it adopted the ruling to reject a class action. However, this procedural construction whereupon an initial group of plaintiffs could propose to the court the procedure for hearing the case cannot be directly derived from the current legal regulatory framework. Consequently, the law which does not yet have developed any case-law or which could develop in the direction of discrediting the institute of class action, could be improved in order to avoid impasses in the procedure for initiating class actions. The legislative improvement should clearly stipulate that by answering to the question whether a class action or procedural mediation would be a more appropriate way of dispute resolution in a given case, the court should not only indicate the possibility of this

[152] Op. cit., 146.

option, but it should also apply it directly in the lawsuit pending in the same court, while initial plaintiffs who have agreed to both ways of dispute resolution could be immediately directed towards the most appropriate type of proceedings in that given case and the need to institute new actions in new lawsuits would be eliminated.

2.4. PRECONDITIONS IN THE FORMS CONTROLLING LEGALITY AND JUSTIFICATION OF COURT DECISIONS

2.4.1. APPELLATE PROCEDURE

In its Ruling of 16 January 2016 the Constitutional Court of the Republic of Lithuania[153] primarily ruled that personal rights shall be protected not formally, but really and efficiently from illegitimate acts of private individuals, public institutions or officials; it has held that the Constitutional right of an individual to seize a court, when analysed within the context of other Constitutional provisions, presupposes that the law shall establish the following regulatory framework whereby a final act by a first instance court could be appealed against to at least one court of higher instance. The Constitutional Court has repeatedly upheld this notion in its jurisprudence. In this way, the official constitutional doctrine was formed that, in accordance with the provisions of Article 30(1) of the Constitution, a person whose constitutional rights or freedoms have been infringed has the right to seize court, *inter alia*, has the right to appeal against a court decision, i.e., to appeal against a final act of a court of first instance to a court of higher instance.

The purpose of the possibility to review the legality and justification of a court decision of first instance at a court of higher instance is to ensure fairness of court decisions. A court of first instance may rule erroneously in matters of law and fact. The appellate mechanism may help to eliminate these errors. The Constitutional Court has held that the purpose of the judiciary comprised of several instances is to eliminate potential errors of courts of lower instance, prevent administration of injustice, thus protecting individuals, public rights and legitimate interests. It follows that the aim of general competence courts is to establish the conditions in courts of higher instance that are necessary to rectify any errors of fact (i.e. determination and verification of legally significant facts) or any other legal errors (i.e. of application of law) which might have been committed by a court of a lower instance for some reasons or other, as well as prevent injustice in any of the cases tried in courts of general competence. The above said rectification of errors made

[153] The Constitutional Court of RoL. Ruling of 16 January 2006. No. 7/03-41/03-40/04-46/04-5/05-7/05.

by courts of lower instance and prevention of injustice related thereto is the *conditio sine qua non*[154] of the related parties to the proceedings and the public at large in the court of general competence hearing the case as well as in the entire system of the judiciary of general competence. Therefore, the possibility to verify the legitimacy and reasonability of a procedural decision by a court of first instance in the court of higher instance is closely related to the imperative of justice – administration of justice – which is the embodiment of the meaning and purpose of the judiciary. Judicial review of judicial procedural decisions in the appellate civil proceedings has not only positive aspects, though.

When each and every judicial procedural decision is appealed, this results in lengthier procedures which are more time- and human resource-intensive and more costly for the society supporting the judiciary from the public funds as well as for the litigants themselves. Every time when a court is seized, a claimant has to pay a court fee which covers a proportion of public funds spent to maintain the judiciary, but content-wise court fees constitute the conversion of public funds into private funds. Eventually, court fees are paid by litigants.

In addition to direct procedural costs, appeals give rise to indirect costs which may result from mistakes made by the state which become amounts payable by the state in the course of the proceedings (public indirect costs, e.g. compensation for too lengthy proceedings), as well as costs of opportunities lost by economic undertakings when economic resources are frozen due to legal uncertainty about the eventual outcome of the given case (private indirect costs). Moreover, hidden costs may be also mentioned. Hidden costs are related not to the case in question but to the functioning of the system of the judiciary in general. A poorly functioning judiciary aggravates legal uncertainty, the risk of higher costs or lower profits and loss of investments. Operation and performance of the system of justice may have a negative impact on consumption, availability of credit, labour market, development of the housing market, etc[155]. The health of the justice system is undoubtedly one of the main lifeblood of economy and business. Thus, one may seriously question to what extent the possibility to appeal against a judicial procedural decision is justified.

In fact there is no, nor could there be any specific guarantees that a court of higher instance is going to decide rightly on the legality and reasonability of the judicial procedural decision of a first instance court. There can only be some facilitating preconditions put in place, such as verbal and/or collegiate hearing of a case, a reduced

[154] The Constitutional Court of RoL. Ruling of 21 September 2006 . Nr. 35/03-11/06.

[155] Manuel Ortells Ramos, "Efficiency of Civil Justice and Appeals System: the Spanish Reforms in the European Context", in *Recent Trends in Economy and Efficiency of Civil Procedure*. Vilnius, 2013, p. 171–175.

case-load of judges at higher instance, thus allowing him/her to devote more time and attention, higher qualifications of a judge, deeper knowledge, more extensive experience, etc. Errors can be made by judges in courts of all instances: in first instance and in the appellate court or court of cassation and super-cassation. Moreover, in dispute resolution procedures, regardless of the type of a decision, it has all the potential not to convince or dissatisfy the litigant which has lost the case. Thus, the system of appeals may enhance the efficiency of the civil procedure only provided that the right of appeal and regulation of the appeal system were such as to allow for a better guarantee of protection of fundamental personal rights and the quality of the final decision. This positive effect shall, inter alia, compensate negative aspects of appeal related to costs and additional length of the proceedings.[156] Contemporary legal systems inevitably share a tension between the wish to remove errors by exposing judgments to several layers of control, and the wish to protect civil rights and obligations in a way that is concrete and effective, and not theoretical and illusory[157].

Considering all the above, no surprisingly it is indicated in Recommendation No. R(95)5 of the Committee of Ministers of the Council of Europe Concerning the Introduction and Improvement of the Functioning of Appeal Systems and Procedures in Civil and Commercial Cases (hereinafter – Recommendation by the Committee of Ministers) that in principle it should be possible for any decision of a first instance court to be subject to the control of a higher instance court. An appeal can assure the accurate and lawful results of civil proceedings, preserve public faith in the judicial system, secure the development of the law, and promote a uniform and consistent application of legal norms[158]. Moreover, the said Recommendation of the Committee of Ministers acknowledges the possibility to limit the right of appeal. It is important to note that such limitations shall be introduced by law and shall be compatible with the fundamental principles of justice. The aim of limitations of appeal is to secure the finality of judgments, foster legal certainty, avoid excessive costs and duplication of court actions, shorten the length of proceedings and prevent financially stronger parties from molesting their adversaries by entangling them in an endless loop of judgments and appeals[159].

The Recommendation of the Committee of Ministers indicates that certain categories of cases, e.g., small claims, can be excluded from the right to appeal. In this respect it shall be noted that neither the Convention for the Protection of

[156] Ibidem, p. 178–179.

[157] Uzelac, A., van Rhee, C. H. "Appeals and other Means of Recourse against Judgments in the Context of the Effective Protection of Civil Rights and Obligations", in *Nobody's Perfect: Comparative Essays on Appeals and Other Means of Recourse against Judicial Decisions in Civil Matters.* Intersentia, 2014, p. 3.

[158] Ibidem, p. 5.

[159] Ibidem, p. 6.

Human Rights and Fundamental Freedoms guarantees the right to appeal against judicial procedural decisions in civil proceedings. No such requirement is required by, e.g., the Constitution of Germany. Under Regulation (EC) No. 861/2007 of the European Parliament and the Council of 11 July 2007 establishing a European Small Claims Procedure, member states shall decide by themselves whether an appeal shall be available against a judgment given in the European small claims procedure (Article 17). This is to illustrate that the right to appeal is not an absolute one and may be subject to limitations under the European legal tradition. The Czech Republic, France, Greece, Germany, Luxembourg, the Netherlands, England and Wales, Portugal and Spain either limit the right to appeal in small property disputes or establish the requirement for obtaining a leave to appeal. Austria and Italy limit the grounds on which a court judgement may be appealed against in small claims.[160] Such practices are natural, considering that the smaller the disputed amount, the larger the probability that lengthy dispute hearing proceedings, covering judicial review at a higher instance court, will be disproportionate to the significance of the case itself and its value for the litigants and the general public. Even in medical science in cases of life or death long and extensive tests are not run at public expense for health conditions which seem to be mild at a first sight.

In accordance with the data of the National Courts Administration, in 2015 courts of first instance of Lithuania tried 208,852 civil cases, out of which only 2,150 cases of first instance were revoked or amended after appeal. This means that the error probability rate in civil cases is miniscule – only 1 per cent from the total number of cases tried. Indeed, in 2015 out of all cases tried under appeal procedure approximately 64 per cent of appeals were rejected (62 per cent of individual appeals). Fewer than 5 per cent of all cases tried are appealed against (in 2015 courts of appeal examined almost 6,000 of appeals)[161]. All these figures illustrate a rather high public trust in decisions adopted at first instance courts. Examination of cases under appeal procedure relatively rarely rectify legal or factual errors made at court of the first instance. This circumstance seems to be a favourable one when considering the possibility of limiting a leave to appeal.

In 2015 an appeal procedure in regional courts approximately lasted 152 days on average (in 2014 – 155 days, in 2013 – 178 days), i.e., far shorter than the civil proceedings in regional courts of first instance (in 2015 – 254 days (in 2014 – 253 days and in 2013 – 254 days)). In the Court of Appeal of Lithuania an average duration of appeal procedure against court decisions of first instance amounted to 191 day

[160] See on-line access: <https://e-justice.europa.eu/content_small_claims-42-en.do?clang=en>.

[161] As a result of cases tried by regional courts as courts of first instance this percentage (i.e., number of judicial decisions appealed) may be 30 per cent or more.

(in 2014 – 252 days, in 2013 – 415 days) [162]. Over the past three years the number of cases received by the Court of Appeal of Lithuania has been decreasing (in 2015 a total of 3,165 civil cases were received, in 2014 – 3,333 and in 2013 – 3,473 civil cases). Indeed, the total number of cases received by courts of appeal in general has been growing: in 2015 there were 14,992 appeals lodged, in 2014 – 14,687 appeals, and in 2013 – 14,262 appeals, while the number of cases tried has been decreasing (in 2015 – 14,774 cases, in 2014 – 14,995 cases and in 2013 – 15,747 cases), resulting in a growing number of pending cases (in 2015 – 3,963, in 2014 – 3,770 and in 2013 – 4,086). An average duration of lawsuits under the appeal procedure in Europe in 2012 amounted to 265 days (a median of 155 days) [163]. It means that, unlike hearing of civil cases in courts of first instance where Lithuania is holding the leading position, Lithuania is mediocre when it comes to its standing in the appeal procedure of civil cases in Europe. Although the time spent in hearing of cases does not constitute a serious reason of concern, in particular, considering a steadily shortening duration recently, the very number of appeals and pending cases have been growing. Almost 50 per cent of Lithuanian judges who participated in the survey responded that Lithuania is too much focussed on the timeliness of the procedure, with too little focus given to the quality thereof or to the protection of litigants. A further 36 per cent of the judges supported this statement only partially. It means that there are circumstances which, albeit not categorically or not insistently, do encourage consideration and analysis of the possibility to limit leave to appeal in civil cases.

As mentioned already, in 2006 the Constitutional Court formulate an official constitutional doctrine whereby the provision of Article 30(1) of the Constitution stipulating that a person whose constitutional rights or freedoms are violated shall have the right to apply to a court covers, inter alia, the right to appeal, i.e., to appeal against a final judicial act of a first instance court to court of at least one instance higher. In light of a not so high trust in the judiciary, and bearing in mind that the right to appeal by many lawyers is considered as a recourse allowing to ensure fundamental personal rights and the quality of a judicial decision and justice (event though, as illustrated above, this is not by far considered as undoubtable truth), most probably there is no basis to expect that the Constitutional Court may change its position in the nearest future. Meanwhile, we believe that even without any change in the jurisprudence of the Constitutional Court the possibility of introducing some mechanisms for limiting leave to appeal could still be considered.

[162] In 2014 appellate procedure of individual cases in regional courts and in the Court of Appeal of Lithuania lasted for 67 and 50 days on average, respectively.

[163] Study on Council of Europe Member States Appeal and Supreme Courts' Lengths of Proceedings Edition 2015 (2006–2012 data). European Commission for the Efficiency of Justice (CEPEJ).

First of all, when deliberating on the issue of compliance with the Constitution of exclusion from appeal of a default court decision, the Constitutional Court held that the available legal regulatory framework, when read in conjunction with the regulatory framework laid down in the CCP and aimed at reopening of the proceedings, means that an exclusion from appeal or appeal in cassation for a litigant which has been subject to a default judicial decision may not be regarded as automatically precluding this litigant, through the institute of reopening the proceedings, from appealing against a default judicial decision also to a court of higher instance.

As regards judicial decisions of first instance courts which have not been reviewed in an appellate procedure, the Lithuanian CCP provides for a possibility to file a request for reopening of the proceedings, where in the decision adopted an obvious error has been made in applying a legal norm that may have led to the adoption of unjust decision (Article 366(1)(9) of CCP). Therefore, if it was decided to limit leave of appeal for some categories of cases (e.g., in small claims), this would not eliminate the right of the person affected to request to review the legality and validity of the adopted judicial decision on the ground laid down in Article 366 (1) (9) of CCP. Reference to a legal error made in this paragraph may also include a manifestly wrong application of the material or procedural law and rules on adducing of evidence related to assessment of facts. A judicial ruling refusing the reopening of the proceedings on this ground shall be subject to a separate appeal (Article 370(1) of CCP). It means that the judicial review of a judicial decision of a first instance court which would be excluded from appeal, could, in principle, be undertaken at a court of higher instance. Such review would be done indirectly while questioning the refusal of a judicial ruling of a first instance court to reopen the proceedings. Such system of judicial review, in the case of a default decision referred to above, was recognised as constitutionally compatible and as sufficient for the purpose of ensuring personal right to defence at a court of higher instance. It follows that there is the basis to discuss whether the official constitutional doctrine formulated by the Ruling of 16 January 2016 by the Constitutional Court regarding the personal right to appeal against a final legal act to a court at least one instance higher completely eliminates the right to limit the right to appeal.

Second, it has been said that in some states the right to appeal is subject to permission by a first instance court or a court of appeal. Lithuania has a successfully functioning system of cassation based on permissions which has, in principle, an established case-law. Therefore, in order to reduce the case-load of appellate courts, consideration may be given to the possibility of introducing permission-based appeals to some categories of cases. Among the first category of cases there could be small property claims as well as disputes that have already been analysed

before the court procedure by independent dispute resolution institutions (such as commission for labour disputes, the Bank of Lithuania, the State Consumer Rights Protection Authority, etc.).

The Lithuanian civil procedure law, namely Article 341 of CCP, stipulates that court decisions and rulings of first instance which have not yet been reviewed under the appeal procedure shall be excluded from cassation. It follows that it is impossible in Lithuania to leapfrog a court of appeal and to lodge an appeal in cassation directly to the Supreme Court of Lithuania. From the point of view of timeliness of the procedure, absence of such possibility has a negative impact on the length of the proceedings not only of a single case. Indeed, such absence may have e negative effect on the timeliness of hearings of other identical cases. In order for a case to reach the court of highest instance, even in the absence of disputes on factual circumstances and in the presence of the need to submit a legal interpretation significant for the entire legal system as fast as possible (e.g., when a lot of identical cases have been/are being initiated by courts), a court decision of the first instance can only be appealed against to a court of first instance. There may be a situation that by the time the first case reaches the Supreme Court of Lithuania, courts of lower instances might have developed divergent case-laws on the same issue of law. Once the Supreme Court gives its interpretation, many decisions adopted by the first and/or appellate instance courts may have to be overruled should it transpire that these are incompatible with the case-law developed by the Supreme Court. All this may lead to a situation when cases have to be returned to appellate or even first instance court, thus further extending the proceedings.

Recently the case-load of the Supreme Court of Lithuania has been stable, hearing of cases takes place in a timely manner, whereas the case-load or time limits for hearings do not seem to be an issue (for more details, read below). Thus, if introduced, the right to seize the Supreme Court of Lithuania directly would unlikely have any significant impact on its total case-load. It is often the case that extremely complex and highly significant disputes eventually result in appeals in cassation which are most likely to be admitted. Therefore, the fact that an appeal in cassation reaches the Supreme Court of Lithuania earlier than it would do now (immediately after the decision by a first instance court) only means that, instead of hearing taking place in one year or so (after the completed appeal procedure, as is the case now), it would be tried in the Supreme Court in three to four months (after the hearing of the case in a first instance court, if the possibility to leapfrog the appellate instance was introduced).

Decision on whether there should be the right to leapfrog the appellate court most probably would have to be made by a court of first instance which is hearing the

case because otherwise the Supreme Court of Lithuania would be overflown with direct appeals circumventing the appellate court. The Supreme Court of Lithuania should, however, enjoy the discretion on whether to refuse to accept an appeal in cassation, if an appellant in cassation, even after obtaining a court permission to seize the Supreme Court directly with appeal in cassation, would fail to formulate the grounds for cassation, as required by Article 346 of CCP. In our view, such system could allow properly balancing the current system. It shall be noted that Recommendation No. R(95)5 of the Committee of Ministers of the Council of Europe makes reference to the possibility of leapfrogging the appellate procedure as one of potential tools for improving the appeal procedure.

In addition to the obligation to obtain a court permission for lodging an appeal or exclusion from appeal of cases of first instance of certain categories, access to appellate courts may be limited with other mechanisms. Nobody is surprised by the obligation to pay a court fee when lodging an appeal. From a comparative point of view, other tools could be found as well to deter from access to a higher instance court. In France and Spain there are some case categories which can qualify for appeal only if the appeal against a decision of a first instance court is enforceable or provided that the amount awarded by a decision of a court of first instance is paid to a deposit account, or where a surety or guarantee is provided to secure enforcement of the decision of a court of first instance. Such tool undoubtedly serves as a deterrent from appeal to litigants who would like to lodge an appeal solely on account of suspensive effect, i.e. whose primary goal is to postpone enforcement of the court decision of first instance. Under this model a court decision of first instance not only becomes enforceable despite a possible appeal, but it must be enforced in order to qualify the case for appeal and request to verify the legality and validity of the court decision of first instance in a court of higher instance.

No such mechanism of deterrence from appeal is available under the Lithuanian law of civil procedure. Even its evaluation is not a foregone conclusion. It is one thing to expand the range of decisions subject to an accelerated enforcement and thus deprive litigants acting in bad faith from delaying the enforcement of a court decision pending the outcome of the appeal procedure. It's another thing "depriving" of the right to appeal, where a decision appealed against is not enforced, i.e., where the right to appeal is made conditional on the circumstances not directly linked with the substance of appeal or implementation thereof.

While Article 6 § 1 of the European Convention on Human Rights does not compel the Contracting States to set up courts of appeal or of cassation, a State which does institute such courts is required to ensure that persons amenable to the law shall enjoy before these courts the fundamental guarantees contained in

Article 6 § 1, states the European Court of Human Rights.[164] The European Court regularly emphasizes that the right of access to the courts is not absolute but may be subject to limitations permitted by implication[165]. This applies in particular where the conditions of admissibility of an appeal are concerned, since by its very nature it calls for regulation by the State, which enjoys a certain margin of appreciation in this regard. Nonetheless, the limitations applied must not restrict or reduce the access left to the individual in such a way or to such an extent that the very essence of the right is impaired. Furthermore, a limitation will not be compatible with Article 6 § 1 if it does not pursue a "legitimate aim" and if there is not a "reasonable relationship of proportionality between the means employed and the aim sought to be achieved[166]. In the context of the aforementioned principles, the means described by the European Court of Human Rights (namely, requirement to pay a deposit equal to the amount awarded by the court or a deposit to ensure enforcement of the court decision appealed against) were not recognised as incompatible with the Convention. The Court noted that the aims pursued by the obligation imposed on appellants to comply with the decisions are legitimate, notably for the purposes of ensuring protection for judgment creditors, avoiding dilatory appeals, reinforcing the authority of the courts below and relieving congestion in the courts of appeal[167].

We believe that the Lithuanian civil procedure law shall primarily assess the possibility of expanding a list of court decisions with immediate effect. For instance, the Consultative Council of European Judges (CCJE) recommends that court judgments should be immediately enforceable, notwithstanding any appeal, subject to provision of security where appropriate to protect the losing party in the event of a successful appeal[168]. So far, we believe that there is no reason to resort to any of the above mentioned or even more radical measures.

Another more popular method which forces the appellant to consider seriously his prospects before lodging an appeal to a court of higher instance is the introduction of the requirement for a deposit to cover potential litigation costs of other litigants in the case. Although the Lithuanian Code of Civil Procedure does not provide for such a possibility, a draft law to this effect has already been registered

[164] European Court of Human Rights. Judgement of 11 January 2001 in *Platakou v. Greece*, case No. 38460/97.

[165] European Court of Human Rights. Judgement of 21 February 1975 in *Golder v. the United Kingdom*, case No. A-18.

[166] European Court of Human Rights. Judgement of 17 July 2003 in case Luordo v. Italy, No. 32190/96.

[167] European Court of Human Rights. Judgement of 8 September 1998 in case *Annoni di Gussola and others v. France*, No. 31819/96.

[168] Opinion No. 6 (2004) on fair trial within a reasonable time and judge's role in trials taking into account alternative means of dispute settlement, Consultative Council of European Judges (2004).

with the Seimas of the Republic of Lithuania which hopefully is soon going to be adopted and is to reduce the number of abusive use of the right to appeal[169].

The mechanism of exercising the right to appeal is also a very important aspect of trial within a reasonable time. At present the Code of Civil Procedure of the Republic of Lithuania provides for a time limit of 30 days for an appeal to be lodged against a judgement of a court of first instance. It happens so that although not completely satisfied with the judgement of a court of first instance, a litigant is ready to accept it and not go ahead with further litigation, provided that the opponent is equally satisfied with the judgement delivered and is not planning to appeal against it. The legal regulation laid down in the Lithuanian CCP is not favourable for such a possibility to resolve a dispute without appeal where both litigants agree to the judgement of a court of first instance as an acceptable compromise. The litigant who is hesitant and yet is ready to accept the court judgement and not to lodge an appeal against it provided that the other litigant also refrains from appeal, may not rest assured that the other litigating party is no going to lodge an appeal on the very last day of the available time limit, thus depriving the former party from access to appeal. From that it follows that the existing legal regulation encourages, to some extent, the hesitant litigant to seize court in order not to lose the right of appeal.

In view of the above, it shall be considered whether it would not be prudent to allow for a party to the proceedings to lodge a counter appeal within a certain deadline after the other party to the proceedings has lodged an appeal, i.e., within the time limit laid down for submitting a reply to an appeal. Such regulation would help to ensure that a party to the proceedings who hesitates whether or not to appeal against a court judgement because of unawareness of the other party's move, would thus be not encouraged to appeal against a court judgement simply because of fear to lose the right to appeal. Such a mechanism would probably contribute to cutting down the number of appeals on one hand, and could facilitate avoiding delays of the hearing on the other hand, provided that the time limits set for counter appeals were very clear. It is noteworthy that this model in the legal doctrine is viewed as one of the tools facilitating the efficiency of appeals and is a well-known practice in Spanish, French and German civil codes[170].

[169] The purpose of this draft law is to establish that: "if there is a reason to believe that a person lodging a claim (initial or counterclaim), an appeal, an individual appeal or appeal in cassation requests to reopen the proceedings, application or request under the non-contentious procedure may abuse procedural rights and not cover the litigation costs incurred, the court shall be entitled to oblige this person to pay a deposit to ensure payment of litigation costs. In the event of failure to pay a deposit within the given time limit the court shall dismiss the procedural document. The size of the deposit shall be fixed, returned and the litigation costs shall be covered from the deposit paid by way of applying *mutatis mutandis* Articles 795–798 of this Code."

[170] Op. cit., 155, 197.

It is a standard practice of the European civil procedure law that the higher the instance of a court, the more often cases are heard collectively, i.e., by a larger number of judges hearing the case. The principle of judges acting as a college is undertaken in order to increase the probability of a just and impartial outcome. In theory, participation by each member of a college in discussions with colleagues may compensate for differences in knowledge, believes, understanding and perception of judges hearing the case. The resulting final outcome is, therefore, much more than a sum total of individual decisions. Coordination of positions and integrational processes within a class may give birth to unique and collective ideas, decisions and arguments which could otherwise be not possible by individual judges acting on their own. According to group psychologists, the quality of a group have the potential to surpass the quality of a decision which could be taken by the most qualified member of this group when acting on his own under identical circumstances. Naturally, there are skills which have to be mastered in order to make use of these advantages. One has to possess knowledge and skills on how to use the advantages of group thinking.

On the other hand, one shall not overestimate the advantages of a collegiate decision taken when acting as a group. These advantages are purely theoretical. Indeed, despite rather extensive trainings organised for the judges of Lithuania in areas other than the law (on issues of psychology, ethics, stress management, time planning, etc.), training on best use of skills and advantages of a team work are almost non-existent. Secondly, due to a very high case-load in courts of first instance, in particular, we have to be realistic and aware that the advantages of collegiality cannot always be implemented in practice. Thirdly, even a team work may have its shortcomings, such as a court decision which may be a result of negotiations and compromise reached among team members, which by its own right is not always clear or consistent and may have some gaps. Fourthly, experience, knowledge and qualifications of a judge of a higher instance court are, as a rule, higher than those of a first instance judge; the former benefits from more experienced assistant judges, usually has a smaller case-load, thus there may be other leverages which could make it possible even for one judge to properly exercise the purpose of appeal. Fifthly, hearing of cases by one judge frees the judges from involvement in a collegiate hearing, thus creating the conditions for them to hear a larger number of cases within the same period of time. Sixthly, Article 6, par. a) of Recommendation No. R (95)5 of the Committee of Ministers of the Council of Europe says that a single judge could be used, for instance, in some matters, such as applications for leave to appeal, family cases, minor and urgent cases, where the appeals is manifestly ill-founded, etc.

In summary of the above, the innovation introduced the Lithuanian civil procedure law as of 1 October 2011 to expand the possibility of hearing by a single judge

of not only separate appeals against rulings of courts of first instance on procedural matters, but also of some cases on decisions of courts of first instance on the merits of the dispute (when the amount contested by an appeal is above one thousand four hundred fifty euros, as well as cases tried under non-contentious procedure) is, in principle, welcome. It came as a natural response to what was happening in courts of appeal in 2008–2011, when the duration of hearings, according to the data of the National Courts Administration, grew by 50–100 per cent. In 2008, hearing of civil (appeal) cases in regional courts of first instance lasted 108 days on average (and 58 days in the case of rulings), whereas in 2011 – already 208 days (or 107 days in the case of rulings). Hearing of civil (appeal) cases by the Court of Appeal of Lithuania lasted for 197 days (or 42 days in the case of rulings), whereas in 2011 – 309 days (or 88 days in the case of rulings). It is noteworthy that the scope of the mechanism in question is very limited. Meanwhile, it is provided for that the judge in charge of the case may adopt a ruling, whereby the case shall be referred for hearing by a panel of three judges.

According to the public survey of Lithuanian judges, 50 per cent of the respondents indicated the extension of hearing of cases by a single judge as an efficient tool for speeding up hearings in the courts of appeal which does not have any negative impact on other goods (such as quality, judicial independence, etc.). A further 35 per cent of the respondents agreed to the aforementioned statement only in part. However, it shall be noted that the survey highlighted the fact that where a case is tried by a panel of judges, many issues arise and there is an on-going discussion which all contribute to the quality of hearing of this type. Moreover, note was taken of the fact that hearing by a single judge is not that significant, nor does it save much time, considering that the appeal procedure is a written procedure, but it may have an impact on the quality of the judge, judicial independence and impartiality.

The predominance of the written appeal procedure has become one of the main tools in Lithuania encouraging hearing of appeals within a reasonable period of time. As already mentioned, in 2008–2011 the duration of hearings in courts of appeal was getting longer at a lightning speed. In 2011 an average length of hearings at the Court of Appeal of Lithuania of civil cases (appeals) against court decisions of regional courts exceeded 400 days (415). In face of the economic crisis the state could not afford allocating more funds for the judiciary and increasing the ranks of the judiciary. Amendments in the legal regulation were chosen instead. The most significant amendment of the time was that as of 1 October 2011 cases under appeal procedure had to be tried in writing. An appeal shall be tried under oral procedure where the court hearing the case recognises the necessity for a verbal hearing. Parties to the appeal, to the reply of the appeal or application permit joining the appeal

may present a substantiated application requesting verbal hearing of the case, which is not binding upon the court (Article 322 of CCP). In this way Lithuania has, in principle, implemented Recommendation No. 84(5) of the Committee of Ministers of the Council of Europe on the Principles of Civil Procedure Designed to Improve the Functioning of Justice. The fourth principle of this recommendation stipulates that the court should be empowered to decide, having regard to the nature of the case, whether written or oral proceedings, or a combination of the two, should be used. The explanatory memorandum to this recommendation, inter alia, indicates that a written procedure shall dominate in appeal procedures.

Broadly speaking, the oral procedure may have its own advantages. A verbal deliberation of the matter may put the conditions in place that are necessary to get a more in-depth understanding of the claim; the oral procedure ensures the principles of publicity, impartiality and direct participation; this procedure may be simpler and clearer. When it comes to the drawbacks, the oral procedure is much more time- and fund-intensive, with a higher probability of abusive attempts by the parties. The advantages of the written procedure are that the litigants may analyse replies and arguments presented by the opponent party in much greater detail, they can formulate their claims in a more precise manner, and there is no need to be fully focused during the entire procedure[171].

Indeed, the written procedure in courts of appeal surely contributes to the acceleration of judicial proceedings. The written procedure is good for saving time of the litigants as well as courts, which would otherwise be spent during verbal judicial hearings. This advantage becomes all the more relevant in view of the limitations of appeal under the Lithuanian civil procedure. Article 324(2) of CCP stipulates that during oral procedures the court shall issue a warning to the parties of the proceedings in the event when the contents of verbal statements mismatch the contents of procedural documents submitted. Under Article 320(2) of CCP, a court of appeal shall hear the case without overstepping the limits as prescribed in the appeal, except where the public interest so requires or where failure to do so would violate the rights and legitimate interests of an individual, the society or the state. Article 323 of CCP provides for that after the lapse of time limit for lodging an appeal, it shall be prohibited to amend (supplement) the appeal. Evidence examined at a court of first instance shall be reviewed in addition or re-examined by a court of appeal should the court decide it to be necessary (Article 324(3) of CCP). It follows that the verbal hearing in a court of appeal usually does not create, nor can create any significant additional value-added which could enhance the

[171] Driukas, A., Valančius, V. *Civilinis procesas: teorija ir praktika* [Civil Procedure: Theory and Practice]. Vol. 1. Vilnius: Teisinės informacijos centras, 2005, p. 291.

probability of awarding a just decision by the court since the appellants are bound by the arguments and claims already laid down in the written procedural documents presented to the court.

Considering the above, we believe that abandoning the model of mandatory verbal hearing of cases constitutes an effective measure for expediting the proceedings. In its Ruling of 6 December 2012, the Constitutional Court held that the legislator, when regulating the relations of consideration of cases in court, must establish such legal regulation that would create the conditions to investigate a case and execute a decision without any unjustified interruptions, thus, precluding procrastination of consideration of cases in court, *inter alia* in the cases when persons abuse their procedural rights. According to the Constitutional Court, the written procedure allows for hearings to be conducted without any unjustified interruptions, thus preventing procrastination of hearings[172]. The public survey of Lithuanian judges demonstrated that 76 per cent of the respondents subscribe to the statement that the extension of the written procedure to appeal hearings is an efficient measure to speed up the hearing of cases in courts of appeal, which does not have a significant negative impact on other goods (quality, the right to be heard, etc.). A further 20 per cent partially supported the statement.

According to the data of the National Courts Administration, there were 531 civil cases appeals tried under the oral procedure in 2015 (out of which 440 were appeals against courts of first instance), 14,145 cases were tried under the written procedure (out of which 5,545 were appeals against decisions of courts of first instance). It follows that approximately 7 per cent of all appeals against judicial decisions are tried under the oral procedure. It is difficult to say with certainty whether this is a large or small percentage. Nevertheless, it is worthwhile paying attention to the fact that the survey of Lithuanian judges has shown that in less than half of all cases appealed with courts of appeal the oral procedure is requested. 85 per cent of the respondents noted that the oral procedure was requested in 10–50 per cent of all cases tried by them. This allows to assume that often the oral procedure in principle is not requested by the appellants themselves. Nevertheless, the courts are advised to stay vigil and analyse with due caution if there is a need for hearing to take place under the oral procedure.

The authors of the research heard from the justices of the Supreme Court of Lithuania that the quality of courts of appeal had recently deteriorated, which might be the result of a rather standard practice of hearing cases under the written procedure. Now that the length of hearings in courts of appeal has gradually started to stabilise, it could be appropriate to consider the possibility of empower-

[172] The Constitutional Court of the RoL. Ruling of 6 December 2012. No. 33/2009.

ing court chairperson to initiate an internal agreement with justices to hear some categories of cases in a simpler way and more often in verbal proceedings (for instance, the already mentioned cases on permanent custodial rights, as well as on dismissal from job for gross occupational misconduct, on award of non-material damage, on annulment of transactions on grounds of error or fraud, protection of personal non-property rights related to interpretation to contracts and the issue of personal guilt). Article 322 of the Code of Civil Procedure stipulates that the court shall be entitled to decide on whether to hear the case under the oral procedure; such decision may be made also by the chairperson of the court of appeal or the chairperson of the civil division of this court who, acting in accordance with the established procedure for distribution of cases in courts, shall rule and compose a panel of judges, the chair and the rapporteur as well as fix the date for the proceedings (Article 319(1) of CCP).

The analysed case-law demonstrates that by far the trickiest area of the written procedure in a court of appeal is admission of new evidence. Article 314 of the CCP provides for that a court of appeal shall refuse to accept new evidence which should have been presented at a court of first instance, save for cases where the court of first instance had wrongly refused to accept them or where the necessity to present this evidence arose at a later stage. This provision is in line with the principles of contemporary and effective civil procedure. When it comes to its practical application, though, it is being corrected by the Lithuanian case-law. In its interpretation of the provisions of Article 314 of CCP, the Supreme Court of Lithuania ruled that the purpose of Article 314 of CCP is to prevent the possibility of abuse of the procedure and to encourage the litigants to act in the interest of a rapid and extensive examination of the case instead of causing surprise after the award of a judicial decision in a first instance court. These limitations are primarily aimed against litigants acting in bad faith who deliberately hide some evidence. In the process of gathering and submission of evidence, it is totally unacceptable to be aware of the available evidence and their crucial importance for the establishment of facts of the case and yet conceal them deliberately. Moreover, the Supreme Court of Lithuania has held that the limitation imposed upon submission of new evidence to a court of appeal shall not be absolute. The court has to apply the law only after verifying the facts significant for the case with reliable data; thus, evidence may be admitted in the stages where the issue of facts is being deliberated, while in order to substantiate their positions the appellants may present evidence which has been newly discovered or demanded, provided that such right is not abused by them[173].

[173] Division of Civil Cases of the Supreme Court of Lithuania. Ruling of 14 April 2016 in civil case *UAB „Vespila" v. UAB „Aksa"*, No. 3K-3-218-916/2016.

Therefore, the provision limiting submission of new evidence to a court of appeal shall not be invoked upon formally and shall not be used against the appellants acting in good faith. In other words, only in the case of abuse can acceptance of new evidence be rejected.

Article 314 of CCP does not provide for explicitly defined criteria when new evidence can be refused to accepted. Despite this, we believe that Article 314 of CCP does not contain any hints that the refusal by a court of appeal to accept new evidence shall be linked with abuse or fraudulent concealment of evidence by an appellant. Therefore, the said case-law of the Supreme Court of Lithuania illustrates that courts follow a very broad interpretation of the possibility to submit new evidence to a court of appeal. In this way it departs from the will of the legislator, who, at the time of adoption of the new code of civil procedure, was not aiming at making this possibility dependent upon the conditions which are formulated in the case-law of the Supreme Court. Moreover, the doctrine of abuse is invoked upon in a very unusual way in this case. The doctrine is used to justify not a narrow, but rather a broad interpretation of the right to act in a certain way. We find this means of legal justification inacceptable. We believe that all of this gives a firm basis to assume that a court of appeal regards admission of evidence at a court of appeal not as a natural procedural judicial outcome, but rather as a very strict "penalty". If, for the purpose of exercising the right to a procedural right the preconditions for such exercise are not satisfied, then the procedural actions undertaken by a party to the proceedings would have to be simply refused to be recognised as legally significant. In other words, in this way the court should refuse to acknowledge the exercise of this right, to sanction relevant procedural actions and disallow legal consequences deriving therefrom or related thereto. Thus, for instance, if a person violates a relative obligation to submit evidence to the court in time (Article 7(2) of CCP), the court shall be entitled to refuse to accept them (Article 181(2) of CCP). It shall be stressed, though, that such negative consequences do not constitute imposition of liability. The right of a court to refuse to accept evidence submitted belatedly is a possible option of a follow-up procedure rather than a procedural sanction[174]. Such refusal is a completely elementary outcome of improper discharge of procedural rights. The latter aspect is highly relevant in the law of civil procedure.

The case-law of the Supreme Court of Lithuania also illustrates a rather unique approach adopted by this court in terms of the impact on the length of the proceedings determined by admission of new evidence to a court of appeal. For

[174] Nekrošius, V. *Civilinis procesas: koncentruotumo principas ir jo įgyvendinimo galimybės* [Civil Procedure: the Principle of Concentration and Possibilities for Implementation Thereof]. Vilnius: Justitia, 2002, p. 94.

instance, the court ruled as groundless a conclusion drawn by a court of appeal that joining new evidence would result in delayed hearing on the ground that the request to join the given document to the case was submitted to the court much earlier than the composition of a panel of judges which was supposed to hear the case at a court of appeal and before the starting date of the hearing in which the appeal was to be deliberated.[175] Obviously, the court is following a too narrow approach when interpreting a potential impact of admission of new evidence on the duration of the proceedings. The court does not reflect as to whether, on the grounds of new evidence submitted, the case would not have to be returned to a court of first instance. Moreover, in the same case, among the grounds which it indicated declining to accept the refusal by a court of appeal to accept new evidence, the Supreme Court of Lithuania ruled that it was partially upholding the conclusion drawn by a court of appeal to the extent that the document delivered contained quite a few derivative evidence, i.e., examination of data which are and/or might have been in the case file. The court drew note that not all data contained in the expert's opinion were derivative, moreover, it summarised some genuine data, thus creating data of new quality. We believe that such arguments are subject for discussion as they open up the possibility for courts of appeal to submit such evidence illustrating that an appellant failed to take care of proper evidence at a court of first instance, although the genuine preliminary data on the basis of which a new evidence could have been obtained (an expert's opinion) that would have been relevant for a court of appeal was mostly already available earlier.

Nevertheless, the case-law of the Supreme Court of Lithuania is inconsistent on this issue. In another more recent case the Supreme Court of Lithuania basically did not follow the principle that abuse is a mandatory precondition qualifying for the refusal to accept new evidence at a court of appeal. The court held that the claimant had not presented any data explaining the reasons why the partial expertise of a construction (land parcel) (evidence which was submitted to the court of appeal) could not have been made available during the hearing of the case already at a court of first instance, thus making it impossible to consider the expertise document as a newly demanded or discovered evidence. The circumstance that the court of first instance, when ruling on the insufficiency of data, adopted a decision unfavourable for the claimant, does not entitle the claimant to an additional process of submitting evidence, i.e., to submit additional evidence in order to substantiate his claim. In the opposite case the principles of equal treatment, concentration of the process, cost effectiveness and adversarial proceedings would be violated

[175] Division of Civil Cases of the Supreme Court of Lithuania. Ruling of 13 February 2015 in civil case No. 3K-3-38-969/2015.

(Articles 7 and 12 of CCP)[176]. Therefore, a careless believe that the court of first instance is going to satisfy the claim can hardly form the basis for submitting new evidence to a court of appeal.

Moreover, the Supreme Court of Lithuania provided the following interpretation that, where (having verified the supporting circumstances) a court of appeal deems that submission of new evidence is reasonable and thus new evidence can be admitted in order to ensure the principles of cost effectiveness and concentration (Article 74 of CCP), sufficient time shall be allowed for the litigants to get access to the new evidence and to state their opinion. It shall be borne in mind that not only a litigant to the case shall receive a request from the court to adduce new evidence together with new evidence, in full compliance with the legal provisions stipulating the procedure for adducing evidence. The court, having decided to join new evidence to the case, shall ensure that the procedural right of the opponent to submit explanations on the evidence is not going to be limited. The Supreme Court of Lithuania emphasises that the concept of a fair trial enshrined in Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms ensures equal treatment of the parties whereby each of the party to the proceedings shall be provided a reasonable possibility to present their case in the circumstances which would not put it into a less favourable situation than the other party; the right to adversarial procedure as one of composite parts of the right to a fair trial entails the possibility for the parties to adduce evidence substantiating their claim as well as the right to have access to and comment on all evidence or comments adduced for the purpose of influencing a court decision. The parties may rightfully expect that they are going to be consulted/asked whether a specific/given document needs to be commented[177].

The case-law of the Supreme Court of Lithuania given above is very clear. Moreover, we believe the court should enable other parties to the proceedings to express their opinion on request to adduce new evidence at a court of appeal before the court actually decides whether (not) to accept such evidence. Only this process would facilitate a genuine and comprehensive adversarial procedure. As regards the jurisprudence of the ECHR cited in the ruling of the Supreme Court of Lithuania, there is no basis to limit the right of an individual to express an opinion on the admissibility of new evidence at a court of appeal and instead limit it to the possibility of responding to the evidence already adduced and accepted by the court.

[176] Division of Civil Cases of the Supreme Court of Lithuania. Ruling of 29 April 2016 in civil case No. e3K-3-244-611/2016.

[177] Division of Civil Cases of the Supreme Court of Lithuania. Ruling of 14 April 2016 in civil case No. 3K-3-218-916/2016.

Another issue which has so far merited very moderate interpretation in the case-law of the Supreme Court of Lithuania is whether the written procedure at a court of appeal shall be possible in the case where the court decides to accept new evidence. In this regard the court of cassation noted that the scope of hearing under the appellate procedure is defined by a factual and legal basis of an appeal; therefore, the court of appeal entitled to examine the facts may acknowledge that, where there is a legal basis to accept new evidence, the case shall be heard under the oral procedure[178]. However, we believe that acceptance of new evidence, in particular such evidence which has a huge impact on the outcome of the case, should not usually trigger the discretion of the court whether the case should be tried under the written or oral procedure, instead, as the Supreme Court suggests, acceptance of new evidence should oblige the court to hear the case under the oral procedure. The higher the significance for the outcome of the case of the newly accepted evidence by a court of appeal, the more likely it is that the court will have to deliberate on the important issue of facts, which, in line with the jurisprudence of ECHR, presupposes the necessity to try the case under the oral procedure. This conclusion is supported further by the circumstance that no oral discussion could have taken place in the first instance court on this evidence due to objective reasons because such evidence was non-existent and was not part of the case file. Acceptance of new evidence indicates that the court of appeal will have to examine and assess it and, in compliance with the principle of direct participation, which could best be achieved provided that all the parties to the proceedings are present at the oral hearing of the case. The Spanish civil procedure contains the rule whereby the oral hearing is necessary whenever a new piece of evidence is accepted because its examination shall be made during the oral hearing[179].

The Supreme Court of Lithuania has provided a reasonable interpretation that CCP does not directly lay down the right of the parties to appeal against a court ruling which rejects a request of one of the parties to try the appeal under the oral procedure. Such court ruling does not preclude further course of the proceedings and, in accordance with Article 334(1) of CCP, it may not be appealed against by an individual complaint and, hence, by an appeal in cassation. Therefore, the court of appeal can, by adopting the same ruling, lawfully and reasonably examine the request for the type of the procedure to be used in the appeal and deliberate the case on its merits[180]. Hence, the court is not obliged to hear the case under the oral

[178] Division of Civil Cases of the Supreme Court of Lithuania. Ruling of 23 December 2015 in civil case No. 3K-3-683-686/2015.

[179] Op. cit., 155, 214.

[180] Division of Civil Cases of the Supreme Court of Lithuania. Ruling of 3 July 2015 in civil case *AB „SEB lizingas" v. A. S.*, No. 3K-3-436-611/2015.

procedure immediately after receiving a request to this effect and shall pass the ruling solving the issue. On one hand, such move saves time because no additional procedural document has to be issued. On the other hand, it is often the case where the court cannot, by having not yet started the written procedure of the hearing, be sure whether the oral procedure would be more appropriate in the given case.

The legal doctrine and the case-law admits that Lithuania has introduced a model of limited appeal, which is understood as revision of legal or factual errors made by the court (*revisio prioris instantiae*). The limited appeal has the following advantages: the litigants are forced to be more conscious of the course of the proceedings and submit all available evidence already during the first instance procedure. Moreover, conditions are put in place to limit the possibility of dilatory attempts by the party acting in bad faith. In this way the principle of promptness is pursued and the right of the litigant to a trial within a reasonable period of time. In addition, the process of limited appeal pursues the aim of preventing possible abuse of the procedure and encourage the litigants be proactive aiming at a rapid and comprehensive hearing of the case, to litigate in good faith and disclose all the data important for the case already at a court of first instance[181].

Recommendation No. 95(5) of the Committee of Ministers of the Council of Europe notes that in principle, the issues of the litigation should be defined at the level of the first court. All possible claims, facts and evidence should be presented to the first court seized. States should consider adopting legislation or other measures to that effect. In the opinion of the Consultative Council of European Judges (CCJE) it was indicated that judges should have power, both at first instance and on any appeal, to exclude amendments and/or new material[182].

Article 323 of CCP stipulates that after the lapse of time limit for lodging an appeal, it shall be prohibited to amend (supplement) the appeal. Prohibition to supplement the appeal could be interpreted as deprivation of a possibility, after the lapse of time limit for lodging an appeal, to submit any new explanations, including those which elaborate and provide more detailed clarification of the arguments laid down in the appeal or reflect the change in the position due to objective circumstances beyond the parties' control. As regards the said statutory provision, the Supreme Court of Lithuania noted that the right to submit explanations to court in writing or orally has been enshrined in Article 42(1) of CCP; a party can exercise this right also during a hearing of a case in an appellate court (Article 302

[181] Division of Civil Cases of the Supreme Court of Lithuania. Ruling of 29 November 2013 in civil case *BUAB „Sapnų sala" v. UAB „Draugų studija"*, No. 3K-3-616/2013.

[182] Opinion No. 6 (2004) on fair trial within a reasonable time and judge's role in trials taking into account alternative means of dispute settlement, Consultative Council of European Judges (2004).

of CCP). As a result, the appellate court, having accepted written explanations of a party before the commencement of the hearing of the case on its merits, shall not be regarded as having committed a statutory violation[183]. Therefore, it means that the given provision is not strictly applied. If applied too liberally, this provision may put into question the true substance of Article 323 and run against the aim to concentrate the proceedings, avoid procedural surprises, as well as it may downplay the significance of an appeal, demand additional costs of the parties and the court. For instance, once received, any newly accepted additional explanations have to be forwarded to the opposing party to allow it make an informed decision on whether it would intend to provide its opinion on the issue.

It shall be noted that the Lithuanian law does not limit the right of an appellant to present a new legal argument not raised at a first instance court. Article 306(2) of CCP stipulates that the appeal may not be based on circumstances not determined at a court of first instance. If interpreted following a systemic approach, the concept of "circumstances" referred to in this legal norm covers facts only, excluding legal arguments. Considering that the Lithuanian civil procedure law has a deeply rooted principle of *iura novit curia*, and in order to achieve that an appellate procedure is not a mere illusion or theory, and is instead the instance for rectifying errors of the first instance courts, we believe there is no basis to exclude the right to submit new legal arguments in the appeal. Prohibition to indicate new defence arguments would unjustly limit the possibility of the parties to defend themselves against the claim already lodged and against an unlawful court decision[184]. Submission of new legal arguments does not mean, nor should entail a hidden attempt to change the subject matter or the ground of appeal.

Under Article 312 of CCP claims that have not been lodged during the hearing of case at a first instance courts cannot be lodged in an appeal. Not considered as new claims are such claims which are directly related to the claim already lodged (for instance, claim to award default payment, interests, etc.). We believe that this provision is perfectly in line with the principles of concentration and cost effectiveness of the proceedings. When it comes to reality, though, in some instances the case-law brings the imperative nature and absolute applicability of this provision into question from the points of view of fairness and compatibility with the right to trial within a reasonable period of time.

In April 2016 the Supreme Court of Lithuania decided to compose an extended panel of judges in a case where the key claim raised by the claimant at a court of

[183] Division of Civil Cases of the Supreme Court of Lithuania. Ruling of 20 December 2013 in civil case No. 3K-3-701/2013.

[184] Division of Civil Cases of the Supreme Court of Lithuania. Ruling of 17 March 1999 in civil case No. 3K-3-20/1999.

first instance was to oblige the respondent to enforce the franchise contract. This claim was satisfied in part. During the hearing of the case in an appellate court and prior to the adoption of the final decision, the franchise contract had expired. In the opinion of the appellate court, since the franchise contract had expired, the respondent could not have been made to enforce the franchise contract in kind. As a result, by acting on the court's advice, the appellant decided to amend his claim and substituted the initial claim to apply the requested remedy of enforcement of contractual obligations in kind by claim for damages. Having examined the case, the appellate court ruled that such substitution of an available legal remedy did not constitute a change of the subject matter of the claim.[185] We do not share the same view with the court. Substitution of one available legal remedy by another legal remedy does constitute a change of the subject matter of the claim. The Supreme Court of Lithuania held that the subject matter of a claim is a material statutory claim constituting a legal remedy selected by a claimant to defend the rights being infringed or contested[186]. From this interpretation it follows that a change of a legal remedy does amount to the change of the subject matter of the claim.

Indeed, prohibition to lodge new claims at an appellate court does have a lot of positive aspects, is extremely important for the purposes of concentration and cost effectiveness of the proceedings, prohibition of abuse, reinforcing the authority of a first instance court. However, in the given case some exceptional circumstances developed. When seizing the court the claimant selected the type of legal remedy which was predetermined by the substantive law. He did not have a wide choice in this case. Unfortunately, due to lengthy proceedings, which for the most part resulted from an increasingly growing case-load of the Court of Appeal of Lithuania, as a result of this delay after the case reached the appellate court, the situation had changed for reasons beyond the claimant's control. In principle, the appellant lost his right to demand what he was initially claiming and which he managed to achieve, only partially, at a first instance court.

Having regard to the facts described above, it becomes questionable whether the advantages of prohibiting submission of new claim at the appellate court indeed outweigh possible negative consequences and losses which would be incurred by the appellant if he was forced to start everything from scratch. Indeed, it may be worthwhile considering whether there is a need for legal amendments to allow, under exceptional circumstances, to substitute the initial claim at an appellate court,

[185] Division of Civil Cases of the Supreme Court of Lithuania. Ruling of 9 November 2015 in civil case No. 2A-12-407/2015.

[186] Division of Civil Cases of the Supreme Court of Lithuania. Ruling of 28 May 2014 in civil case *UAB „Atea" v. Vilniaus miesto savivaldybės administracija*, No. 3K-3-295/2014.

thus avoiding the necessity of initiating a new procedure. For instance, in Spain the civil procedure law provides for a possibility to submit to an appellate court and to examine a new claim replacing the initial claim which, due to unforeseen circumstances, can no longer be satisfied[187]. The German civil procedure law provides for a possibility to replace a claim and lodge a counter-claim with an appellate court as long as the other party to the proceedings agrees to that and provided that the court rules to this effect in the interest of expediting the proceedings. Such claims have to be based on facts and circumstances on the basis of which the appellate court would, in either case, examine the case and adopt its decision (Article 533 of the German CCP).

Another highly significant aspect of trial within a reasonable time it to limit the possibilities for returning the case for re-examination to a lower court. The court of appeal, acting within its remit to decide the case on facts and legal issues, should be competent to correct errors made by the first instance court – it should rectify the errors related to determination of facts as well as correct shortcomings in the application and interpretation of substantive and procedural law. An inconsistent or insufficient examination of facts relevant for the case at a first instance court may be regarded as a procedural violation providing the basis for annulling or amending the court decision, but it shall not constitute the basis for referring the dispute for resolution by a first instance court when it is already possible to do by the appellate court. In accordance with Article 324(3) of CCP, in cases where the appellate court recognises the necessity to re-examine or additionally review the evidence already covered at a first instance court, as well being of an opinion that some issues call for expert knowledge, it may resort to statutory measures foreseen and apply special instruments of proving evidence (such as expert's opinion)[188]. In cases of only procedural violations of substantive law, the appellate court shall be competent and obliged by the law to rectify the violation without referring the case for re-examination to the first instance court[189]. Only where, due to circumstances to be examined or the scope and nature of evidence to be demanded, there is a need to conclude that the case shall be tried at an appellate court in its entirety looking into new aspects, this would mean that there is the basis to conclude that failure to disclose the real substance of the case by the first instance court constitutes the basis for referring the case for re-examination[190].

[187] Op. cit., 124, 213.

[188] Division of Civil Cases of the Supreme Court of Lithuania. Ruling of 2 October 2015 in civil case No. e3K-3-501-701/2015.

[189] Division of Civil Cases of the Supreme Court of Lithuania. Ruling of 20 April 2009 in civil case No. 3K-3-121/2009.

[190] Ibidem.

The Supreme Court of Lithuania is rightly following a rather strict approach when it comes to the possibilities of the courts of appeal to refer the case for re-examination to a lower court if the substance of the case had not been disclosed and on the basis of the available evidence the case may not be tried in the court of appeal (Article 327(1)(2) of CCP). Broadly speaking, identical principles are also followed by the Supreme Court in such cases when determining to which of the court categories – the first instance or appellate – should the case be returned when, after hearing an appeal in cassation it determines that there is no basis for passing the final decision by a court of cassation[191]. If, in consideration of the principles as mentioned above, the case can be tried by the appellate court and there are absolutely no grounds for reversing the decision of the first instance court, the case is simply returned to this court rather than the first instance court. Such case-law certainly contributes to a more expedited proceedings.

2.4.2. PROCEDURE OF CASSATION

At first sight, the figures on hearing of cases under the cassation procedure shows that, to the extent that this is related to a trial within a reasonable time, this stage of the proceedings is least problematic. Trials usually last 195 days on average (according to the 2015 data). Despite the fact that since then the length has increased slightly (as compared against 140 days in 2011), the year 2015 was completed with a record low backlog of pending cases – 205 in total (compared against 235 and 365 of pending cases in 2011 and 2014, respectively). A lengthier duration is primarily due to the fact that there were many cases the proceedings thereof had been suspended on grounds of seizing the European Court of Justice. In 2015 almost 700 appeals in cassation were analysed, compared against 574 of applications for cassation received. On the European scale, although not being among the leaders in terms of the speed of trials at higher courts, Lithuanian statistical figures are not to be considered a matter of concern (the European average totals 263 days, with a statistical median of 188 days[192]). As regards the number of appeals in cassation received, Lithuania apparently is somewhere in the "golden mean". Compared with

[191] Article 359(4) of CCP: "Where the court of cassation determines that the legal provisions of substantive law violated on grounds of improper application of interpretation thereof, the court shall amend or reverse the decision or ruling and shall adopt a new decision. The court of cassation shall be entitled to act accordingly also where a procedural legal violation detected can be rectified by itself. In the latter cases the court of cassation shall be bound by the circumstances determined by the first and/or appellate courts".

[192] Study on Council of Europe Member States Appeal and Supreme Courts' Lengths of Proceedings Edition 2015 (2006-2012 data). European Commission for the Efficiency of Justice (CEPEJ).

other countries, the Supreme Court of Lithuania pre-screens quite a few appeals in cassation in civil cases (approximately 25 per cent (23 per cent in 2015), compared to only 16 in Estonia, 6 per cent in Norway, and as little as 1.5 per cent in Sweden). In the reminder part of the research we are going to review some legal and practical issues relevant for the procedure of cassation that may have an impact on the length of the proceedings.

Under Article 4 of CCP, the Supreme Court of Lithuania shall ensure a uniform case-law in the procedure prescribed by the law. In this way, along with other provisions limiting the right to appeal in cassation and ensuring prevention of overloading the court of cassation, the Lithuanian legislator prioritises public and normative function of the cassation procedure, i.e., to ensure a uniform case-law, development and improvement of the law. Screening of appeals in cassation is implemented with the help of screening mechanism used for selection of appeals in cassation, whereby only such appeal in cassation which is in line with the statutory requirements is eligible for hearing by the Supreme Court of Lithuania. The grounds for judicial review under the cassation procedure have been laid down in Article 346(2) of CCP. Hence, the grounds for cassation correlate with the function of the Supreme Court to ensure a uniform case-law, albeit the *prima facie* illegitimacy of the contested procedural decision plays a rather significant role in screening appeals in cassation.

It is gratifying to note that the decision to introduce screening of appeals eligible for the cassation procedure is beyond any doubt in Lithuania. From a comparative point of view, though, some countries in Central and Eastern Europe have set quite alarming precedents. For instance, the Czech and Hungarian courts of cassation have recognised the screening criteria for appeals in cassation which are aimed to reinforce the public (normative) function of the Supreme Court as anti-constitutional. The Czech criterion, whereby the Czech Supreme Court could accept cases for hearing that were significant from a legal point of view, was abandoned lately. Meanwhile, in Hungary the requirement that an issue arising in the case had to be such as to necessitate uniformity in the case-law has also been proclaimed as anti-constitutional and running against the principle of legal certainty. Attention shall be drawn to the fact that states which have opted to prioritise private interests as opposed to public interests in the cassation procedure (i.e., to rectify errors which have occurred in individual decisions) and in principle do not limit or limit to a very narrow extent the cassation procedure, usually face a longer duration of hearing of the case at a court of higher instance than Lithuania (for instance, Belgium, Italy, France, the Czech Republic, Hungary and Greece[193]).

[193] Ibidem.

Screening of appeals to be tried in cassation is very important because: (i) every legal system faces the challenge of utilising limited resources made available to them in the most qualitative, timely and cost effective way. This becomes all the more relevant in the context of a steadily growing number and complexity of cases. If the possibility to examine the case in two instances is ensured, in the context of limited resources the need to safeguard individual justice is decreasing significantly (the law of limited benefit) because a sound presumption can be made that the previous processes were capable of ensuring a just outcome of the trial; (ii) in the absence of screening mechanism, the Supreme Court would be overloaded with cases, which would have a direct impact on the motivation of decisions (they would become much more standardised in order to tackle a huge backlog), it would become more difficult to guarantee the possibility of uniform interpretation of the law (the more cases there are the larger the probability of diverging case-law), and, last but not least, the quality of judicial decisions themselves. For instance, in France which has only moderately limited cassation procedure, a large proportion of appeals in cassation after a lengthy trial (although in principle, most of the time the case is simply pending trial) are rejected without giving any grounds, by simply referring to the fact that the appeal in cassation is manifestly ungrounded. The case-law of the Italian Court of Cassation is sometimes referred to as "supermarket", where one can always find a solution in favour of the losing party[194]; (iii) within the context of multitude of decisions, the process of getting access to, application and forecasting of the case-law becomes complicated. As a result, this creates the status of uncertainty, which by its own right stimulates an even stronger desire to appeal and to seek trial at the highest instance court; (iv) rectification of errors when all or almost all decisions may be subject to review is less efficient because its focus is on the past rather than the future. Screening for eligible cases allows selection of cases which are significant for the future because of many upcoming similar cases, having the potential of reducing the scale of litigation on the whole. In the status of legal certainty and clarity people are less interested in litigation because they are better aware of and appreciate the prospects of such litigation. Sometimes it takes only one case to set the precedent for hundreds or thousands of similar disputes in the future.

It is noteworthy that in some states with a system of cassation similar to that of Lithuania (e.g., in Norway, Latvia, Estonia, Poland, Denmark, England, Ireland, and Germany), the decision on admissibility (screening) of appeals for cassation is

[194] Chiarloni, S., "Fundamental Tasks of the Corte di Cassazione, Hetereogenous Objectives Arosen form the Constitutional Right to Appeal and Recent Reforms", in *Los recursos ante Tribunales Supremos en Europa. Appeals to Supreme Courts in Europe* (Difusión Jurídica y Temas de Actualidad, 2008), p. 79.

made by enabling the parties to the proceedings to express their opinion. In this way the adversarial principle is ensured along with the right to be heard and speak on essential procedural issues. Although this system can guarantee a larger transparency of screening of appeals eligible for cassation and the fairness of the whole procedure, from the point of view of concentration and cost effectiveness such practice has its shortcomings. The said procedure prolongs the screening of appeals for cassation, which eventually may lead to the overall lengthy duration of the entire proceedings in the court of highest instance. Moreover, the parties to the case incur additional costs not on account of such appeals in cassation, which manifestly do not merit hearing at the higher instance court. Indeed, in Estonia, for instance, a court which believes that an appeal of cassation does not have the potential, may decide not to transfer it to the other parties to the case and decide on the issue without having heard the parties. Moreover, if the cassation function is focused on safeguarding public interest (for legal certainty and uniformity of the case-law), hearing of the parties to the case is not mandatory from a conceptual point of view.

In consideration of the above, introduction of the adversarial principle into the procedure of screening of appeals eligible for cassation shall be regarded with some reservations, thus, we would not be willing to speak too categorically about the introduction thereof into the Lithuanian civil procedure law. Indeed, due to circumstances as described above, in Sweden and Austria which have the cassation procedure similar to the Lithuanian procedure, a decision on selection of appeals for cassation is made without involving or hearing other parties to the proceedings.

In Lithuania a person, whose appeal in cassation was rejected for failure to comply with the grounds of cassation as stipulated under Article 346 of CCP, is entitled to lodge a new appeal in cassation. It is important to respect the time limits for lodging an appeal in cassation. However, there are many jurisdictions which exclude the possibility of re-lodging the appeal in cassation (Sweden, Norway, Estonia, Latvia, England and Austria). Introduction of such system could be subject for discussion in Lithuania too. Currently, attorneys at law who fail to submit an appeal of high quality, often re-submit it every month within the time limit available for lodging appeals in cassation, waiting for a new panel of judges to be formed. Such practice only further aggravates the case-load of judges of the Supreme Court and partially encourages reckless behaviour when drafting the initial appeal in cassation. Moreover, this may lead to the situation when an appeal in cassation is lodged and accepted towards the end of the time limit, thus naturally prolonging the ultimate resolution of the dispute calculated from the date of announcement of the procedural decision by an appellate court.

Under the model of appeal in cassation laid down in the Lithuanian civil procedure law, a case may be accepted for hearing by the Supreme Court on condition

that the appeal in cassation satisfies the grounds for lodging appeals in cassation as stipulated in Article 346 of CCP. A decision on admissibility of an appeal in cassation shall be made by a panel of judges. The decision to accept an appeal in cassation is issued as a ruling. Under Article 350(4) of CCP, this ruling shall be composed of the introductory and operative parts, shall give a summary of the grounds for admittance or rejection of an appeal for hearing under the cassation procedure. It is mainly this ruling, in particular, that receives most of the criticism of attorneys at law representing the appellant in cassation that refusal to accept for cassation lacks substantiation, that it often contains standardised formula rather than individual motives derived from an individual case.

It would be difficult to argue to the contrary that the arguments given by the Supreme Court of Lithuania to refuse to accept an appeal for cassation are often standardised. However, we believe that refusal to accept an appeal in cassation by the Supreme Court shall not be extensively reasoned with the arguments related to the substance of the case. Such practice does not violate the principles or values that are protected by a principal requirement to reason all judicial decisions on condition that the state gives priority to the public function performed by the Supreme Court that is manifested by the duty to ensure uniformity of interpretation of the law and case-law, legal development and improvement. It is exactly this model which has been reasonably selected by the legislator for the Supreme Court in the Lithuanian civil procedure. This circumstance binds and obliges the Supreme Court to follow this concept of appeal in cassation.

If, at the time of deciding not to issue leave to appeal, arguments had to be submitted on the substance of the case, such practice could seriously undermine the aims pursued by legal regulation of lodging appeals to the Supreme Court and would dampen the significance of the Court. The conclusion to this effect was made by the Slovenian Constitutional Court in its ruling of 12 May 2011. In this case the Slovenian Constitutional Court had to resolve the issue of failure to present arguments on the substance of refusal to admit an appeal in cassation. From this ruling it follows that an opposite decision – obligation to motivate refusals – would stand in the way of attempts to reduce the backlog of cases pending with the Supreme Court, because, for the purpose of examination and argumentation of such refusals, the judges would have to give almost as much time as for resolving precedent cases; such practice would create unfavourable conditions for judges of the Supreme Court as regards allocation of their time and efforts on resonant cases or cases with a huge potential value for future decisions and for careful substantiation; one might expect a large number of court decisions on the substance which would eventually only increase the risk of heterogeneous case-law and aggravate possibilities for the

public to find its way amidst numerous case-law and thus decide upon their behaviour. It would give an impression that the court at the stage of admitting an appeal in cassation, i.e., at the stage of not examining the case on substance (the Supreme Court of Lithuania even does not have access to the case when it is screening appeals for cassation because according to the law the case file is requested only after the appeal in cassation has been admitted for hearing) is in fact examining the case on the substance. The latter aspect, inter alia, may give rise to problems related to imperatives of a fair trial, would encourage instance-based mentality because the parties would be aware that eventually the final word about the case rests with the Supreme Court. Moreover, such practice is fully compatible with the case-law of ECHR, whereby very concise arguments given by the Supreme Court when refusing to grant leave to appeal to the Supreme Court may be considered as sufficient[195].

The litigants may claim that failure to substantiate the results of screening of appeals for cassation weakens public trust in the judiciary. As far as this loss of trust is concerned, the doctrine underlines rightly that the larger the public distrust in the judiciary, the more frequent are atte mpts to handle it with elaborated numerous arguments. However, countless arguments may be vague, unclear, which again leads to further breach of public trust. Hence, there may be better ways for building public trust rather than extension of motivational parts of judicial decision.[196] Moreover, in the same ruling the Slovenian Constitutional Court also held that the public should, to some extent, have trust in the Supreme Court and in the appropriate discharge of the functions by the judiciary. If the society does not trust the Supreme Court, it is highly unlikely that the requirement to substantiate refusals to accept appeals in cassation with arguments on the substance might significantly improve this trust, in particular when bearing in mind the kind of problems this practice would create in the eyes of the public itself.

Indeed, the authors of this research in principle subscribe to the idea prevailing in the legal society that screening for appeals eligible for cassation is, most probably, the hardest part of the job of the Supreme Court of Lithuania. This perception is further strengthened by the fact that the court is continuously looking for ways to improve the procedure.

In this context, the 2015 initiative of the court to provide recommendations to appellants in cassation is highly welcome. Unfortunately, the practice shows that attorneys at law who draft appeals in cassation more often than not seem to

[195] European Court of Human Rights. Judgement of 24 September 2002 in civil case *Nerva and Others v. the United Kingdom* (dec.), No. 42295/98.

[196] Uzelac, A. "The Need to Provide Reasons in Court Judgments: Some developments in East and West", in *Aure Praxis Aurea Theoria.* Lexis Nexis, 2011, p. 22.

disregard these recommendations and lodge appeals in cassation which are obviously incompatible. Then, the fact that such documents are usually rejected shall come as no surprise. The rejection in turn triggers a public reaction that the society and litigants are serviced with a refusal ruling that is not motivated and is, hence, ungrounded and arbitrary. Meanwhile, an attorney at law may be simply trying to cover up his or her incompetence and distinguish those appeals that are worth to be heard at the Supreme Court of Lithuania. It shall be noted, in our view, that the recommendations to appellants in cassation mentioned earlier contain an exemplary list of criteria used by the court when deliberating the issue of admissibility of the appeal for cassation under Article 346(2)(1) of CCP[197].

Article 347(2) of CCP provides for that an appeal in cassation may not be based on new evidence and circumstances which have not been examined by a first instance or appellate court. However, there are cases when part of the arguments of the appeal of cassation comply with the grounds of appeals in cassation. Then, such appeal in cassation is admitted for hearing despite the fact that a certain part of the appeal fails to meet statutory requirements. In this regard, we believe that the court of cassation rightly notes that the subject matter of hearing in cassation consists of the motivated grounds for lodging an appeal in cassation that have been indicated in the appeal in cassation. When referring to the ground of cassation in his appeal an appellant in cassation fails to provide any legal arguments to substantiate it or provides such arguments without linking them to a specific substance of appeal in cassation, the appeal in cassation shall be regarded as improperly motivated and as falling short of the statutory requirements under Article 347(1)(3) of CCP. A summarised evaluation of an appeal in cassation made by a panel of judges of the court of cassation (as being in compliance with the statutory requirements) in practice does not always mean that every single argument of the appeal or a group thereof complies with the statutory requirements. A detailed analysis of appellate arguments is conducted by a panel of judges hearing the appeal in cassation. Where the arguments of the appellant in cassation are based solely on facts (namely, on analysis of witness statements and is analysed differently than the court; when factual circumstances are analysed related to use of funds or land parcels, etc.), the panel of judges is not entitled to give its opinion on such arguments of the appeal in cassation. The court of cassation does not deliberate the issues of facts (Article 353(1) of CCP)[198].

[197] On-line access: <http://www.lat.lt/lt/asmenu-aptarnavimas/rekomendacijos-paduodantiems-kasacinius-skundus_154.html >.

[198] Division of Civil Cases of the Supreme Court of Lithuania. Ruling of 28 June 2013 in civil case *V. T v. L. T.*, No. 3K-3-373/2013.

In our view, the case-law of the Supreme Court of Lithuania, whereby a court of cassation shall be entitled (also when acting at its own discretion) to rectify typing errors made in the decision (ruling) of a court of first instance or appeal without referring this issue for the relevant court that has adopted the decision thereupon, is highly welcome[199]. It allows for saving time and costs of the litigants and reach a more rapid legal outcome in the case.

At first sight, a slightly different assessment of another case-law could be given when a court of cassation overrules part of the ruling of a court of appeal dismissing the case, leaving in effect part of the court decision of first instance provided that the part of appeal on establishment of a legal fact has been satisfied[200]. Under Article 340(1) of CCP, an object of appeal in cassation is primarily the decision/ruling by a court of appeal. Moreover, appeal in cassation is impossible against decisions and ruling of the first instance court that have not yet been examined at a court of appeal (Article 341 of CCP). Therefore, if a case is dismissed during the appellate stage, then the hearing in cassation can only review the reasonability of dismissal and not on the issue whether the court of first instance resolved the case properly. Was the court to establish that the case has been dismissed in the appellate court without justification or unlawfully, the case should then be referred to the appellate court for re-examination of justification and reasonability. In the given case, however, the situation was atypical. A court of appeal, although dismissing the case, extensively described the evidence gathered in the case file that were related with the legal fact requested to be verified. It follows that a court of cassation most probably has determined that a court of appeal tried the case on the substance. This circumstance most likely can explain the decision of the court of cassation not to return the case to the court of appeal and instead try the issue thus resolving the dispute by itself (which was also requested by the appellant, and, hence, saving time and costs of the litigants and the court as well as additional costs related to re-examination of the case in a court of appeal).

Application of the doctrine of precedent in principle positively affects the duration of the proceedings. First, availability of a precedent makes the litigants better aware of the relevant legal content as well as enables them to forecast on what the court is to say on the issue should they decide to bring the matter to court. Such awareness allows to substantially reduce the number of new disputes and to achieve that litigation, where it is inevitable, is made as simple as possible. Second, the available

[199] Division of Civil Cases of the Supreme Court of Lithuania. Ruling of 26 February 2016 in civil case *UAB „Aviaturas ir partneriai" v. K. M.*, No. 3K-3-117-687/2016.

[200] Division of Civil Cases of the Supreme Court of Lithuania. Ruling of 12 February 2016 in civil case No. 3K-3-40-421/2016;

precedent also enables saving the resources of the litigants and the court because the parties, when drafting procedural documents, and the court, when adopting its decision, may invoke upon the existing precedent. However, the case-law suggests that there are some issues to be solved. For instance, in one of the cases tried before a court of appeal the court held that it was bound by its previous legal interpretation given in two of its own rulings adopted in this case and not yet reviewed under the appeal in cassation procedure because such interpretation could no longer be the object of repetitive (i.e. third) appeal. In this regard the Supreme Court of Lithuania held that such position was in principle compatible with the case of a horizontal precedent applicable only by way of analogy because the earlier rulings had been adopted by the court of appeal in the same case which has not yet been completely resolved. The rules of a horizontal precedent which in the earlier mentioned case of the appeal proceedings were applied by analogy are in no way relevant for a court of higher court of cassation, due to the status of precedents set by procedural decisions of courts of lower instance. Moreover, rulings of appellate courts which have not been appealed in cassation, became enforceable, although they have not resolved part of the dispute on the substance and the case was returned for retrial. Hence, these rulings in the same case have not acquired the authority of *res judicata*[201].

Article 350(8) of CCP provides for that upon decision to accept an appeal in cassation for hearing, no amendments and supplements to the appeal in cassation can be made. In practice, though, situations do arise where, following admission of an appeal for hearing in cassation, the legal circumstances to the case change substantially, for instance, a judgement by the European Court of Justice or the European Court of Human Rights that is relevant for the case has been passed, a new interpretation by an extended panel of judges of the Supreme Court of Lithuania was announced, etc. The principles of fair trial recently have demanded that the parties to the proceedings could comment on the newly emerging and significant legal circumstance which is relevant for the case in question. This may have some negative effect on the length and cost effectiveness of the proceedings (because explanations submitted by a litigant and accepted by the court would have to be forwarded to the other parties of the proceedings as well). Even in such circumstances a balance should be sought with regard to promptness and concentration of the proceedings, aligned with the underlying aim and objective of the proceedings, i.e. administration of justice. On the other hand, submission of additional explanations should not become a possibility for clarifying or amending the appeal in cassation. Therefore, we believe that the Supreme Court of Lithuania rightly notes that the

[201] Division of Civil Cases of the Supreme Court of Lithuania. Ruling of 4 February 2016 in civil case No. 3K-3-30-378/2016.

rules of interpretation of the law formulated by a court of cassation after submission of an appeal in cassation and which do not overrule the previous interpretation of the law do not provide the basis for derogation from the imperative laid down in Article 350(8) of CCP[202].

Article 361(4)(2) of CCP stipulates that the operative part of the ruling (decision) by a court of cassation shall refer to the rule of application or interpretation of the law which is relevant for the case-law. It is noteworthy that the recent case-law, in particular the one established by an extended panel of judges of Supreme Court of Lithuania[203], increasingly invokes upon the provision stipulated earlier, i.e., it provides a summarised wording of the interpretation of the law. This is a very progressive trend. When a court ruling explicitly refers to the key rules of application or interpretation of the law, this renders the decision clearer and more understandable not only to other judges who are bound by a court precedent, but also to business undertakings, legal advisers and the public at large. All these developments hold a potential of minimising the probability of satellite litigation related to the same legal problem and of expediting hearings of pending or upcoming cases to the judicial system. In this way the Supreme Court of Lithuania transposes a positive practice of German and Swiss Supreme Courts.

[202] Division of Civil Cases of the Supreme Court of Lithuania. Ruling of 3 February 2016 in civil case No. 3K-3-2-969/2016.

[203] E.g., an extended panel of judges of the Division of Civil Cases of the Supreme Court of Lithuania. Ruling of 29 April 2016 in civil case No. e3K-7-89-378/2016; Ruling of 15 April 2016 in civil case No. e3K-7-105-687/2016.

III. Insights and conclusions

In summary of the research Structural Elements of the Judicial Reform Facilitating Civil Proceedings within a Reasonable Time, it can be concluded that in principle hearing of civil cases in Lithuania takes place within a reasonable time, in particular, as compared against the neighbouring countries and other EU member states. This statement is further attested by reports of the Commission for the Efficiency of Justice (CEPEJ), as well as by EU statistical tables on administration of justice. The statistics do not mean, however, that there are no problems in Lithuania in terms of the length of civil proceedings or that no amendments are necessary in the judiciary on the whole and the legal regulation of civil proceedings. The present research, focused primarily on structural and procedural elements for hearing of civil cases within a reasonable period of time by not forgetting that quality is important administration of justice, was not to be compromised.

Although the situation with regard to hearings of cases in courts of first instance is good enough, the need to optimise the system of local courts has become the subject to discussions. Scholars of the research, having analysed various arguments in favour of the planned reform of the judiciary as well as the arguments against it, believe that any reforms in the area of judiciary should only be undertaken after proving the inevitability and a huge value-added thereof. Merging of local courts should take place only where it is feasible because of very short distances to be travelled between local courts to be merged in order to make sure that administration of justice is kept as close to the people as possible. One of the key aims of the reform of the judiciary in local courts is to put better conditions in place as one of the tools contributing to a better efficiency of the judiciary, i.e., contributing to specialisation of the judiciary. The research has shown that specialisation of judges by its own right does not automatically lay the foundations facilitating acceleration of the proceedings. Specialisation can achieve the aims pursued only where judges indeed have all the necessary knowledge, skills and competence, enabling them to resolve any issues arising before them during a hearing in an expedited manner. For the purpose of attaining this objective of judicial specialisation, it is necessary to merge courts in real terms in the way it has already been done (in Vilnius, Kaunas and Šiauliai), at the same time not leaving any court chambers. Moreover, it shall be reminded that in order to maintain or improve the current pace and/or quality of civil proceedings, quite substantial financial investments may be necessary to improve the judicial infrastructure, working tools and staff, selection, training and motivation of judges.

Over the past few years, the use of information and electronic communication technologies (ICTs) for the purpose of acceleration of the Lithuanian civil procedure has made a significant progress and has helped to shorten the length of the proceedings in some categories of civil cases. The most notable impact on acceleration and improvement of civil proceedings is achieved when all levels of ICTs applicable in courts are presented to consumers in a user-friendly and attractive way (basic technologies used for administration and organisation of judicial activities and assistance to the judiciary). To use the full potential of ICTs in a smooth and efficient way adequate degree of attention and funding is necessary for a revolutionary phasing-out of the judicial infrastructure based on hard copies to allow phasing-in of information infrastructure based on electronic communication and documents.

The scholarly research has showed that in principle legal regulation of individual stages of civil proceedings makes it possible to administer justice within a reasonable time, in particular, if the court respects the duty of "clarification" and the parties to the proceedings respect their duty to bring matters to court in good time. Moreover, the case-law is trying to prevent abusive practices of the proceedings on a much broader and stricter level than before. Such conclusion does not yet mean that there are no aspects of the legal regulatory framework of civil proceedings which call for review or that there is no need to regulate individual categories of cases more specifically.

It would be worthwhile to review the currently very stringent and formally defined rules for preparatory stage, without leaving much discretion to the courts in this stage to decide on how arrangements for a hearing have to be made, how many preparatory hearings are to be held, to provide for possibilities to accommodate both forms of preparatory arrangements in parallel. At the same time, judges should be encouraged and probably trained on work organisation and planning skills so as to allow for one or two full days for hearing of a single civil case. To enable the use of the legal norm whereby, provided that no additional preparatory actions before the hearing are necessary, the court shall be permitted to launch an oral hearing of the case and to decide it on the substance immediately following the preparatory judicial hearing.

The scholarly research has shown that, in order to speed up the proceedings, the courts of first instance find it difficult to refuse to accept evidence if such evidence could have been submitted earlier and when submitted later it might delay the proceedings. In such cases courts of higher instance still rather often overrule the court decision of first instance to allow submission of belated evidence. In addition, the survey of judges conducted during the research clearly showed that judges of first instance courts feared to refuse to accept belated evidence even though it was clear that in this way they were delaying the proceedings of the case.

Most probably, one of the reasons behind rather frequent adjournments of trials is insufficient regulation of default decisions in Lithuania. In many countries across the world it is widely recognised that default decisions are one of the key tools in fighting against abusive and dilatory practices during the proceedings. Hence, it is high time to adjust the regulation of the institute of default decisions. The authors of this scholarly research fully subscribe to the currently on-going deliberation of amendments and supplements to the CCP which would enshrine two types of a genuine and bogus default decisions that are well known in the theory of civil procedure law.

According to statistics, in Lithuania, less than 5 per cent of all tried civil cases are subject to appeal. From that it follows that there is a huge public trust in decisions passed by courts of first instance. Hence, speaking in the language of numbers, the benefit of the appellate mechanism is a relative one. It is, in a sense, a rather expensive service for the whole society and for each individual litigant. Hence, the mechanisms for judicial control of legitimacy and lawfulness of court decisions and rulings exist and are governed not by legal or economic motives. Indeed, they are the result of a political and ideological decision based on philosophical and psychological concepts. In Lithuania the form of limited appeal is provided for in the law whereby the case is not automatically referred for hearing by other (appellate) judges; instead, the process involves verification of legality and justification of decisions and rulings already adopted. In the process of appeal in cassation the public interest prevails aiming to ensure a uniform interpretation of the law and case-law, development and improvement of the law. Legal regulation is in compliance with the principles of a modern, contemporary and well-balanced civil procedure. During the research, it has been determined that the length of the given proceedings is not an issue of concern and would even be an example for many European states. Particularly welcome is the aspect of the appellate procedure introduced into the CCP in 2011 for the purpose of shortening the length of proceedings, whereby appeals shall be primarily tried under the written procedure. An appeal shall be tried under the oral procedure only if the court trying the case recognises the necessity for that. As far as the quality of procedural decisions is concerned, this causes much more concern. Nevertheless, we do believe that the courts are making efforts to self-improve and modernise themselves and become more open for discussion. Indeed, some amendments are necessary in the current legal regulatory framework as well as in the case-law. The most important task is to apply the current rules properly and consciously, not forgetting that, even though compliance with procedural formality does have its meaning and purpose, a very "blind" application of rules may obstruct the achievement of one of the key aims of the civil procedure – to restore legal peace among the parties to the dispute.

The authors of the scholarly research believe that the existence in Lithuania of certain categories of cases subject to some special requirements do not raise major concerns from the point of view of the speed of the procedure. One exception could be made in the case of small claims, where the courts could be given the possibility to try such claims and to be guided by peculiar features typical of this category of cases. Yet another specific category of cases has to be distinguished, namely class actions. This category of cases remains to be a matter of concern as the parties may not properly exercise their right to this innovative and yet rather complicated procedure. Therefore, measures are necessary to make the class action an effective tool for protection of rights of the litigants.

As35 Asmens teisės į civilinės bylos išnagrinėjimą per protingą laiką įgyvendinimo sąlygos = Ways of Implementation of the Right to Civil Proceedings within a Reasonable Time : mokslo studija / [Aurimas Brazdeikis, Vytautas Nekrošius, Rimantas Simaitis, Vigita Vėbraitė] ; [mokslinis redaktorius Vytautas Nekrošius]. – Vilnius : Vilniaus universitetas : Vilniaus universiteto leidykla, 2016. – 320 p.

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Ši studija yra parengta Vilniaus universiteto Teisės fakulteto mokslininkų mokslinio tyrimo, kurį finansavo Lietuvos mokslo taryba, metu ir skirta visapusiškai išnagrinėti sąlygas, kurios padeda įgyvendinti asmens teisę į civilinės bylos išnagrinėjimą per protingą laiką. Atsižvelgiant į ribotą mokslinio projekto laiką bei turimas tiek žmogiškąsias, tiek finansines galimybes, studijoje apsiribota išimtinai ginčo teisenos analize, nenagrinėjant nei ypatingosios teisenos, nei vykdymo proceso, nei tarptautinio ir ES civilinio proceso nuostatų. Studiją sudaro dvi svarbiausios dalys: pirmoji skirta teismų institucinės sistemos funkcionavimo efektyvumo analizei; antroje dalyje analizuojamos procesinės prielaidos išnagrinėti civilines bylas per protingą laiką. Kaip papildoma knygos dalis yra įtraukta užsienio autorių jų valstybėse esamos padėties analizė.

This study was prepared by the scholars of the Faculty of Law of Vilnius University during the research, which was funded by the Research Council of Lithuania and was devoted to examine thoroughly the conditions to implement the right to civil proceedings within a reasonable time. Considering the limited time and both human and financial resources available for the research project, the study was limited only to the analysis of contentious proceedings, excluding non-contentious proceedings, enforcement proceedings or the provisions of international and EU civil procedure out of the research scope. The study consists of two core sections: first of them analyses the performance efficiency of the judicial institutional system; the second section is devoted to procedural preconditions to hear civil cases within a reasonable time. The study also includes a supplementary component of foreign authors dealing with the analysis of the situation in their states.

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Mokslo studija

Ways of Implementation of the Right to Civil Proceedings within a Reasonable Time

Scientific Study

Viršelio dailininkė AUDRONĖ UZIELAITĖ
Kalbos redaktorė DANUTĖ PETRAUSKIENĖ
Anglų k. redaktorius MARKAS AURELIJUS PIESINAS
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Spausdino UAB „Baltijos kopija“
Kareivių g. 13B, LT-09109 Vilnius