THEMATIC INDEX

INAUGURAL CONFERENCE (I/III)
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COUNTRIES

AUSTRIA, BELGIUM, CYPRUS, FINLAND, GREECE, ITALY, ROMANIA, AND SLOVAKIA

CORE TOPICS

I. PROCEDURAL AUTONOMY AND DIFFERENT CIVIL PROCEDURE TRADITIONS

The civil procedure systems in Europe are mainly influenced either by the germanic-romanic school or the Napoleonic one (or both). Most Member States have a civil law system, some have a mixed system and Ireland is the only exception to have a common law one. Depending on their deeply rooted civil procedure history, countries like Austria and Italy may have a more conceptualised, possibly "romantic", view of the subject, whereas Finland and the Nordic countries exhibit programmatic realism.

Consequently, the effects of the CJEU judgments also vary based on cultural tradition. For example, Finland shows no **"unnecessary Euro-Sceptism"**, unlike Italy, that often finds itself either excessively prudent in recognising the CJEU *auctoritas* or, the opposite, applies EU law and its jurisprudence blindly without contextualising it in the specific case.The CJEU's jurisprudence has a strong impact today, more than ever, affecting all Member States to varying degrees, leading some from a strictly civil system to name a few: Austria, France, Germany and Italy, towards a common law one.

In Finland, as portrayed by **Laura Ervo**, **procedure is a tool to achieve an end, not as a value in itself, making harmonisation a practical tool.** Scandinavian realism forms a part of the East-Nordic legal culture, where jurisprudence should be understood as social theory, and legal policy as social technology.

The pragmatist, policy-orientated solutions that legal realism promotes, found fertile ground in Sweden. There, law never lost its connection with the lives of ordinary counterparts, **Swedish legal professionals never managed to monopolise their language and culture.** Law is not something that stands alone, but its validity relates to societal needs and people's values. It is important that the law corresponds with practical concerns of society. In other words, a legal solution must work in practice and align with current societal values so that the law can be followed without moral dilemmas. If not, the law can ultimately be seen as invalid. In this sense, Nordic law has been more about experience than logic, and Nordic jurists are, by tradition, pragmatists.

On the other hand, Cyprus, as **Nicholas Mouttotos** taught us, an ex-British colony, traditionally follows the common law tradition in procedural law. However, the European legislator has compelled the country to gradually shift and revise its rules of civil procedure, aiming to improve the enforcement of judgements. The same applies to the ex-USSR counties that with the European Union – to some extent in an easier and less skeptic way compared to the southern European States – introduced European legislation and followed the EU jurisprudence in an orderly way.

The financial crisis that hit the EU in 2008, some countries more than others, highlighted the relationship between the pressures of European legislation to reform an economic turmoil. This crisis significantly influenced many countries reform process both in substantial law areas and procedural ones. On a European level it led, for example in the banking system, to the Single Supervisory Mechanism that still has some legislative gaps that has caused the CJEU to force "creative interpretations", that led – on a national level to jurisdiction gaps – in order to safeguard the system. **This aspect prompts reflection, for instance, on the Covid-19 pandemic and its economic implications, as well as the Recovery and Resilience Facility (RRF). To access some of these funds, the RRF has forced certain Member States, such as Italy, to accelerate reforms – the civil justice one is a perfect example – to achieve "harmonisation" at an EU level.**

II. CJEU'S JURISPRUDENCE AND INFLUENCE ON LEGISLATIVE INTERVENTION

The CJEU in C-6/60 *Humblet v. Belgium* created the first of the two strategic and fundamental principles that would justify her – today not so "rare" – intervention in the procedural autonomy of the Member States. The Court also added the requirements of proportionality, adequacy and effectiveness late in C-222/84 *Johnston v Chief Constable of the RUC*, C-222/86 *Heylens* and C-327/02 *Panayotova*.

The first being the **principle of equivalence** that states that the procedures would not be less favourable than those governing similar domestic situations. The second one, the **principle of effectiveness** that says that the procedures should not render impossible or excessively difficult the exercise of rights conferred by the Community legal order.

Although these two principles have a similar conceptual meaning, they differ significantly in their implications. Their application varies based on each Member State's procedural system and also on the different subject areas. Consequently, their application will vary from State to State. For example, concerning ADR application as seen with mandatory mediation law in Greece, for **consumer protection** and ***ex officio* duty of the judge (as will be seen later)**.

Kalliopi Makridou showed us the principle of effective judicial protection in relation to national legislation. Greece was strongly influenced by **Italian legislation,** particularly in the **mandatory attempt of settlement and mediation**. This reflects the **impact of cases from the CJEU originating from the other Member States.**

Greek Mediation Law of 2010 was a translation of Directive 2008/52/EC. Based on the *Menini* and *Alassini* cases, the Greek legislator introduced two laws in 2018 and 2019, regulating mandatory mediation.

Although Law No. 4512/2018 was a significant attempt by the Greek legislator to promote and establish mediation effectively, it faced strong reactions from both lawyers and judges. Notably, the most forceful arguments against the implementation of the Mediation Law of 2018 stemmed from the CJEU case law.

The role of Supreme Courts is portrayed clearly in this Greek experience. In Greece, Opinion No. 34/2018 of the Supreme Court rendered a negative opinion on the law regarding mandatory mediation. The Court used the *Alassini* case as a basis, which states, "*various factor show that a mandatory settlement procedure, such as that at issue, is not such as to make it in practice impossible or excessively difficult to exercise the rights which individuals derive from that directive*".

The exclusion of both consumer disputes and small claims from the scope of the requirement to attend with a lawyer appears to indicate the compatibility of the Greek mediation regime with the relevant CJEU case law.

As a conclusion, the **CJEU's rulings in the *Alassini* and *Menini* cases significantly influenced the development of mandatory mediation in Greece. The Greek Supreme Court focused on the main points of these rulings and reached its opinion twice, cautiously but not always successfully.**

III. RES JUDICATA AND JURISDICTION

***Res iudicata* is a core topic, directly and indirectly, for all the Member States' reports.** Different countries consider the effects on *res iudicata* within their systems, always based on the protection of consumers and their privileged position. This also involves the connection as highlighted by **Christian Koller** between *res iudicata*, *lis pendens* and *appeal*. Three essential categories, that from the Austrian experience, are well connected and where the CJEU in different cases has impacted on.

The connection between **jurisdiction and *res iudicata***. There are connections like the decision on jurisdiction under the **Brussels I-*bis* Regulation (*Gothaer*, C-456/11)** and the extension of ***res iudicata* effects (*BNP Paribas*, C-567/21)**, as seen in Austria. Last, but not least, *ex officio application* – may issues not raised by the parties be raised *ex officio* by the appellate court?

Denial of jurisdiction and res iudicata have been two crossed categories for the Italian experience. Denial of jurisdiction from the EU Judge to the Italian **administrative enforcement judge (*giudice di ottemperanza*) see C-219/17, *Fininvest***. As well as the impact of the CJEU in different scenarios as marked by **Marco De Cristofaro**. For instance, in **C-497/20 *Randstad Italia,* the Luxembourg judge was very respectful of the limits of procedural autonomy by not intervening, even with the manifest non-application of EU law and jurisprudence by the administrative judge (Italy's Council of State). Meanwhile, in cases related to the payment order and consumer protection, such as joined cases C-693/19 and C-831/19 *SPV Project/Banco di Desio*, the CJEU discharged *res iudicata* and also granted new powers to Italy's enforcement judge in applying Art. 6 and 7 of Consumer Directive.**

There is obviously also the common issue of the relationship between national judges and the CJEU. The issue is evident in all Member State and connects obviously to the different civil procedure traditions. In fact, the effectiveness of the preliminary referrals varies. There are instances of both abuse and underuse of this instrument.

IV. CHALLENGES IN BALANCING CONSUMER PROTECTION LAW AND CIVIL PROCEDURE

This seems to be a – unanimous (for now) – and biggest issues that the CJEU is facing in implementing its decisions rigorously, as the procedural systems of each Member State are seen as major obstacles with the enforcement of the EU law, in this case Directive (93/13/EEC). Consumers, as the weaker party in any case, may have some special privileges due to their vulnerability.

The question that arises is: **can these privileges be extended to procedural rules**, significantly alternating the general procedural system? The issue, for example, has been evident lately with the payment order and joined cases C-693-19 and C-831/19. The same applies to Romania and the numerous judgements from the CJEU in this area.

Specifically for the Austrian experience it must be noted that national courts are required to analyse the qualification as a consumer and unfair terms *ex officio*; this has ramifications for numerous proceedings in the Austrian experience.

Ex officio analysis in consumer disputes vs. the principle of contradictory procedure (Case *Cornelius de Visser*, C-292/10.

The role of the consumer in arbitration proceedings and unfair term to consumer's detriment – Council Directive 93/13/EEC.

Uncertainty in light of the Court's ruling in *Caixabank SA* (C-224/19).

IV.1. CONSUMER PROTECTION JURISPRUDENCE

The first two cases are for: taking of evidence *ex officio* in consumer disputes v. the principle of contradictory procedure. The following jurisprudence, as accentuated by **Sandra Meňhartová** and **Sebastian Spinei** and **Corina Bănceu-Vulpe** respectively for Slovakia and Romania, clearly portrays the difficulties in application of the consumer's directive and the consequent intervention by the CJEU in procedural law.

(i) Case Mostaza Claro v Centro movil Millenium SL, C-168/05

Preliminary ruling:

"May the protection of consumers under Council Directive 93/13/EEC … require the court hearing an action for annulment of an arbitration award to determine whether the arbitration agreement is void and to annul the award if it finds that the arbitration agreement contains an unfair term to the consumer's detriment, when that issue is raised in the action for annulment but was not raised by the consumer in the arbitration proceedings?"

Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts must be interpreted as meaning that a national court seised of an action for annulment of an arbitration award must determine whether the arbitration agreement is void and annul that award where that agreement contains an unfair term, even though the consumer has not appealed that invalidity in the course of the arbitration proceedings, but only in that of the action for annulment.

(ii) Case Banif Plus Bank v Csaba Csipai vs Viktòria Csipai, C-472/11

… However, the principle of *audi alteram partem*, as a general rule, requires the national court which has found of its own motion that a contractual term is unfair to inform the parties to the dispute of that fact and to invite each of them to set out its views on that matter, with the opportunity to challenge the views of the other party, in accordance with the formal requirements laid down in that regard by the national rules of procedure.

(iii) Impuls Leasing Romania IFN SA, Case C-725/19

Question referred for a preliminary ruling

Whether Directive 93/13 must be interpreted as precluding national legislation which does not allow the court hearing enforcement proceedings, before which **an objection to enforcement** of a leasing contract

concluded between a consumer and a seller or supplier, which constitutes an enforceable instrument, has been brought, to assess, of its own motion or at the request of the consumer, **whether the terms of that contract are unfair**, on the ground that there is **an action under ordinary law** in which the unfairness of the terms of such a contract may be reviewed by the court hearing that action.

In the separate action, the consumer seeking suspension of the enforcement proceedings is required to pay a security calculated on the basis of the value of the subject matter.

The Court observed that:

- Effective protection of the rights conferred on the consumer by Directive 93/13 can be guaranteed only **provided that the national procedural system allows the court**, during the enforcement proceedings concerning an order for payment, **to check of its own motion whether the terms of the contract concerned are unfair.**
- In the **separate action the consumer seeking suspension of the enforcement proceedings is required to pay a security**.
- The costs which legal proceedings would entail in relation to the amount of the disputed debt must not be such as to dissuade the consumer from bringing court proceedings to assess the potential unfairness of the contractual terms.
- It is likely that a debtor in default does not have the financial resources necessary to provide the guarantee required.

Article 6(1) and Article 7(1) of Council Directive 93/13/EEC of 5 April 1993 must be interpreted **as precluding national legislation** which does not allow the court hearing the enforcement proceedings in respect of a debt, before which an objection to enforcement has been lodged, to assess, of its own motion, or at the request of the consumer, whether the terms of a contract concluded between a consumer and a seller or supplier which constitutes an enforceable instrument are unfair, where the court having jurisdiction to rule on the substance of the case, which may be seised of a separate action under the ordinary law with a view to an assessment as to whether the terms of that contract are unfair, may only suspend the enforcement proceedings until a decision has been given on the substance if a security is paid at a level that is likely to dissuade the consumer from binging and maintaining such an action.

(iv) <u>Raiffesisen Bank SA, C-698/18</u>

First Question

Whether Article 2(b), Article 6(1) and Article 7(1) of Directive 93/13 must be interpreted as not precluding a national rule which, while providing that an action seeking a finding of **nullity of an unfair term** in a contract concluded between a seller or supplier and a consumer **is not subject to a time limit**, subjects the action seeking to enforce the **restitutory effects** of that finding to a **limitation period**.

The obligation for the national court to exclude an unfair contract term imposing the payment of amounts that prove not to be due entails, a corresponding **restitutory effect** in respect of those same amounts.

Article 2(b), Article 6(1) and Article 7(1) of Council Directive 93/13/EEC of 5 April 1993 must be interpreted as not precluding a national rule which, while providing that **an action** seeking a finding **of nullity of an unfair term** in contract concluded between a seller or supplier and a consumer **is not subject to a time limit**, subjects the action seeking to enforce **the restitutory effects** of that finding to a **limitation period**, provided that that period is not less favourable than those governing similar domestic actions (principle of equivalence) and that it does not render practically impossible or excessively difficult the exercise of rights conferred by the EU legal order, in particular Directive 93/13 (principle of effectiveness).

Second Question

Whether Article 2(b), Article 6(1) and Article 7(1) of Directive 93/13 and the principle of equivalence, effectiveness and **legal certainty** must be interpreted as precluding a judicial interpretation of national

legislation to the effect that the **legal action for repayment of amounts unduly paid** on the basis of an unfair term in a contract concluded between a consumer and a seller or supplier **is subject to a three-year limitation period** which **runs** from the date of full performance of that contract, since the consumer is deemed from that date to be aware of the unfair nature of that term.

Under Romanian law, **the effect of absolute nullity is the restoration** of the previous situation (*restitutio in integrum*) by means, in relation to reciprocal contracts, of an action for reimbursement of the undue payment. Also, where such an action is brought, the **limitation period** begins **to run on the date on which the court establishes the cause of action.**

The referring court pointed out that, **for reasons of legal certainty** and having regard that the definition of the **term 'consumer'** does not contain any information that can be used to determine when a contracting party ceases to be a consumer, it is conceivable **that the period for the reimbursement** of amounts paid on the basis of an unfair term in a contract concluded with a consumer **could start to run** from the **date of the full performance of that contract**, and **not** from the date on which the term at issue is **found to be unfair**, and therefore **declared invalid**.

The principle of effectiveness precludes a**n action for reimbursement** from being subject to a limitation period of three years, which starts to run from the date on which the contract in question ends, irrespective of the question whether the consumer was, or could reasonably have been, aware on that date of the unfairness of a term of that contract relied on in support of his or her action for reimbursement, since such limitation rules are likely to render excessively difficult the exercise of that consumer's rights conferred by Directive 93/13.

The principle of equivalence must be interpreted as precluding an interpretation of national legislation whereby **the limitation period applicable to a legal action for reimbursement** of amounts unduly paid on the basis of an unfair term start**s to run as from the date of the full performance of the contract**, where that **same period starts to run**, in the case of a **similar domestic action**, as from the **date of the judicial finding** of the cause of the action.

(v) C-419/18 and C-483/18 Profi Credit Polska [2019] paras. 67-68

It follows that, where a national court is hearing an application based on a promissory note which was initially left blank when issued and subsequently completed and is intended to secure a debt arising under a consumer credit agreement, and that court has serious doubts as to the merits of that application, Articles 6(1) and 7(1) of Directive 93/13 require that that court be able to demand the production of the documents on which that application is based, including the promissory note agreement, where under national law such an agreement constitutes a precondition for the issuance of such a promissory note.

It must also be noted that the considerations above do not contravene **the principle, referred to by the referring court, that the subject matter of an action is to be defined by the parties. The national court's requirement that the applicant produce the content of the document or documents on which his application is based simply forms part of the evidential framework of the proceedings, since the purpose of such a request is merely to verify the basis of the action**.

IV.2. CASE MANAGEMENT AND *EX OFFICIO* DUTY

Case management should be viewed as a vehicle for achieving a just resolution of cases at a proportionate cost. This involves setting realistic deadlines for procedural steps, scheduling realistic hearing dates, maintaining flexibility in dealing with arising matters, ensuring proportionality, promoting transparency 8cards up on the table), encouraging cooperation between litigating parties, promoting alternative dispute resolutions, and implementing sanctions that act as a counterbalance to the provided flexibility.

Modification of the adversarial system with some elements of the inquisitorial system which give rise to case management. This raises the question: will consumer cases lead to a more inquisitorial form of procedure? The illegality of a contract could be a potential basis for establishing *ex officio* powers.

From the principles of the above CJEU jurisprudence it can be concluded that there is an obligation to apply rules on unfair contract terms ex officio, going beyond the ambit of the case as defined by parties. This includes a reasonable obligation to take instructional measures, as seen in the Belgian doctrine through the

eyes of **Janek Tomasz Nowak** on *ex officio* application. The obligations from ECJ case law can be integrated into the existing framework by transforming a discretionary power into a duty.

V. CONCLUDING REMARKS

As evident from the summary of all reports given at the Vienna Conference, what becomes clear for most Member States is that, to quote Romania, "*introducing special rules for certain types of cases may lead to fragmentation instead of harmonisation of the national law*".

On this point, it's even more evident how much these special rules, particularly concerning a specific category such as "consumers" are being introduced through a hard-core harmonisation process. This process inevitably leads the CJEU, hopefully subconsciously, to force civil procedural rules to adapt. Does civil procedure possess the same elasticity as substantive law to be adapted on a jurisprudential level? As pointed out with the intervention of Vigita Vėbraitė from Lithuania, can we create a Code of Civil Procedure and a separate one solely for consumers?

Although, always justified by the principle of equivalence and effectiveness, the non-application of some national civil procedure rules inevitably forces, at least for the civil law tradition Member States, a new, or rather constant, intervention by the national legislator. However, this results in creating almost a discrimination between categories of people. Why are consumers favoured and not workers that in contractual obligations are as much a weak party as consumers? I ponder this especially thinking of the Italian system.

Furthermore, this has led the CJEU to intervene in the *ex officio* powers of judges as well in the core principles such as *res iudicata*. Do we need to change everything for it all to remain the same? The road is leading us to believe that we actually require some common minimum standards. A starting point could be the ELI/UNIDROIT "Model European Rules of Civil Procedure" and the 2017 Directive Proposal on Common Minimum Standards of Civil Procedure in the European Union.

These concluding remarks are just some general reflections on the topic, more akin to a stream of consciousness, I would dare say. Nonetheless, they are essential for understanding wether a common thread may be traced between among so many and such diverse legal traditions. The Vienna Conference appears to be a very positive beginning in confirming this and the following encounters will be instrumental in reaching a conclusion.