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## POLISH PREPARATORY PROCEEDINGS IN CIVIL CASES: WRITTEN OR ORAL? LESSONS TO BE LEARNED FROM SOME OTHER JURISDICTIONS

**Abstract.** In this paper a description of the model of Polish preparatory proceedings in civil cases will be presented. By looking at foreign examples of preparatory activities in civil cases first, we will be able to discern what potential advantages and disadvantages are associated with the written or oral (spoken) form of preparatory activities of court actors in the first stage of civil proceedings. In the second main part of the paper the author will turn to Polish counterparts of these preparatory activities and their form. The author will also deliberate on where a change is needed. She will also attempt to propose some measures that might be useful in the current condition of Polish civil proceedings.

*Keywords:* civil cases, preparatory proceedings, preliminary stage, pre-trial stage, pleadings, written form, oral form

### 1. General remarks

In public debate in Poland the administration of justice including civil justice is sometimes considered to be in crisis. (See e.g.: “Kryzys”, 2014:<sup>1</sup> but see Łętowska, 2010: 30). To what extent is the set of facts that exists today within the Polish administration of justice a crisis?

In 2012, the time needed to resolve litigious civil and commercial cases was in Poland shorter than seven months, according to the 2015 EU Justice Scoreboard (“The 2015 EU Justice”, 2015: 9). It was shorter than, for instance, in Latvia, Slovenia, Slovakia, Hungary, France or southern Europe. But is this statistics a useful index of the strength of the Polish administration of justice and a proof of the lack of a crisis? If we include into statistics civil and commercial proceedings regarding payment orders, which usually last a short time, the average is in fact quite low. It does not mean, how-

ever, that there are neither long-lasting proceedings nor heavy workloads in Polish courts.

To prove that we are correct in asserting that the phenomenon of protraction of civil proceedings has existed in Poland, the case-law of the European Court of Human Rights related to the protraction of civil litigation in Poland may be presented, e.g. judgments in cases: *Prądzyńska-Pozdniakow v. Poland* (no. 20982/07), *Gawlik v. Poland* (no. 26764/08), *Bańczyk i Sz-tuka v. Poland* (no. 20920/09), *Postek v. Poland* (no. 4551/10), *Purpian sp. z o.o. v. Poland* (no. 2311/10). This is related to the fact that the excessive length of civil proceedings is considered as a violation of the fundamental right to a fair and speedy trial enshrined in Article 6 of the European Convention on Human Rights (as well as in Article 47 of the Charter of Fundamental Rights of the European Union). Over the years, many works have been published with focus on the protraction of civil litigation. (See e.g. Piasecki, 1989; Murray & Stürner, 2004; van Rhee, 2004; Gonera, 2005; Ervo & Dahlqvist, 2014; Uzelac, 2014a). Some of the works entered into the details of this phenomenon in the light of the post-communist transition, considering inefficiency and delays as features of post-socialist legal systems, especially in the context of civil proceedings. (See Kornai, 1995: 218; Uzelac, 2010: 388). All this makes touching on topics relative to the protraction of civil proceedings justified and sound.

The workloads of Polish courts are going to be increased. There is a growing trend in the legal consciousness of the Polish society. Alongside the increase in the legal consciousness as a reason for the increase in court workloads, there is a process of opening up of the market in legal services; there are more and more both lawyers and court cases. Therefore, the acceleration, simplification and improvement of civil proceedings are needed. Various means to this end are taken into account, including simply increasing the number of judges and court clerks, the introduction of IT technology in civil proceedings and alternative dispute resolution by ways of mediation or arbitration. It is notable that little attention has been paid to the preparatory proceedings as means to this end, their content and form.

In short, the term “preparatory proceedings” means a stage (phase) of court proceedings. In European civil procedures we can find various stages of proceedings realising various goals. (See most recent information in this respect in Uzelac, 2014b). However, a final stage, namely the main hearing, is – as O.G. Chase and V. Varano have observed – quite commonly considered as “dedicated to proof taking and reaching a decision” (Chase & Varano, 2012: 224). Where the main hearing is concentrated, it is generally oral (consists of oral activities recorded in the form set out in appropriate pro-

visions). On the other hand, legal writers have looked at stage(s) preceding the main hearing as directed at the preparation of the case (*ibidem*). They have given various names to stage(s) preceding the main hearing.

Note, for instance, that the authors of the ALI/UNIDROIT Principles of Transnational Civil Procedures (“ALI/UNIDROIT Principles”, 2004) have suggested a preferred procedural model, modelled on German, English and Spanish models, consisting of three stages: the pleadings stage (statement of case), an interim stage (scheduling) and a final stage (main hearing). (More van Rhee, 2012: 59). An interim stage is a *stricto sensu* preparatory stage called also the preliminary (or pre-trial) stage/proceedings or preparatory proceedings. It is what occurs between the pleadings stage and the main hearing.

A closer look at the scheme of Polish civil proceedings, the details of which are set out in the Civil Procedure Code (ustawa z 17 listopada 1964 r. – Kodeks postępowania cywilnego, tekst jedn. Dz.U. z 2014 r., poz. 101, z późn. zm., hereinafter k.p.c.), shows that the (main) hearing stage is preceded by pleadings (the statement of claim filed by the claimant and the statement of defence filed by the defendant – Articles 187, 207 k.p.c.) and activities of the court or the presiding judge such as the order to correct pleadings if they are defective, the order to serve correct pleadings to the parties, the order to inform the parties about the date of the hearing (Articles 130, 206 k.p.c.). There are several activities of the court actors which precede the order to serve the statement of claim to the defendant and activities that take place after this, until the hearing. However, as *inter alia* Karolczyk and Łazarska pointed out (Karolczyk, 2013: 156; Łazarska, 2012: 61), the Polish civil procedural rules do not recognise a specific stage of civil proceedings in the form of the preparatory stage; structurally there is just no such distinctive stage (a stage between the pleadings stage and the hearing). It seems that in case of Poland it would be justified to distinguish only two stages instead of three stages of proceedings: (1) the *largo sensu* preparatory stage (pleadings and the preparation) and (2) the hearing stage, separated by a “point” in which the first sitting of the hearing begins.

If we look at the stage preceding the hearing stage as the *largo sensu* preparatory proceedings, we will see this stage as involving all the activities undertaken by the actors of civil proceedings prior to the hearing. What is important, these activities are aimed to prepare the hearing and all of them may be written – some of these activities are by definition written, e.g. pleadings (but there are some exceptions; in labour cases an employee can present the statement of claim orally) – or written activities may be combined with oral (spoken) activities (i.e. oral preparatory hearing which

will be mentioned later). This paper relates mainly to the “form” of language and the issue of choice of the policy-makers with regard to the preparatory proceedings in civil cases made between oral, written and combined preparatory proceedings. My main argument is that oral preparatory activities may constitute an effective means of speeding up the resolution of civil cases. This observation will be accounted for and discussed on the background of the practice of selected foreign jurisdictions. Further, recommendations for the Polish legislation and practice will be formulated.

The point of the analysis is both normative and descriptive. The comparative method (Tokarczyk, 2008) is employed, as the topic can benefit from being examined in the light of comparative evidence drawn from foreign legal cultures.

## **2. Comparative perspective**

### **2.1. Introductory remarks**

In order to accelerate civil proceedings and resolve dispute in the main hearing in the shortest possible time, in some European jurisdictions the tendency is to use the preparatory stage, which – objectively measured and compared to the length of the main hearing stage – is relatively long (“The most time consuming phase in civil matters is the preparatory phase, where parties involved present relevant material”; see Smolej & Johnsen, 2007: 25). In national models which have considerable preparatory stage of proceedings in civil cases, in particular in the Nordic countries, the preparatory stage is developed. It serves the collection of evidence and is followed by the relatively short concentrated main hearing, “one day in court”, which if needed is conducted during a few consecutive days.

### **2.2. England and Wales**

Common law systems<sup>2</sup> distinguish clearly between the preparatory (pre-trial) and trial stages of an action. For the purpose of this paper, England and Wales has been selected as a relevant example of a common law jurisdiction that has a developed preparatory stage. The preliminary stage (pre-trial process) traditionally played a predominant part in English civil justice (Jacob, 1987: 69). England and Wales used to have lawyer-dominated pre-trial proceedings culminating in a trial before judge and jury. It was up to the parties (and their lawyers) to take all the necessary steps to prepare the case for trial, while the function of the judge was very limited (liberal conception of civil litigation). This did not guarantee judicial control

over the parties during the preliminary stage to ensure that they do not prolong a case.

Currently, the preliminary stage is governed by the Civil Procedure Rules 1998 (hereinafter, CPR) which came into effect in 1999 and provide a code of civil procedure for the civil courts. Since then judges have various managerial responsibilities (Andrews, 2013: 1345–1346); there is a framework for case management, that is, active involvement of judges before trial in the preparation of a case for adjudication, with emphasis on the need for proportion and expedition (Andrews, 2012: 4). It needs adding that the managing judge does not have to be the trial judge.

During the preliminary stage, the proceedings must be started, the parties must prepare themselves for trial and as much precisions as possible must be given to the questions that the jury will have to answer (Jolowicz, 2000: 374). Pre-trial applications as well as pre-trial hearings can take place before trial, during the commencement and pleadings phase and the party preparation of factual evidence, expert evidence, and exchange of documents between the parties (the pre-trial process of information gathering, i.e. “disclosure”, formerly known as “discovery”). (See Andrews, 2008: 29). Under the CPR, the court sets a timetable to govern preparation for trial, including fixing the date for trial or a trial period or “window” (Andrews, 2005: 167). All parties file pre-trial checklists, previously known as listing questionnaires unless the court dispenses with this requirement (Kay, 2012: 706, 721).

Small claims track cases are generally given directions requiring minimal pre-trial preparation and early trial dates (Kay, 2012: 54). In non-complex proceedings involving between £5,000 and £25,000 which are allocated to the fast track, there are fixed timetables of no more than 30 weeks between track allocation and trial. More complex cases usually require more judicial attention during the preparation stage, and there are usually a number of case management hearings (*ibidem*). The rules provide for a variety of pre-trial hearings which may be held, starting with an allocation hearing, a case management conference (at some stage after allocation) and culminating with a pre-trial directions hearing and a pre-trial review. None of them is compulsory, however, and the court may reach its decisions on the directions for the preparation of the case for trial on the papers (Jolowicz, 2000: 58). The use of the telephone or other method of direct oral communication is explicitly authorised (*ibidem*). Standard pre-trial directions provide that an indexed, paginated bundle of documents contained in a ring binder must be lodged with the court before the trial (Kay, 2012: 710, 717). The judge is given the option of directing that a case summary should be included in the trial bundle (Kay, 2012: 710, 718).

Pre-trial hearings have considerable practical importance; the few actions reach trial (Andrews, 2008: 34). Most of them culminate in settlements between the parties. During the preparatory stage, the court may encourage and facilitate the use of an alternative dispute resolution (ADR) procedure, especially mediation; it may also help the parties to settle the whole or part of the case.

The English model of the preparatory stage changed considerably which contributed to the acceleration of civil proceedings. However, the average disposition time for small claims cases (less than £10,000) is around seven months and for other cases exceeds one year (“The truth”, 2015).

### 2.3. Nordic countries

Two of the Nordic countries, namely Denmark and Sweden, have had a civil procedure partly resembling the common law tradition (Nylund, 2014: 34). It is argued that there is an overarching Nordic legal culture within the field of civil procedure, bridging over the gap between the Eastern and Western cultures (Nylund, 2014: 34–35). When comparing the solutions existing in the Nordic countries to the English reform of 1998, commentators observed a common trend towards more flexibility and an active role and responsibility for both the parties and the judge in order to attain the standards of fair trial at reasonable cost (Storskrubb, 2008: 287). In general, the Nordic countries have relatively fast proceedings in civil cases (“The 2015 EU Justice”, 2015: 9) in which the preparatory stage plays an important role. Therefore, Denmark, Norway, Sweden and Finland are put altogether in this section and the focus of this paper is on the solutions existing in those countries.

In Denmark, a major reform of the administration of justice was adopted with effect from 1 January 2008 and one of its issues was to secure that the preparation and hearing of the case is, at the soonest possible stage, agreed in detail between the court and the parties (Werlauff, 2010: 68). “The instrument to secure this”, Werlauff writes, “is a preparatory meeting (...), which after the reform plays a significant role in speeding up civil cases” (*ibidem*). Even before the reform judges usually called the parties to session although they could also demand a preparation in writing and convert an oral preparation into written procedure (Ekelöf, 1995: 201). Werlauff also refers to the whole complex of items to be discussed at the preparatory meeting (Werlauff, 2010: 69). To name but a few issues on this list there are: agreements and disagreements of the parties, objections of the parties to formalities, evidentiary issues, costs the case will cause, the date (and the plan) for the final oral hearing (and how time-consuming it is going to be),

the possibilities to obtain an amicable settlement between the parties or to try some kind of alternative dispute resolution, for example, court-connected mediation. Behind the last two concepts is the assumption that they can be used to save time and costs and that it will often be natural for parties who disagree on the interpretation of an agreement, for example, to seek to settle the case before trying litigation (Werlauff, 2010: 73). Werlauff speaks of custom and tradition as the bases of “negotiations before a court” (*ibidem*). In practice parties often have reached a settlement during the preparatory proceedings (Ekelöf, 1995: 201). The interesting feature of the Danish model of the preparatory proceedings is that the preparatory meeting may be held as a phone meeting, where some or all parties attend by telephone. Werlauff emphasises that “this concept has shown to function very well, and (...) time-saving for all parties involved” (Werlauff, 2010: 69). On the other hand it is possible to hold further preparatory meetings, also as phone meetings (*ibidem*). It is worth emphasising that as a general rule after the end of the preparatory stage no new evidence can be submitted although the court has discretionary powers to allow it at a later stage if a party can justify good cause why the evidence was not presented earlier (Kiurunen, Lindström & Bylov Rath, 2012: 188). At the end of the preparatory stage, parties are required to prepare a written summary of their claims and allegations which shall also include a list of the evidence that will be presented at the trial (Petersen, 2014: 24).

A good introduction to Swedish preparatory proceedings comes in a quotation from Sunnqvist: “Given that the assessment of the relevance of the evidence will normally take place at the preparatory session or after a written procedure, this means that there will be no costly preliminary proceedings about which evidence is to be allowed” (Sunnqvist, 2012: 269). At the preparatory stage normally a session is held before a judge (it may also be held by telephone) with the goal the parties should clarify all issues and make all the factual allegations they want to make; additional proceedings, which might be costly – such as subsequent sessions on preliminary issues – are kept to a minimum (*ibidem*). The preparation could be in writing, but normally there is one or more oral hearings (Orton, 2008: 313). Furthermore, also in the Swedish preparatory stage the new key terms are a plan for dealing with the case and a summary of the case (Petersen, 2014: 24). However, summaries are prepared by the court and not by the parties. Another characteristics of the Swedish preparatory stage is the use of alternative methods of dispute resolution at the preparatory stage in the form of judicial mediation (common) or referral of the case to an external mediator. At the pre-trial stage 80% of all legal conflicts are settled (Modéer, 2004: 196).

In Norwegian preparatory proceedings much effort seems to go into the preparation of a schedule (plan, timetable) by the judge (often at the initial court sitting with lawyers of the parties) according to which the main hearing is proceeded (Backer, 2007: 57). This type of activities where the court, on receiving the defendant's first written reply, sets the date for the main hearing and this date shall only in special circumstances be more than six months after the submission of the statement of claims, may be analysed as means towards the acceleration of proceedings (Backer, 2007: 64). The successful application of the preparatory procedure may also result from frequent making use of modern techniques. For instance, the initial court sitting (oral preparatory hearing) at the preparatory stage to draw up a schedule for the handling of the case, may be held as a distance meeting by telephone or televised communication (conference call). (See Backer, 2007: 65). One of the most crucial characteristics of the Norwegian preparatory proceedings is that certain cases can be decided at the preparatory stage without a main hearing, e.g. during an oral sitting at the preparatory stage if the court finds that it has a sufficient basis and the parties give their consent or by simplified proceedings upon application where it is evident that a claim cannot be upheld, a claim is frivolous or vexatious, the objections against it are entirely unfounded. (See Backer, 2007: 64; for similar Finnish solution see Ervo, 2009: 71). As a rule, no amendments to or additional claims or evidence may be submitted once the preparatory stage is completed, usually two weeks prior to the main hearing (*ibidem*). New evidence cannot be presented after the preparatory stage unless the court allows it under certain circumstances (Kiurunen & Lindström, 2012: 231). Furthermore, at the preparatory stage the court can also restrict the right of a party to present evidence according to a proportionality principle. As Petersen put it: "there shall be reasonable degree of proportionality between the importance of the dispute and the scale and scope of presented evidence" (Petersen, 2014: 24). At the end of the preparatory stage, parties are expected to provide a final written submissions (summaries) as a summing up of their contentions (including a list of the evidence) and a basis for the judge's final preparation (Backer, 2007: 58, 64; Petersen, 2014: 24). During the preparatory stage (in particular at the initial court sitting) judicial settlement efforts are made; judge encourages the parties to settle the case and/or considers the use of judicial mediation or mediation with a view to obtaining an amicable settlement (Backer, 2007: 64). To sum it up, the preparatory procedure in Norway can be viewed as very pragmatic. The Norwegian legislation in this respect is also characterised by the systemic and holistic approach to court pro-

ceedings integrating the preparatory stage within the wider context of the whole proceedings.

It seems that the preparatory hearings are held most frequently in Finland, although they are not compulsory. They are generally held in the majority of disputed civil cases (Niemi, 2010: 76). Furthermore, the preparatory hearing is sometimes adjourned and continued after some other preparatory measures (activities), like obtaining documentation or settlement negotiations, have been carried out (*ibidem*). The preparatory hearing can be organised even by telephone or by some other suitable technique (Ervo, 2009: 72; Niemi, 2010: 76). Parties are required to present the evidence at the preparatory stage according to the principle of preclusion (Ervo, 2009: 70–71, 73–74; Niemi, 2010: 64). During the preparatory stage the court has to make the schedule of the case (Ervo, 2009: 72). The court also makes a summary of the claims, grounds and evidence presented in the case (Niemi, 2010: 77). Last but not least, one of the most important duties of Finnish judges is to try to find a friendly settlement during the preparatory stage (Ervo, 2014: 57–58). The point is that the judge has very important role in the proceedings. The judge has a lot of discretion power to find the best and the most reasonable solution to the case (*ibidem*).

#### **2.4. Some other countries**

Also countries from the Romano-Germanic law family tend to have the preparatory stage (although not always clearly delineated) including preparatory sitting(s) but it contributes to the efficiency of civil proceedings to various extents.

For example, the average disposition time for litigious civil and commercial cases in Austria is fourth in the 2015 EU Justice Scoreboard (“The 2015 EU Justice”, 2015: 9). Austria has never had a clear distinction between the pre-trial and trial phases of an action. Before the reforms of 1983 and 2002 the *Vorverfahren* (a separate preparatory procedure with an oral hearing that could take place at the court’s discretion in very complex cases) existed merely on paper; the courts preferred to allow additional written statements by parties who were represented by counsel in such cases (Oberhammer & Domej, 2010: 266). Currently, Austrian courts, after receiving the written statement from the defendant, have to arrange and hold the *vorbereitende Tagsatzung*, that is a preparatory hearing dominated by the judge in which all the parties’ allegations must be brought forward. If possible, evidence is taken already in the preparatory hearing. Judges are given opportunity to promote a settlement during the entire proceedings, includ-

ing the preparatory hearing. In the preparatory hearing the parties and the judge discuss the plan for the proceedings unless a settlement is possible at that stage.

On the other hand, in France the average disposition time for litigious civil and commercial cases is over 300 days (“The 2015 EU Justice”, 2015: 9). The preparatory phase of civil proceedings includes carrying out a number of tasks such as interviewing witnesses and assessing experts’ reports. It also includes the preliminary hearing (*appel des causes*) to which the principle of giving due hearing to the parties applies. At the preliminary hearing, the judge evaluates the progress made in the preparation for the hearing and decides whether additional work needs to be done or the matter can proceed to the hearing. In practice, judges usually find that more preparation is needed (Elliott, Vernon & Jeanpierre, 2006: 177). The case is then referred to the *juge de la mise en état*, preparatory judge who ensures the proper progress of the proceedings and intervenes in the proceedings in order to complete the preparation of the trial, which the parties have not managed to complete on their own initiative (*ibidem*). As a rule, civil cases are heard at the main hearing by the preparatory judge and two other judges.

## 2.5 Interim assessment

The above examples show that the “mixture” of preparatory hearings/meetings, modern technologies, settlements, preclusion, timetables and summaries not always leads to the same results.

First, certainly, civil cases are solved within a short period in the countries where the oral preparatory meeting/hearing is conducted but only provided that it is not transformed into the “chain” of oral preparatory sittings (what happens in England and Finland which have longer case disposition times). The streamlined procedures shorten the time involved in administering the preparation of civil proceedings. The complicated procedures (like in England or France) make it longer.

Second, some inefficiencies may arise from the fact that in some countries at the main hearing the case is not necessarily tried by the same judge who is responsible for the preparatory stage (see English and French solutions).

Third, one notable conclusion is that the advantage of some preliminary procedures is their flexibility. It should not be understood, however, as the discretion of the judge to arrange subsequent unnecessary preparatory sittings but as the possibility of the application of flexible communication solutions which enable the acceleration of proceedings and the reduction of their costs.

### **3. Polish perspective**

#### **3.1. General remarks**

In Poland the situation looks different than for the countries having a shorter average disposition time for litigious civil and commercial cases. The preparatory stage is usually relatively short. On average, in district courts (in Polish *sądy rejonowe*) it took 4.1 months to conduct the preparatory stage in civil case in 2010 and 3.3 months in the first half-year of 2012.<sup>3</sup> Depending on the region, court and case, it may take even shorter, around one or two months.

The preparatory stage may be so reduced due to the fact that the judge when orders to serve the statement of claim to the defendant, at the same time has to set the date of the first sitting of the main hearing (Article 206 § 1 k.p.c.). The judge sets this date looking for a free place in the calendar even without seeing the statement of defence (Karolczyk, 2013: 158).

So far, a typical preparatory stage has used to include only written activities. Oral preparatory activities (preparatory hearings) have been, as a rule, unusual. The sections below are intended to give the reader an idea of what options are available to Polish courts with regard to preparatory activities under the existing legal provisions (even if courts have not used some of them).

#### **3.2. Main hearing or preparatory hearing/sitting?**

With the date of the first sitting of the main hearing (Article 206 § 1 k.p.c.) set by the judge, the (main) hearing stage opens. It is declared in Article 6 § 1 k.p.c. that the court should aim to ensure that the resolution of the case occurred at the first sitting if this is possible without detriment to the clarification of the case. In practice, this stage usually is not concentrated and does not consist of a single sitting but consists of a few sittings taking place at a few-months intervals. Activities of the court and parties between those piecemeal sittings of the hearing are undertaken in writing. Such de-concentrated style of the proceedings is called the “piecemeal trial” (Uzelac, 2014c: 21). The relatively short concentrated main hearing hardly occurs in civil cases in Poland unless they are not very simple.

The initial questioning of the parties takes place as late as the main hearing (preferably the first sitting of the main hearing), since according to Article 212 § 1 k.p.c., the court at the main hearing asks the parties questions in order to make parties to present, complete their arguments, and/or provide evidence to support these arguments and give explanations necessary to determine the true factual basis for claims and/or rights pursued

by the parties and, in the same manner, the court aims at clarification of important disputed issues of the case.

However, Article 207 k.p.c., remodelled in 2012, in § 4 offers the opportunity to proceed to the hearing of the parties in chambers at the preparatory stage, thereby allowing to combine written activities with oral activities (it is a special case of repetition of the general legal basis for proceeding, if needed, to sessions – open, closed-door or in chambers – contained in Article 149 § 1 k.p.c. which has not been applied, however, in order to conduct preparatory hearings in chambers). According to Article 207 § 4 k.p.c. the preparatory hearing in chambers may take place in cases envisaged by § 3. The latter states that the presiding judge may, before the first sitting of the (main) hearing, order the parties to provide further submissions (preparatory submissions), giving to them directions on the sequence of submissions, deadlines and facts that have to be explained (clarified) to the court. If not ordered by the court, preparatory submissions are not allowed unless they only adduce evidence. In legal literature, this restriction is considered contrary to the right to justice/trial (Zieliński, 2014: 436). (But see Górowski, 2014: 885; Żyżnowski, 2013: 784). During the preparatory hearing, evidence cannot be taken. Rulings on evidence, the initial questioning of the parties and the conclusion of a settlement before the court are not allowed (Górowski, 2014: 886).

The application of Article 207 § 4 k.p.c. is subject to the discretion of the presiding judge. Hence even if the parties applied for such session, their request would not be binding upon the presiding judge. In practice, judges seem resistant to preparatory hearings aimed to discuss preliminary matters with the parties. According to the author's experiences at a law firm as well as relations of the interviewed lawyers and judges, courts traditionally prefer written preparatory stage and the preparatory stage is often limited to few activities in writing. The solution provided for in Article 207 § 4 k.p.c. has not become popular so far (Czerwiński, 2015: 9). It is possible that judges consider a preparatory hearing to be a time-consuming mini-main hearing and unnecessary expense. Symptomatically, within the vast literature on civil proceedings, Zieliński sees the preparatory hearing as unnecessary prolongation of proceedings (Zieliński, 2014: 436). Górowski (Górowski, 2014: 886) presents a contradicting view stating that the preparatory hearing is additional to written submissions; it is optional and should not be abused contrary to the principle of procedural economy. It is useful in complicated cases, especially that oral explanations are valuable source of information which creates more opportunities to assess its truth (*ibidem*).

As of 8 July 2015, the new Regulation of the Minister of Justice of 25 June 2015 relating to the rules of procedure in courts of general jurisdiction (Rozporządzenie Ministra Sprawiedliwości z dnia 25 czerwca 2015 r. Regulamin urzędowania sądów powszechnych, Dz.U. poz. 925) came into force. The new Regulation provides for important procedural measures that could not be achieved through the previous Regulation, which referred to the preparation of hearing in just four sections regarding only sittings outside the court building, convening lay judges, open sittings with audience participation and the way of setting the hour of the beginning of the sitting. One of the principal weaknesses of the construction of Polish civil proceedings has been the unpredictability of the schedule of piecemeal proceedings, which might last many years. The new Regulation contains one completely new section (§ 53) which in paragraph 1 provides for the so-called organisational sitting. It is convened, if necessary, in order to determine the dates of sittings with the parties and their lawyers. The precondition of the organisational sitting is the necessity for such a meeting. Where the organisational sitting has been convened, the plan for the hearing should be agreed upon, if possible, during this meeting. The plan for the hearing is further referred to in § 53(2). The new provision states that if the examination of the case requires more than one sitting to be held, the presiding judge – if possible – will plan (set) dates of all sittings of the hearing for consecutive days (if there are no obstacles to this end). The question arises whether we are close to the tipping point in the Polish history of preparatory hearings/sittings.

### **3.3. Amicable dispute resolution at the preparatory stage**

Pursuant to Article 10 k.p.c. courts are obliged to promote settlement – where settlement is permissible – that is, to aim at amicable resolution of disputes at each stage of the proceedings. However, the statistics of the Ministry of Justice show that in 2014, only around 14 thousand civil cases of over 780 thousand adjudicated contentious civil cases (excluding family cases, labour cases, commercial cases, payment order cases) were settled before mediators (215 cases) and courts district and regional (around 1,79%). (See Ministerstwo Sprawiedliwości, 2015a; Ministerstwo Sprawiedliwości, 2015b). Settlements reached during the preparatory stage are not distinguished in the statistics.

In particular, the demand for mediation and its outcomes are very weak. Therefore, the Act amending k.p.c. and some other acts with regard to the promotion of alternative dispute resolution (ADR) methods (ustawa z dnia 10 września 2015 r. o zmianie niektórych ustaw w związku ze wspieraniem

polubownych metod rozwiązywania sporów, Dz.U. poz. 1595) was adopted on 10 September 2015. According to this Act, from 1 January 2016 provisions of Article 1838 § 4, 5 and 6 k.p.c. are going to read: § 4. *The presiding judge may summon the parties to chambers so that they take part in the information meeting regarding ADR methods, in particular, mediation. This meeting may be conducted by a judge, a court clerk, a court official, an assistant of the judge or a permanent mediator.* § 5. *Before the first sitting of the hearing the presiding judge shall decide whether to refer the parties to mediation. To this end, the presiding judge may summon the parties to appear in chambers in person if there is a need to hear the parties.* § 6. *If the party fails to attend the information meeting or the hearing in chambers without justification, they may be ordered to pay the costs incurred by the other party summoned to be present at this meeting or hearing.*

### **3.4. Modern technologies at the preparatory stage**

The chance of having a quick and efficient preparatory stage is higher if courts are allowed or obliged to make use of the modern technologies. However, the Polish legislature has traditionally been reluctant to experiment with e.g. new ways of convening participants or informing of the court's decisions such as phone call, video link, fax, email or telegram. These solutions are provided for in provisions of k.p.c. regarding labour and social insurance cases (Article 472) and, *mutatis mutandis*, with regard to small claims proceedings (Article 5056 § 1). These provisions state that the court may convene the parties, witnesses, expert witnesses and other persons in a manner considered the most purposeful, even when it disregards the general rules in this respect, if only the court considers this necessary to speed up the resolution of the dispute. It relates also to the service and orders aimed at the preparation of the hearing, in particular requests for delivery of personal files and other documents necessary to the resolution of the dispute. Convening and service performed by other means than in writing have effects provided for by general rules if there is no doubt that the addressee has been reached. However, it is not possible to hear the parties, witnesses and/or expert witnesses by telephone (or video link); this can be done only in an oral hearing. (See e.g. judgment of the Supreme Court adopted on 15 April 1969, Case III PRN 20/69). Practising lawyers usually have not reported occurrences of the application of flexible communication solutions. Regrettably, the legal formalism of proceedings has told against technical possibilities which have been successful in other legal and cultural contexts, such as those of Norway.

However, as of 8 September 2016 Article 1491 k.p.c. will be added. It has been modelled on Article 472 k.p.c. and will provide for the possibility to convene the parties, witnesses, expert witnesses and other persons in a manner considered the most purposeful.

Furthermore, Article 151 § 2 k.p.c. will be added which will allow the court to hold an open session in the form of a videoconference hearing provided that the participants of proceedings will be present in the other court building and the transmission will take place between the courts. The possibility to use modern technologies for taking evidence (Article 235 § 2 k.p.c.) will be much enhanced.

It should be underlined that the topic of simplifying civil proceedings by using modern technologies was explicitly debated by the EU institutions. In 2013 the Justice and Home Affairs Council adopted the Draft Strategy on European e-justice 2014–2018. Next, on 15–16 June 2015 the Council adopted a set of Council Recommendations to offer concrete guidelines for the member states to improve the use of videoconferencing technology in the area of justice (“Promoting the use of and sharing of best practices on cross-border videoconferencing in the area of justice in the Member States and at EU level”). On 16 December 2015, Regulation (EU) 2015/2421 of the European Parliament and of the Council amending Regulation (EC) No 861/2007 establishing a European Small Claims Procedure and Regulation (EC) No 1896/2006 creating a European order for payment procedure was finally adopted (OJ L 341, 24.12.2015). The Regulation will oblige member states to promote the use of distance communication technology (DCT). The courts or tribunals that are competent in relation to the European Small Claims Procedure will need to have access to appropriate DCT, such as videoconference, teleconference or others, with a view to ensuring the fairness of proceedings with regard to the particular circumstances of the case. A party summoned to be physically present at an oral hearing will be able to request the use of DCT, provided that such technology is available to the court or tribunal, on the grounds that the arrangements for being physically present, in particular as regards the possible costs incurred by that party, would be disproportionate to the claim. (More Mańko, 2014; Mańko, 2015).

### **3.5. Preclusion**

K.p.c. contains the principle of preclusion in the penultimate section of Article 207. This provision (§ 6 added in 2012) states that the court shall ignore late arguments and/or evidence which means the preponderance of the timeliness over the truth (Arkuszewska & Kościółek, 2012: 13).

Exceptionally, however, late arguments and/or evidence will be taken into account by the court if the party presents plausible reasons in support of the conjecture that: (1) the delay is no fault of their own, (2) investigating late arguments and evidence will not lead to a delay in the resolution of the case, or (3) there are other exceptional circumstances.

The rules on preclusion may seem difficult to interpret if one is aware of Article 217 § 1 k.p.c. which states that arguments and evidence to prove the disputed facts and to refute and rebut any arguments and evidence of the other party must be made “before the closing of the hearing”. The court ignores late arguments and evidence, unless the party presents plausible reasons in support of the conjecture that the delay is no fault of their own or investigating late arguments and evidence will not lead to a delay in the resolution of the case or there are other exceptional circumstances (§ 2). The court ignores also arguments and/or evidence if they are invoked only for the purpose of delaying proceedings or if disputed issues of the case have already been sufficiently clarified (§ 3).

In legal literature there are contradicting views on the topic. Some scholars believe that Article 207 k.p.c. takes precedence over Article 217 k.p.c. (Strus-Wołos, 2013:194). The others are of the opinion that Article 207 k.p.c. does not exclude plaintiff from adducing evidence till the closing of the (main) hearing (Zieliński, 2014: 436).

#### **4. Written versus oral procedures – general conclusions**

Is there the superiority of oral preparatory proceedings over written ones? The answer cannot be affirmative in all cases. Courts adjudicate also cases which are simple or very well prepared by the parties for the hearing stage. As a rule, such cases do not need spoken preparatory activities. It is worth detailing, however, why a purely written form of the preparatory stage in the remaining cases does not seem more efficient than other models of the form of the preparatory stage. The main advantage of written preparatory proceedings is that they are cheaper (in particular where it is possible to replace written communication via hard copy with electronic communication) and, to some extent, more convenient for judges who do not need to hear the parties. (See also Kunicki, 2008: 3). It is much cheaper to fill in the standardised form regarding e.g. mediation and/or settlement and send it to the parties by mail than to take more resources to organise the preparatory meeting. It is much cheaper to answer such a question in writing than to travel to the court.

However, the cheap and short written preparatory stage does not mean necessarily that the whole proceedings will cause the lower costs to the justice system. The resolution of the complex case (especially where extensive taking of evidence is necessary) at the first sitting is impossible without the appropriate preparation. If the comprehensive preparation was done at the preparatory hearing in chambers, a limitation to one sitting in the main hearing (for the taking of evidence) would be quite realistic. (See also Oberhammer & Domej, 2010: 268).

The oral character of procedural activities is supposed to produce a justice that is more consensual and “communitarian” (Cadiet & Amrani-Mekki, 2008: 316). It seems that effective communication is essential to court proceedings (communication is not the same as discourse; see Wojciechowski, 2010: 58), especially that, as Robberstad puts it, from the users’ perspective, civil justice may be regarded as providing a forum for dialogue which the contesting parties are obliged to attend (Robberstad, 2012: 4). Verbal communication during the preparatory stage favours direct contact between the parties, dialogue, and therefore amicable dispute resolution methods. (See also Cadiet & Amrani-Mekki, 2008: 316).

It is better to communicate by talking, since this implies an interaction between the judge and the parties, while writings are the long-lasting exchange of the acts of articulation. In written preliminary proceedings judges, even though far from being totally passive, cannot be as active as at the hearing in chambers in which the parties participate. Conducting the preparation at the hearing, judges are given greater flexibility and can, through dialogue, reformulate the parties’ statements. The oral character of preparatory activities results in that judge should hear the parties as to the circumstances relevant to the outcome of the case; it happens that the party does not refer to these circumstances in the written statement because he or she does not know which of them are relevant or does not describe them with sufficient precision. As a consequence, the party may lose the case. (See also Kunicki, 2008: 2).

Although it is beyond the scope of this article to present the details of methods and findings of studies of communication, it is worth pointing to lessons that have been learned from these studies and some of these lessons can probably be applied to the analysis of spoken versus written communication between the court and the parties. They found that oral communication may be most effective when there is a need to exchange views, seek feedback and provide an immediate opportunity for clarification (O’Reilly & Pondy, 1979). Face-to-face communication is a more persuasive channel because it provides a dynamic and effective way of dealing with

people's concerns (Clampitt, DeKoch & Cashman 2000: 42). Consequently, parties are more likely to give their consent to refer them to mediation if they are directly asked about this and an immediate response is required, especially that it is much more difficult to refuse mediation when standing in front of the judge. With that position, the judge may contribute to amicable settlements of disputes in a greater number of cases. Parties are more ready to accept the referral to mediation under such circumstances than in case of the request in writing; that means that the conclusion of a litigation case through settlement acceptable to both sides (instead of adjudication) is more likely to take place.

The parties' and the court's statements and reactions thereto occurring during the meeting may contribute to the quick clarification or the conclusion of the case even before the main hearing. With such an explanation, the preparatory hearing (if not multiplied) can be seen as possibly making the whole proceedings shorter.

Oral preparatory activities will not always be expensive, since oral communication includes not only face-to-face meetings but also videoconferencing and telephone. In particular, Swedish and Danish examples show that drawing up a schedule for the handling of the case may take place during a distance meeting by telephone. The proceedings may be shorter if the dates of sittings are agreed upon by the judge and the parties instead of just informing the parties of the judge's choice. The telephone may be used successfully to this end. In case of the less technical issues, like the referral to mediation, more direct communication should be preferred, at least videoconferencing. It is worth noting, however, that there may exist factual limitations of the use of technologies, even in the countries where it is most advanced. For example, even where the evidence of the witness can be taken by video link (transmitted directly during the trial), judges may prefer witnesses to appear in court in person, since it may not be possible to control a witness appearing on a screen in the same way as a witness who is physically present in court.

This goes along with the need to shift (if not shifted within a given national system) the focus from a purely technical to rather managerial role of judges who would have more human relations skills. Still, it should be said that these skills can be successfully used also in preparatory proceedings where the modern technologies (televised communication, telephone) are used. The latter, combined with judges' skills, may contribute to the efficiency of oral activities.

## 5. Summary

There are a number of factors which may lead to the outcome in terms of the efficiency of civil proceedings. It is not the intention of this article to suggest that oral preliminary proceedings can be regarded as the only such factor or that there are no gains at all from written preliminary proceedings. However, foreign examples show that these gains would be most visible if written preliminary proceedings were used in conjunction with, rather than in opposition to, elements of oral proceedings. In the countries which have significantly reduced court disposition times, a moderate use of preparatory hearings/sittings is made consistently.

The analysis of the Polish *status quo* leads to the conclusion that in terms of oral preparatory activities Poland has some components of the necessary legal frameworks in place which enable the development of efficient methods of the preparation of the case. But so far the implementation of the described changes has not revolutionised thinking about case management during the preparatory stage. These amendments created some inconsistencies and difficulties in interpreting k.p.c.

There is a need for unambiguous legal framework in k.p.c. providing for the initial examination of the case at the preparatory stage. It should include the conduct of activities that allow to resolve the dispute at the first sitting of the hearing. Currently, courts are expressly advised by Article 207 § 4 k.p.c. of the possibility to conduct preparatory hearings/sittings. However, this possibility cannot be fully utilized for the benefit of the preparation of the case as long as it is subject to limitations of the initial questioning of the parties resulting from Article 212 § 1 k.p.c. Systems that allow a broad range of problems to be discussed already during the preparatory hearing (a single hearing and not “fragmented” preparatory proceedings) are more efficient in terms of the length of proceedings. Therefore, it should be re-considered whether the amendment of Article 212 § 1 k.p.c. is not needed. It will also be necessary to watch the impact of reforms of 2015 on court practice as well as judges’ efforts to rationalise the preparatory stage and make it more flexible. Will they hold one comprehensive sitting in chambers during the preparatory stage which will combine functions of organisational sitting, information meeting and preparatory hearing referred to in Article 207 § 4 k.p.c.? Will they, to the contrary, conduct separate sittings for these purposes? Will they ignore oral preparatory activities even though their significance seems unquestionable based on the experience of other countries? Will they plan the (main) hearing stage like courts do in the Nordic countries as well as England and Wales?

If the results of the initial examination of the case support this, the court should undertake explanatory activities aimed at the clarification of the positions of the parties, the determination of which of facts crucial for the resolution of the case are disputable between the parties as well as whether and which pieces of evidence should be admitted in order to clarify them, the clarification of other facts that may be of importance to correct and quick resolution of the dispute. Frequently this cannot be done in a written form as effectively as when the court opts for direct communication methods.

Second, the discrepancies in the legal provisions regarding the principle of preclusion should be clarified, so that they guarantee the discipline of the parties presenting evidence, and their (so far divergent) interpretation does not adversely affect proceedings. In practice, clear rules on preclusion may be the factor that limits the length of proceedings (see e.g. Denmark or Norway).

Third, the court should undertake explanatory activities aimed at encouraging the parties to reconciliation and settlement. In the countries scored as most efficient (Denmark, Sweden) parties often reach a settlement during the preparatory proceedings. In Poland, pre-trial negotiations before a court or a mediator have not, however, been a considerable part of the local tradition. Judges should (reasonably) organise pre-trial meetings provided for in legal provisions in order to make efforts to incorporate the culture of negotiations into the Polish court culture.

Fourth, in the most efficient countries (in terms of the length of proceedings) courts use telephone and video conferencing. Irrespective of their positive experiences with DCT during preparatory proceedings, we should perceive that a key advantage of the use of DCT would be that it would allow courts to gain an experience needed to ensure compliance with EU legislation. The amendments that will come into force in 2016 mark a significant step forward in the legal bases for the use of DCT by Polish courts (even though Article 151 § 2 k.p.c. has a quite narrow scope). But the legal bases are not the only issue of importance in the use of DCT; another issue is the practice of their application resulting first from the availability of DCT to the court, and second from the completely voluntary nature of legal provisions thereon.

To sum it up, a more balanced use of written and oral activities in the Polish preparatory proceedings in civil cases should be advocated. Moreover, judges should place a stronger focus on the development of new ways of managing cases. The new tools provided for in the new Regulation relating to the rules of procedure in courts of general jurisdiction and the amended legal framework on mediation may make judges less “isolated”

and more amenable to balanced collaboration with all the parties aimed at the preparation of efficient main hearing. The success will certainly depend on the approach of the judges, their education and training.

#### N O T E S

<sup>1</sup> All Internet references in this article were last visited on August 30, 2015.

<sup>2</sup> However, commentators are increasingly sceptical of creating distinctions between the common and the civil law legal families, since there are also strong instances of convergence and stark categorisations are unhelpful in identifying these. See (Storskrubb, 2008: 285).

<sup>3</sup> See the response of the junior minister of the Ministry of Justice (with the authorization of the Minister of Justice) to the parliamentary interpellation no. 9832 related to the increasingly longer waiting periods for hearings in district courts; in Polish at <http://www.sejm.gov.pl/Sejm7.nsf/InterpelacjaTresc.xsp?key=64AEE1DA> (accessed August 30, 2015).

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