Draft REPORT

on the Aspects of “Minor Cases” in the Practice of Civil and Commercial Proceedings in the First Instance and Appellate Courts of Ukraine

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I. Executive summary

An important feature for a sound economy in a present time society is the attitude to feel responsible and subsequently to take responsibility for one's own actions and that one may expect that others will keep their promises. These needs supporting instruments to support and where necessary ensure such attitude and conduct.

For instance, when it comes to paying even small bills, it is necessary that such obligations are enforced. It may be so that it deals only with relatively small claims, but the most important thing is that it is part of a structure. A telephone company cannot work if for instance only 80% of the so-called small claims are paid. For the existence and continuity of such enterprises ensuring that precisely the "small sums" are paid regularly indeed every month. For that reason, supporting instruments must be in place to help people to live up to their obligations. This report, with as background the overarching goal to make the Ukrainian civil and commercial justice more effective and efficient, seeks to improve, and where necessary, find solutions.

It takes as a starting point what in the framework of this project is done/will be done as regards the payment order. It is present in the Ukrainian procedural system, but the instrument and the model might be improved and applied more broadly. Moreover, it could be developed into a model to be used generally for purely monetary claims up to an amount 500 Subsistence Minimum for Able-Bodied Persons (SL), presently UAH 1 135 000.

Secondly, proposals are done concerning a swift handling of cases by default and non-disputed cases.

For statistical purposes and court management issues it is from a point of view of assessing workload and required capacity of the court system necessary to make a distinction between litigious and non-litigious cases, on which topics proposals are offered. In that framework it is useful to analyse the different stages in civil and commercial disputes, showing the shift from the sole responsibility of parties to the more active role of the courts.

After having identified to what extent minor cases are mentioned in the procedural codes, and looking at best practices in Europe, the question was asked and answered if such a distinction between "minor cases" and other cases is useful.

This option should be introduced that contested payment orders to an amount of not more than UAH 227 000 will be determined as small cases for which a simplified procedure before an experienced single judge could be in place. Other purely monetary claims – more than 500 SL as mentioned above - could start with requesting a payment order; only in case of contestation it will become a regular civil procedure, as will be the case in all other civil disputes.

The present opportunity is used to propose simplifying the civil and commercial procedure, by adjusting and changing the case flow and by giving at one hand parties the procedural responsibilities and on the other the

courts/judges more possibilities to direct the case flow. The number of decisions to be taken by a judge needs to be diminished as much as possible.

Looking at the court statistics (over 2019 and 2020), a very relevant number (34% for the first instance civil courts and 38% for the first instance commercial courts) of cases of modest monetary value could benefit from a simplified contentious proceeding.

As a result, an indication – just an indication – will be given how the new procedure could look like (submission claim, written reply, hearing, judgment). Once the ideas in these proposals wholly or partially are accepted, close attention by professional drafters of legislation must be ensured.

In order to have adjusted procedural rules to function properly, it will be necessary that procedural guidelines are introduced, specifying the expectations of the court concerning the practice of the application of the civil and commercial procedural rules.

As to appeals, it will be good consider making constitutional arrangements allowing – and introducing – limitations to appeal for small cases, for instance below a monetary value of UAH 113 000.

Also, here attempts can be made, and proposals are done to streamline the appeals procedure and to clarify and determine the roles and responsibilities of attorneys and the courts in these procedures, suggesting a short-written procedure leading to a result by which the courts need to assess the grievances by parties; in this framework the hearing of the case by the panel of three judges will take place.

II. Introduction and general remarks

In the first place it is justified to ask the question why many efforts are devoted to issues like minor cases and/or - as will be shown – small cases.

Of course, it can be placed in the context of legal and judicial practice in Ukraine, but it has a much wider perspective: society as a whole and a well-functioning economy. Increasingly economic activities take place in a different way than, let us say, 25 years ago: we buy many goods online, we have a mobile phone subscription, we have health- and other insurances, we pay rent etc. All such claims are more or less small, but “many small ones make one big one” as the saying reads. The economy is built on these kinds of relations with small claims as a result. These claims must be paid, no doubt, and the companies concerned could not continue to exist if such claims would not be paid.

This requires that for the economic well-being of the country mechanisms must be in pace that endure swift and efficient procedures to realise that.

Moreover, Ukraine is not an island in the world. It has increasingly strong economic and social ties with Europe, the EU member countries in particular. This makes that it is useful to see how neighbouring countries solved

these kinds of issues and to examine to what extent Ukraine could join these countries in these and comparable efforts.

In addition, before focusing on the minor cases – or rather the small claims – some more general remarks may be made, in order to put the issues at hand in the broader perspective of civil and commercial disputes in general.

Another aspect deserves attention in this respect. It is good from time to time to have a look whether all the existing rules really serve their purpose or that it would be possible to do some of them away. Increasingly the practical approach by experienced judges is preferred over detailed procedural rules. When looking at the present topic, one can observe some rules and situations which might be solved by allowing experienced judges to hear the case properly and to move away from the tight corset in which the practitioner finds himself.

Looking at the European experiences, indeed focusing on a situation that the judges only do "judges work" (essentially judges work is to sit and to decide), the preparation phase of the procedure (exchanging the views of parties and collecting the documentary evidence) can be taken care of by a well-trained registry and/or judicial assistant, so that the court sees the file not until the moment that the day of the hearing is determined.

a. Stages in civil and commercial proceedings

The whole matter deals essentially with disputes between parties, that at the end of the day end up in court. Such disputes can be categorised in different stages. It is good to determine which stages are relevant for the current issues. Following these subsequent stages, one may notice that **the obligation to resolve dispute moves gradually** from the **parties to the State** (court):

Stage 1

Payment order as the first step of a development allowing for establishing whether or not there is a litigious case; proper communication with the debtor that can be done, for instance, by bailiffs.

Stage 2

When the payment order is disputed – which make it to a litigious case – a prescribed procedure will be applicable. In a situation that it concerns a small claim, to be defined clearly and solely by the **monetary value** of claim, simplified procedures will be in place, frequently before more or less specialised judges in a general court of first instance.

Stage 3

All types of cases – except the small claims under stage 2 – should follow the **"pre-trial stage"** (in all civil and commercial disputes), which would basically mean that the **parties must present** (written) **evidence** to the judge that they have tried to **resolve the dispute peacefully.**

Before submitting the case to court, parties each are supposed already to have collected the necessary evidence in their files, being that the proper preparation of any litigation.

The court would **not start collecting evidence** on the **merits** at that stage.

Stage 4

All the **mediation (or reconciliation) forms,** including possibly compulsory mediation in some types of cases in which framework one may think of divorce, inheritance, guardianship relation parents with their children, alimonies.

Stage 5

When all earlier attempts to prevent litigation have failed, the "**regular litigious procedure**" - would apply **only if** all the **other stages** below have been **tried and exhausted**. As already indicated, the litigious phase of the dispute in payment order cases, starts with the contestation by the debtor; it must show that the steps in stages 3 and 4 have been applied (unless it concerns small claims).

b. The minor cases or small cases

In many jurisdictions' distinctions are made between more or less small cases and other cases. Overarching principle behind this matter is the need for effective and efficient procedures in the interest of the national economy but also in the interest of a sound state budget.

Also, such a distinction is made in Ukraine and the effects will be examined.

Moreover, in terms of clarity and efficiency it is important to determine in an early stage of the procedure whether a case can be determined as non-litigious and when and in which stage one can define a case as litigious, with all the consequences that go with it. The manner in which a case can be submitted will be a matter of examination as well.

Starting point is or should be what belongs to the usual European standards, the responsibility of parties to take up their role as the ones who are responsible for the content and the progress of the procedures. Courts are in principle passive where it concerns the content of the cases and the contents of procedural documents. However, the court will be active in the field of efficiency of the procedure as well as attempting amicable solutions.

This responsibility of parties touches upon the so-called "minor cases", to be considered as cases which can be considered rather simple both in terms of content as in procedure. In the following the different sorts of procedural minor cases are described and the proposals that can be made in order to increase the efficiency and effectivity of court proceedings.

III. European practice

a. First instance

Small (monetary) procedures are rather frequent in W. European countries: people for whatever reason don't pay the mobile phone bills, their health insurance premiums, bank loans etc. It concerns rather limited amounts of money, of less than for instance EUR 5 000 (presently UAH 170 000).

Debtors know that they will have to pay, but just wait and see. Often, debtors are summoned to court by a bailiff or otherwise. This is basically the motive to start court proceedings: to obtain an enforceable document, which allows for, for instance, seizure of salaries etc.

Because of its frequency, such cases are dealt with in a rather fast and routine like way.

Various international projects deal with the structure of such proceedings. The ALI/UNIDROIT rules have been developed and soon also the ELI/UNIDROIT rules.

Most European jurisdictions have a specific procedure for minor cases (i.e. a small claims procedure[1]).

In England & Wales this is called the "small claims track", while in France (claims less than EUR 4 000) it is called the "circuit court". At a European level this procedure can be found in the (not very successful) Small Claims Regulation for cross-border cases.

The reason why such small claims procedure exists is:

(a) that (the costs of) the procedure should be proportionate to the amount at stake, and

(b) that one sometimes does not need to be represented by a lawyer in small claims litigation.

In interesting example may be the Austrian procedure. Any small money claim has to start with an order for payment (so it is not possible to file a purely monetary claim directly in court). In case the debtor files opposition against the order for payment, a very simple adversarial small claims procedure follows.

The judge in a small claim procedure is more active since there is often no lawyer.

For instance, in the Netherlands (population about 17 million), which does not have a separate small claims procedure - cases below a value of EUR 25 000 are litigated before the small claim sections of the general first instance court ("sector kanton"), and representation by a lawyer is not needed there – the number of such monetary claims in 2016 was 427 000, of which more than 300 000 were cases by default. Judgment was delivered in 19 days on average. Such procedures are streamlined, in such a way that as soon as the notification is received and registered by administrative staff, formalities are checked, a judgment will be

[1] https://e-justice.europa.eu/content_small_claims-42-en.do?clang=en

prepared based on a template, which is prepared and drafted, to be signed by the judge, who in fact only very superficially verifies and checks the draft as he is able to rely on his experienced and well-trained staff.

In Germany no small claim procedure exists in the proper sense of the word; there is just a provision for claims under EUR 600 which allow for an informal proceeding before court (Art. 495a ZPO (Civil Procedural Code). A comparable option is available in Austria (less than EUR 1 000).

Recently the EU has developed a small claims procedure applicable in – in principle – all member states. The order of events is as follows, based on the information available on the website of the European Union.

Situations that this procedure can be applied

One can use the European Small Claims Procedure to make a claim against a person, organisation or business based in another EU country for a maximum value of EUR 5 000. The procedure can be used to claim reimbursement for goods or services. For example, one can make a claim for a faulty product bought in another EU country or bought online from someone living in a different EU country. Assistance by a lawyer to submit a claim is not required.

Some civil and commercial matters however are not covered by the procedure, including:

- revenue, customs or administrative matters;
- family rights arising from marriage (such as maintenance), wills and successions;
- social security and employment entitlements;
- the liability of the state.

The manner to submit the claim

The Small Claims Procedure is mostly a written procedure. To make a claim, one needs to fill in a provided form and add any documents that can support the claim. Once completed, the form and any supporting documents must be sent to a competent court - either in the home country or in the other EU country concerned.

The amount claimed cannot exceed EUR 5 000, excluding interest and expenses.

Once the court receives the claim, the court will check the form and supporting documents and decide if the claim is within the scope of the procedure. It may ask you to complete an additional form if any necessary information is missing. If the case is admissible under the Small Claims Procedure, the court will contact the defendant. The defendant has 30 days to reply.

Within 30 days of receiving an answer from the defendant (if they decide to answer), the court will either:

- make a judgement about the claim
- ask for more details in writing either of the parties, or determine a hearing

b. Appeals

In the Netherlands by law there is no definition of minor cases, albeit, that in daily speech the word “small cases” will be used. A difference as regards to Ukraine, however, is that certain types of cases (of a monetary value of less than EUR 1 750) are excluded from appealability as an application of the Roman principle “De minimis non curat praetor” (small cases are not submitted to a court of justice). Moreover, in some sorts of cases the priority is given to legal certainty over the possibility to have cases reviewed, due to needs in society. For instance, dissolution of a labour contract or provisional measures during divorce proceedings are excluded from appeals.

For instance, in France the Civil Procedural Code mentions the options of limits to appeal, by delegating this to specific laws (Art. 543 ZPO “Means of appeal are available in all matters, even non-contentious ones, against judgements of first instance, save where otherwise is provided”), Art. 511 ZPO (Germany) opens the possibility to limit appeals in cases less than EUR 600.

It is clear that legislation in these countries does not qualify these cases legally as “minor cases” but just describe neutrally in which types of cases appeals are not allowed. Possibly they even determine the way these kinds of cases are dealt with before court.

When it comes to the competent court, one can observe a movement from specialised separate small claims courts (tribunal d’instance in France, kantongerecht in the Netherlands, Amtsgericht in Germany) to a more or less specialised department or section in larger courts (respectively tribunal de grande instance, general court of first instance, Landgericht). Such a development would be good for Ukraine. It also shows that specialisation in the court system is present, something to be considered in Ukraine as well.

IV. “Minor Cases” in Ukraine

The present Civil Procedural Code **(“Civil PC”)** offers for an important number of cases the option to choose between two sorts of proceedings: summary proceedings and normal proceedings. The same goes for the Commercial Procedural Code **(“Commercial PC”)**. Below mostly the Civil PC works as the reference, with cross-references to the Commercial PC.

The Code mentions these kinds of cases, with all the complications that come with it.

In the first place, Art. 19 § 6 Civil PC (Art. 12 § 5 Commercial PC has a similar regulation) defines minor cases, reading as follows:

“6. For the purposes of this Code, minor cases are:
1) cases in which the amount of the claim does not exceed one hundred times the subsistence level for able-bodied persons (UAH 227 000 = EUR 6 700);

2) cases of insignificant complexity, recognized by the court as minor, except for cases that are subject to consideration only under the rules of ordinary action proceedings, and cases in which the amount of the claim exceeds two hundred and fifty times the subsistence minimum for able-bodied persons (UAH 567 500 = EUR 16 700);
3) cases on recovery of alimony, increase of their amount, payment of additional expenses for a child, collection of a penalty (penalty) for late payment of alimony, indexation of alimony, change of the method of their recovery, if such requirements are not related to establishing or disputing paternity (maternity);
4) divorce cases;
5) cases on consumer protection, the price of the claim in which does not exceed two hundred and fifty times the subsistence level for able-bodied persons".

Secondly, in Art. 274 (comparable with Art. 247 Commercial PC), the concept of minor cases is mentioned and the proceedings for these types of cases in first instance is prescribed, quoting:

"Article 274. Cases considered by way of simplified action proceeding

1. In the simplified action proceeding cases are considered:
1) minor cases;
2) arising from labour relations;
3) on granting a court permit for temporary departure of a child from Ukraine to a parent who lives separately from a child who has no arrears of alimony and who has been denied a notarized consent by the other parent to such departure.

2. Any other case falling within the jurisdiction of the court may be considered by way of simplified proceedings, except for the cases referred to in para. 4 of this Article.

3. In resolving the issue of consideration of the case by way of simplified or ordinary action proceeding, the court shall take into account:
1) the amount of the claim;
2) the significance of the case for the parties;
3) the method of protection chosen by the plaintiff;
4) category and complexity of the case;
5) the amount and nature of evidence in the case, including whether it is necessary to appoint an expert in the case, call witnesses, etc.;
6) the number of parties and other participants in the case;
7) whether the consideration of the case is of significant public interest;
8) the opinion of the parties on the need to consider the case under the rules of summary proceedings.

4. Cases in disputes may not be considered by way of simplified action proceeding:

1) arising from family relations, except for disputes over the recovery of alimony, increasing their size, payment of additional expenses for the child, collection of penalties (fines) for late payment of alimony, indexation of alimony, change of method of recovery, divorce and division of property;
2) on inheritance;
3) on the privatization of state housing;
4) on the recognition of unfounded assets and their recovery in accordance with Chapter 12 of this section;
5) in which the amounts of the claim exceed two hundred and fifty times the subsistence minimum for able-bodied persons;
6) other claims combined with the claims in the disputes specified in paragraphs 1-5 of this part.

5. The court refuses to consider the case under the rules of simplified proceedings or decides to consider the case under the rules of ordinary action proceeding, if after the court accepts the plaintiff's application to increase the amount of claims or change the subject of the claim the case cannot be considered under the rules of simplified action proceeding".

The definition in Art. 19 Civil PC (resp. 12 Commercial PC) will have to be considered to be determining.

V. Removal of this distinction?

It is just human reality: everyone who has a case pending before a court, considers his or her case as important, or else it would not be in court.

Using the word minor in any language, tells the message that the case is of small significance, a good reason to consider a different description of the concept. It probably better to determine that the nature and content of the claim is thus that a simplified procedure can be applied, and lesser procedural rights are granted.

If one wishes to increase efficiency in court proceedings (aiming at an effective judiciary) it is essential to decrease the number of decisions that a judge has to take as much as possible. From that perspective, it is essential to allow the court only or at least mainly to deal with the real dispute between parties and to disregard as much as possible all kinds of unnecessary steps as they are self-evident. When in a case a judge determines that a hearing has to take place, for instance, implicitly he has decided to commence the case, a separate decision does not need to be taken. Only when there is a reason not to commence the case, the judge decides exactly that. In other words, the mere fact that the judge orders a hearing implies that he has commenced the procedure.

This intention to decrease the number of unnecessary decisions brings with it that it is worth examining whether a distinction between minor and other cases is really necessary. In reality, it appears, that the (summary) procedure for minor decisions of contradictory nature is rarely or never used because attorneys usually request

the court to qualify their cases as a “not-minor” one (a possibility given by Art. 274 and resp. Art. 247 Commercial PC) so that a hearing needs to take place, which is according to the wish of their clients.

The rules about the summary proceedings already show the number of decisions that the court has to take (summary proceedings or not, deciding on motions, notifying other party, setting time limits, assessing validity of reasons for overstepping time limits, changing back to the regular procedure) which can be considered as superfluous, or sometimes can be considered to be taken implicitly.

Apart from that, towards parties and their attorneys it may not be exactly polite to tell them that their case is just minor, a sort of degrading qualification, while parties or at least one of them generally regards their case as important.

Given these circumstances, it will be advisable to remove the distinction as it now, also because it has no added value.

VI. Different types of procedures related to minor cases / small claims

Looking at this subject from procedural point of view, in increasing complicatedness, the following enumeration can be made:

a. Payment order

What was said about the different stages in civil and commercial disputes (chapter II), explains why it will be useful to make a relation with the report in the framework of the Pravo-Justice project, titled “Gap Analysis of Enforcement Legislation” by Katilin Popov. On page 11 it states: “Payment order procedure, although existing, is not functioning due to its limited application scope and flaws in the service of process”.

The payment order – subject to a separate examination by other experts – is one of the legal remedies, to be seen in connection with the topic of this report, the matter of the minor cases. Until about 2010 the Civil Procedural Code contained the option for a relatively simple procedure to obtain payment orders. After a discussion in society the legislator decided to limit the application of such simple procedures (apart from very specific situation as prescribed in Art. 161 §1 under 1-6) only allowed against a legal entity or a private person-entrepreneur (Art. 161 § 1 under 7). In the Commercial Procedural Code, prior to the entry into force of its new edition in the end of 2017, the payment order procedure as such did not exist.

For a proper understanding of the proposals a short summary of the present rules and regulations is useful.

The present Codes allow the payment order in the Chapter with the header: ‘Writ (payment order) Procedure’ in, respectively, Art. 160-172 of Civil PC and Art. 147-160 of Commercial PC.

The provisions are more or less similar, but as could be expected, the parties may be different (Art. 161 §1 under 7 of Civil PC compared with Art. 147 §3 Commercial PC. In the Commercial PC all monetary claims are subject to this procedure, with the maximum of 100 SL (which is similar to the CPC). In the CPC additional categories are mentioned (salary, alimonies, small claims concerning housing, telephone and RTV services). The requirements for the content of the claim and the documentary evidence are also more or less similar. But here the remark may be that the requirements for what is intended as fast and simple way of collecting debts, are relatively burdening (Art. 150 Commercial PC resp. Art. 163 Civil PC). According to the law the court has to study the request rather carefully (for instance, Art. 165 §4 Civil PC), which is relatively time consuming, compared with the procedure, for instance in Germany.

Art. 155 § 3 Commercial PC as well as Art. 168 § 3 Civil PC prescribe the signature by the judge.

The subsequent order of events (Art. 156 Commercial PC and Art. 169 Civil PC) is that the court forwards the payment order to the debtor, attached with copies of the application and the supporting evidence. The debtor can submit his objections to the court withing 15 days, in which case the dispute turns into a litigious procedure.

Both the Civil PC and the Commercial PC have some procedural disadvantages. The number and nature of the formal requirements as described above is very high, which makes the option not very attractive, particularly when thinking of relatively small claims. For instance, the Codes enumerates the list of documents to be attached to the request, which constitutes a relatively high and unnecessary burden.

It will be preferable, for a well-functioning economy, to return to simplified procedures to obtain payment orders for most purely monetary claims.

In the following the presumption is that the option of relatively simple payment orders for exclusively monetary claims to a level of 500 SL will be introduced. In a later stage the reports by Katlin Popov and this one may be merged into one comprehensive proposal starting with the payment order and ending with a successful enforcement, as it were a description of the “chain of events” leading to fulfilment of monetary obligations.

An option might be to look at the example in Germany for purely monetary claims – Mahnbescheid; the order of events: submission of the request, checking on only formalities, issuance Mahnbescheid, sending it to the debtor, 14 days for objections, in case of no objection – request for executive order. There, in each of the 15 “Länder”, one court issues these Mahnbescheid; in case of dispute the cases are transferred to the territorial competent court (Art. 688-696 Civil Procedural Code – ZPO).

Payment orders and small claims disputes have in common the overarching goal to speed up relatively simple disputes in order to allow for enforcement and fulfilment of civil and commercial obligations.

b. Judgements by default

When examining the issue of the minor cases, must be borne in mind that a clear distinction needs to be made between two types of cases:

- cases in which the defendant appears in court to defend his interest and disputes the claim wholly or partially, and
- cases where the defendant does not appear in court, so that a judgment by default has to be given.

The last category of cases must be deemed to be simple and straightforward. The system of commercial and civil rights that are at the disposal of parties implies that if a party does not wish to defend himself against a claim by not appearing in court, the claim can be sustained unless it is not based on the law, what rarely happens. Such cases can be dealt with in a few days or weeks and do not pose problems.

It looks as if the Commercial Procedural Code does not have provisions on this issue similar to the articles below.

The main part of the present regulation of the judgement by default (Art. 280 Civil PC and following) is not needlessly complicated and rather straightforward. The only complication concerns Art. 280 §3 Civil PC. In the situation of disputes by default, the generally accepted rule is that – by nature - the claim nor the grounds cannot be changed or amended, because you must presume that the defendant has decided not to oppose to the claim as is submitted to court. One could follow the said §3, but it will be less complicated when the claimant just withdraws the claim and submits a new one, alternatively he can submit a new additional claim, thus the burden of extra work is on the claimant and not on the court.

Without any harm to parties or the quality of the judgment it could be reduced to the draft rules, mentioned below. For instance, it is not up the court whether the defendant has a reason not to appear in court; the court/judge just has to check if he is not there while duly notified. Parties/citizens not only have rights, they also have obligations (like showing that you want to dispute the claim).

> ***Draft rules***
>
> ***Chapter 11. Hearing in Absentia***
>
> ***Article 281.*** *Conditions for a Hearing in Absentia*
>
> *1. The court adopts a default judgment on the basis of the existing evidence, provided that the following conditions are met:*
> *1) the respondent has been duly notified of the date, time, and venue of the hearing;*
> *2) the respondent has failed to appear for the hearing*
> *2. If there are more than one respondent in the case, a hearing in absentia is possible if all respondents fail to appear in court.*

> *3. If the claimant changes the subject matter or cause of action or the number of claims, the court defers the trial to notify the respondent thereof.*
>
> ***Article 282.*** *Hearing in Absentia Procedure*
>
> *1. The court delivers a ruling and grants the claim, unless the claim is insufficiently grounded or based on the law;*
>
> ***Article 283.*** *Form and Content of a Default Judgment*
>
> *1. The form and content of a default judgment shall comply with the requirements laid down in Articles 264 and 266 of this Code; it may refer to submitted documents in the case.*
>
> ***Article 284.*** *Notification of a Default Judgment*
>
> *1. A copy of a default judgment shall be sent to respondents who failed to appear in court under the procedure provided by Article 273 of the Code.*

Indeed, there should be a procedure by which the defendant has the opportunity to defend his case. Such an opportunity should be limited in time, which term should start after notification of the judgments or any other circumstance that might lead to the conclusion that and on which date the defendant was informed about the judgment and its material content.

Looking at the present legislation, such a procedure could look as follows:

> ***Draft rules***
>
> ***Chapter 11. Hearing in Absentia***
>
> ***Article 285.*** *Procedure and Time Limits for Filing an Application for Review of a Default Judgment*
>
> *1. A default judgment may be reviewed by the court that delivered it, subject to a written application of the respondent.*
>
> *2. The application for review of a default judgment may be filed within thirty days after its notification by the claimant or any other circumstance proving that the defendant was informed about the material content of the judgment.*
>
> ***Article 286.*** *Form and Content of the Application for Review of a Default Judgment*
>
> *1. An application for review of a default judgment shall be made in writing.*
>
> *2. Such an application for review of a default judgment shall has as an attachment the judgement in question or a copy;*

It will contain the grounds for defence, reference to the evidence whereby the respondent justifies its objections to the claimant's claims and a motion for review of the default judgment, joined by a list of materials attached to the application.

3. An application for review of a default judgment shall be signed by the person who files it.

4. An application for review of a default judgment shall come with its copies in the number equalling the number of participants in the case, and copies of all materials attached thereto.

5. An application for review of a default judgment filed by the respondent's representative shall be supplemented with a power of attorney or other document confirming the powers of this representative.

6. A document evidencing payment of the court fee shall be added to the application for review of a default judgment.

7. The application for review of a default judgment shall also be supplemented with the evidence referred to by the applicant.

8. An improperly made application for review of a default judgment will lead to rejection of the application for review.

***Article 287**. Actions of the Court after Receiving an Application for Review of a Default Judgment*

1. After receipt of the application for review of a default judgment, the court shall immediately send its copy and copies of the enclosed materials to other participants in the case. At the same time, the court shall notify the case participants of the date, time, and venue of consideration of the application.

2. Subsequently the dispute will be heard by the court, as prescribed in Art. 279 § 2 and 3 and Art. 280 of this Code.

***Article 288.** Procedure for Consideration of an Application for Review of a Default Judgment*
1. 2. …

3. As a result of considering the application for review of a default judgment, the court may rule to:
1) dismiss the application;
2) reverse the default judgment and puts in its place the decision on the merits of the case as if it would have been a regular contradictory court dispute.

***Article 289.** Reversal and Appealing against a Default Judgment*
1. …

2. The claimant has the right to appeal against a default judgment under the general procedure established by this Code.

c. Claims which are not disputed

A second category of cases concerns those case in which a claim is submitted, the defendant appears in court and does not dispute the claim, either by expressly saying that he acknowledges the claim and does not dispute it, or that he just not provides for a written defence.

In these situations, to a certain extent the same goes as for the judgement by default, the claim can be sustained, and a judgement can be given, more or less comparable with what was said above about the judgment by default.

VII. Relevance for the first instance courts

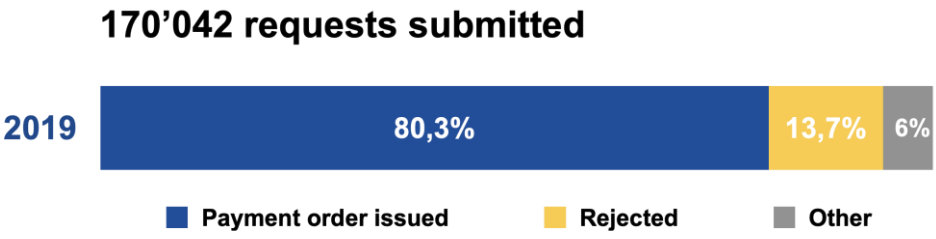
We studied the statistics over 2019 and 2020 (annual reports) collected by the State Judicial Administration (SJA)[2], focusing for this report mainly on first instance courts.

1) Civil courts

The law allows for issuing payment order for several categories of claims, like – among other:

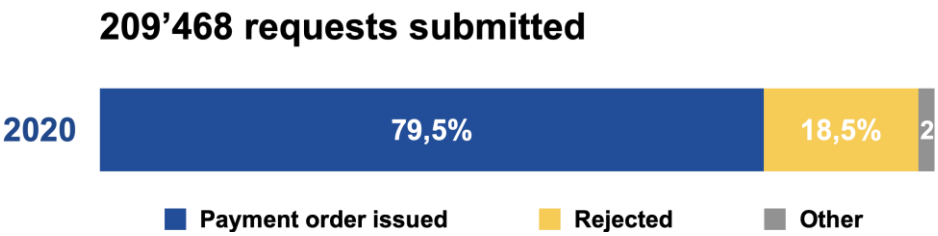
- recovery of the amount of salary accrued but not paid to the employee
- recovery of arrears for housing and utility services, telecommunications services, television and radio services, etc.
- recovery of alimony in the amount for children

According to the statistical data over the year 2019 and 2020[3], the number of applications for issuing payment orders was 170 042 (2020: 209 468), of which 136 572 (2020: 166 524) resulted in a court order. Not more than 6 633 (2020: 8 410) - less than 5% - orders were protested against, of which only 5 113 (2020: 6 766) were more or less successful.



[2] The full versions of statistic tables are available at https://court.gov.ua/inshe/sudova_statystyka/

[3] The statistics of 2020 are presented in parentheses, alongside the numbers of 2019, respectively



The most important category appears to be the one for arrears for housing and utility services etc as mentioned above.

In this category the number of applications is 124 142 (2020: 171 168) while the number of issued orders is 97 882 (2020: 134 283); in 4 872 (2020: 5 757) objections were raised, so less than 5% (2020: 4%).

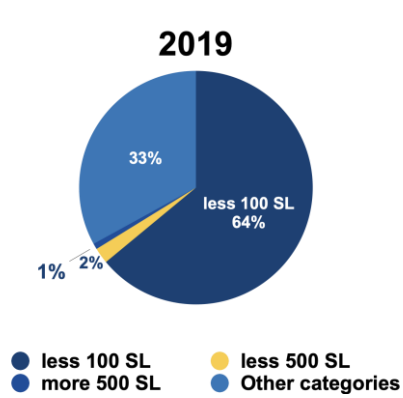
It shows that the number of payment orders both in absolute numbers as relatively is impressive and relevant.

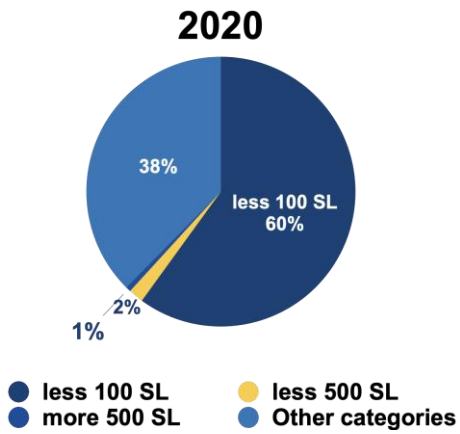
It could be a valid "calculated guess" that if the law would allow payment orders "under a contract" not only against legal persons but also to private persons, the use of this procedure would certainly increase even more and the workload in the courts would be reduced significantly.

The total number of civil cases submitted for the regular procedure at first instance courts amounts to 567 245 (2020: 511 666).

The following three categories are by far the most numerous ones:

Purchase, sell, contracts etc. (cat. 28[4])	176 211 (2020: 172 464)
Loan, bank credits etc. (cat. 38)	130 099 (2020: 122 829)
Family law disputes, divorce etc. (cat. 67)	206 803 (2020: 173 971)
The total number of these cases is	513 113 (2020: 469 264) – total 90% (2020: 92%)





[4] The numbers of categories are those used by the State Judicial Administration and mentioning them allows for scrutinising the used data

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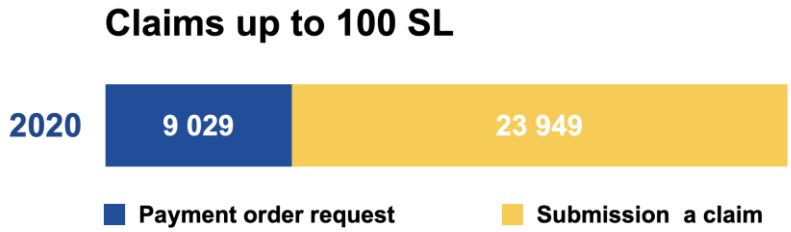
For the purpose of this report the category of small claims is the most important one. The submitted cases in categories 28 and 38 with an amount of the claim of less than 100 SL), are respectively 110 034 (2020: 100 814) and 86 524 (2020: 75 523), so in total 196 558 (2020: 176 337) claims.

This means that of all submitted claims at the first instance courts 34% had a value of UAH 210 200 or less.

The conclusion may be that from all submitted cases to the first instance courts for regular procedure in Ukraine 34% or 196 558 (2020: 176 337) claims had a value below UAH 210 200 or EUR 6 200. A relatively large number results in a judgment by default: 87 120 + 70 666 = 157 786, also 80% (2020: 76 544 + 57 752 = 134 296, also 76%).

2) Commercial courts

The number of requested payment orders (on recovery of monetary debt under a contract concluded in writing not exceeding 100 SL, UAH 210 200) in 2019 was 6 814 (2020: 9 029), of which in 988 (2020: 1 594) cases a protest was raised by the debtor. Compared to the situation in the civil courts this procedure is relatively rarely used.



The number of submitted claims in 2019 was 87 387 (2020: 85 825), of which 29 253 (2020: 29 939) claims had a value below 100 SL (UAH 210 200, EUR 6 200). The total number of claims with a value between 100 and 500 SL was 11 461 (2020: 11 304). The total of the claims under 500 SL before the commercial courts was 40 714 (2020: 41 243).

These numbers justify that for the purpose of simplifying and speeding up of procedures, both categories are considered. These categories together make 46% (2020: 48%) of all submitted cases.

The following three categories are by far the most numerous ones:

Land disputes (cat. 25)	5 186 (2020: 4 463)
Transactions, loan, bank credits etc. (cat. 71)	50 950 (2020: 48 332)
Bankruptcy (cat. 102)	15 304 (2020: 16 121)
The total number of these cases is	71 440 (2020: 68 916), total 81% (2020: 80%)

For the purpose of this report also here the category of small claims is the most important one in terms of the numbers of cases. The submitted cases in category 71 with an amount of the claim of less than 100 SL are 23 867 (2020: 23 949). Looking at the economic position of the commercial courts and the character of its court

users, there is sufficient reason to include for the purpose of creating a reliable impression, also the next category of claims (between 100 and 500 SL) numbering 9 558 (2020: 9 343). So, the total number of disputes in this category amounts to 33 425 (2020: 33 292).

This means that the category of monetary cases with a value lower than 500 SL is 38% of the total number of incoming cases.

3) In sum

These data show that a very relevant number of claims has a relatively modest monetary value:

Case value up to 100 SL (civil cases)

34%

Case value up to 500 SL (commercial cases)

38%

Simplification of the court proceedings for these kinds of claims and/or expanding the use of payment orders will reduce the workload of the courts and may even shorten the duration of the court proceedings.

VIII. Interim conclusions

In the subject matter one of the questions to be answered if and which choice has to made between having a clear-cut procedure for all kinds of civil and commercial claims or that a special small claims procedure is useful.

The latter seems to be in line with European standards. To a certain extent Germany took another approach: all cases are handled in a similar way, only an exception is made for claims under EUR 600 (really small claims).

Secondly, if it is considered to be useful to determine some cases as small claims-disputes, it must be investigated whether is it necessary in the first place to have a more or less specialised civil/commercial judge in place, and secondly that he is in a position to determine the appropriate procedure within the framework of the procedural laws.

In addition, there is a clear difference between non litigious and litigious cases. This will at the end of the day only show in the court proceedings: is there contestation of the claim or not?

Still the question is in which procedural manner and form (request, application payment order, writ of summons served by bailiff) such procedures have to be submitted to the courts.

IX. Options for Ukraine

In the first place the question needs to be answered whether for Ukraine a fast and simple procedure for small claims is useful. The answer can insofar be positive, that introduction and the actual use of payment orders for monetary claims needs to be promoted.

When it would concern smaller amounts of money, like not more than, for instance, UAH 227 000 a simplified procedure may be applied, for instance the way Germany has approached this issue, or in such a way that it will become a written procedure with a short hearing after which a judgement will be given.

This is of course only the case when the payment order is contested.

It is obvious that clear rules for such payment need to be formulated, in the sense that it concerns exclusively monetary claims, added with interest and costs of litigation. Such an order will be issued by the court and notified to the defendant. If the defendant raises objections and contests the claim in the legally prescribed manner, only at that moment it is clear that the case has become a litigious claim.

The following table can be used to determine the answer to the questions above:

1) Is the claim exclusively a monetary claim of not more than 500 SL plus interest and costs?

a. If not, regular procedure

b. If yes, follow the procedure for the payment order.

2) Payment order issued and notified:

a. Is there no contestation – enforcement follows;

b. Is the claim contested?

3) In case of contest

a. The monetary claim is UAH 227 000 or less - small claims procedure applicable;

b. The monetary claim is more than UAH 227 000 or a claim of a different sort - regular procedure.

One could argue that one may reasonably expect that the defendant will defend his interests before court in a situation of a purely monetary claim of relatively very high value, for instance more than 500 SL, UAH 1 135 000. This might lead to the option to submit the claim straight away in the same manner as non-monetary or not purely monetary claims.

For management and statistics purposes, it is essential to be able to make a distinction between the two, as non-litigious cases will result in much less work that litigious cases:

- Non litigious cases are - payment orders that are not contested, claims by default and claims without defence.
- Litigious cases are - contested payment orders and contested other claims.

In daily practice, one only knows whether a case is to be considered as litigious the moment that contestation is submitted, so in a later stage in the procedure. As a consequence, registration as litigious occurs when a case is registered earlier as request for payment order. For example, the payment order is requested on 1 October 2020, the payment order is issued on 7 October 2020. Subsequently it is served to the debtor on 15 October and the debtor submits the contestation on 29 October 2020.

The payment order is registered as such on 7 October. The registration of the same case, turned in to a litigious case, is done on 29 October 2020. One might argue that one and the same case is then registered twice. However, modern automated systems allow for changing the case under one and the same number for non-litigious into litigious. At the end of the year, this case will not anymore be counted as non-litigious but as litigious.

The same goes to a certain extent for the situation that after the submission of a regular claim, the defendant submits his reply.

X. "Minor Cases", disputed claims

As stated above, it will be in line with European best practices to replace for the reasons stated above to replace the concept of "minor cases" and to create a "small claim" procedure, applicable only when a payment order for the amount of UAH 227 000 or less is issued and contested. For such types of disputed cases a short procedure must be prescribed.

All other civil and commercial cases need to be dealt with in the procedure prescribed for all other litigious cases.

XI. Which procedure should be applicable then?

a. "Small claims"

For the "small claims" procedure, one may consider a really simple procedure. Presently the order of events according to the existing law is the following:

- Request for payment order

- Issuance
- Notification to the debtor
- Challenging the payment order
- If satisfied – without a hearing – payment order becomes invalid/is withdrawn
- Claimant entitled to submit regular claim

A new approach could come down to the following. After the payment order has been issued, the claimant will notify it to the debtor, who will have according to law the possibility to contest the claim. Such a contestation needs to be submitted within the prescribed time limits through a written contestation. He should provide simultaneously with the relevant documents or other evidence supporting his stance.

Briefly the order of events could be the following:

- Request for payment order
- Issuing payment order
- Notification to the debtor by the claimant
- Submission contestation with documentary evidence – the order is cancelled *ipso iure*
- Submission documentary evidence by the claimant
- Hearing of parties
- Judgment.

When, during the hearing the judge finds that additional evidence must be produced, he can adjourn the hearing, allow parties to submit the required documents by deposing them at the registry with copies to the counterpart and subsequently resume the trial. This way he has the option to make the whole procedure into a sort of a tailormade procedure.

It goes without saying that also for these procedures procedural guidelines by the courts will be necessary and supportive, particularly when it would be so that parties can proceed without being represented by an attorney. The payment order procedure may be initiated without the assistance of a lawyer, but when it comes to contestation and subsequently the regular procedure follows, assistance of an attorney equal to the regular procedure, should be in place.

It will be advisable then that the judges will deal with these cases in the framework of a sort of specialisation: fast, practical, balanced. This implies that experience as a judge in civil and commercial matters will be of much added value. In smaller courts, such a judge could deal both with these small cases and also with regular cases.

Separately a document containing a draft of applicable rules will be prepared.

b. Other claims – regular procedure

Reflecting on these matters, the question rises if there is reason to reconsider the current Codes. For matters of simplification and speeding up procedures, it may be an option to transform the present “simplified procedure” into the regular procedure. In a situation that a certain case appears to be more complicated and

for that reason needs more procedural steps to be taken, like additional hearings or other opportunities to complete the procedure and allowing the court to have a clear and complete picture of the case, the judge should have the discretionary power to shape the process in the appropriate form, indeed also here a “made to measure” approach. This is more in line with developments in European practice.

The present Civil Procedural Code as well as Commercial PC contain rules for summary (simplified) procedures (Art. 274 – 279 Civil PC / Art. 247 – 252 Commercial PC in particular).

The characteristics are:

- Submission of the claim
- Statement of objection
- Response to reply
- Objections
- (no preparatory hearing)
- No oral hearing/trial unless requested: then verbal explanations
- Judgment

Such a procedure will serve the intended goals properly: hearing parties both in writing and orally, the court will take decisions and judgments which comply with European standards. However, looking at the overarching goal (swift civil and commercial proceedings, efficient and effective) as well as at European best practices, one could consider simplifying the procedure and introduce only one sort of procedure. Separately a proposal will be drafted based on the existing general proceedings, perfectly fit for the said purposes.

Important feature is that the written phase of the procedure is managed by the supporting staff of the court, under the supervision of an experienced judge, for instance by a deputy president or the president her/himself. The dispute itself is handed over to a judge or a panel of judges as soon as a hearing will be held, or a judgement needs to be made in case parties waive the right to a hearing. Also, here procedural guidelines are essential so that parties and their attorneys know what is expected from them in order to respond to their responsibility to shape the whole procedure in order to make it ready for judgments.

In this proposal the possible options will presented in a separate document, based on the existing civil procedures (the article numbers have been kept).

One of the observations concerning the practice in civil and commercial proceedings concerns the relatively much time-consuming live pronouncing of judgments. In countries in Western Europe such a pronouncing does not take place anymore.

Just as an illustration: let us say that the court determines the pronouncement on Friday at 14.00h. That means that parties and attorneys have to go to the court which requires per person at least an hour to be there and

an hour before they are back from where they came. The judges must be in the courtroom, which makes that they each will spend about ten minutes getting there etc, then pronouncement takes place, after which they go back to their offices and can resume working. That will cost all in all at least half an hour. Moreover, the doormen in the courthouse, as well as ushers and the registry must be notified, the registry has to prepare the hearing etc. All in all, at least one hour of staff time. By just making the text of the judgment available to parties and the public, saves many working hours of each of the interested persons. According to the ECtHR (Pretto et al. v. Italy 8 December 1983) such a practice is in line with art. 6 ECHR, *"… the object pursued by Article 6 § 1 (Art. 6-1) in this context - namely, to ensure scrutiny of the judiciary by the public with a view to safeguarding the right to a fair trial - is, at any rate as regards cassation proceedings, no less achieved by a deposit in the court registry, making the full text of the judgment available to everyone, than by a reading in open court of a decision…".*

The example just shows that it is possible to introduce such a way of proceeding. One matter for discussion concerns the position of third parties. This is a matter to be discussed separately.

XII. Third parties

As already indicated, the goal is to improve the civil and commercial proceedings by removing all kinds of formal obstacles. One of them might be the matter of the third parties, albeit that their position cannot be regarded as a formality.

However, as we have seen, the basic philosophy in Ukraine in the civil and commercial proceeding is that they are determined by parties, where it concerns the scope and the substance. As an example: when in a contradictory dispute some facts and circumstances are not disputed by the other party, they do not need to be proven any further and can be defined as being a fact between parties. As a consequence, a judgment in such a case is only valid between parties. This implies that as a rule rights any third party cannot be violated or impacted by such a judgment.

In certain situations, it can be indeed useful that a third party, when he sees the advantage of that, intervenes in a procedure, in order to have an issue clarified, which is of interest of all parties. That concerns for instance in limited companies the interpretation and applications of articles of association, or security rights on certain goods or rights. But these are rather exceptional, in which situation it will be preferable to introduce a special procedure in which a third party upon his request can be admitted to the procedure, being that by virtue of a court decision. This is preferable over an unlimited access to a procedure at whatever moment in the procedure, which only complicates and needlessly delays handling of the court case.

XIII. The procedure in appeals

i. The Constitution of Ukraine.

The Constitution reads where it concerns justice, judiciary and right to appeal and cassation, as follows:

"Article 129. While administering justice, a judge is independent and governed by the rule of law.

The main principles of justice are:

1) equality of all participants in a trial before the law and the court;

2) ensuring the guilt to be proved;

3) adversarial procedure and freedom of the parties to present their evidence to the court and to prove the weight of evidence before the court;

4) exercising public prosecution by the prosecutor in court;

5) ensuring to an accused the right to defence;

6) openness of a trial and its complete recording by technical means;

7) reasonable time of case consideration by a court;

8) ensuring the right to appeal and, in cases prescribed by law, the right to cassation of court decision;

9) the legally binding nature of a court decision.

Other principles of justice can be determined by law.

Justice is administered by a single judge, by a panel of judges, or by jurors. Persons found guilty of contempt of court or against a judge shall be held legally liable".

ii. Consequences

As a consequence, where the right to appeal and cassation is concerned and taking the text of the Constitution as leading, the relevance of the distinction between small cases and the other cases, is only relevant for cassation.

This is at first glance different for appeals, now that according to the Constitution appeal should always be possible.

However, it would be advisable to follow examples in Europe. In the Netherlands for instance, no appeal is allowed when the interest at stake is below EUR 1 750. In other countries there are different amounts (for

instance Germany EUR 600, Austria EUR 1 000). Apparently, in Ukraine the rule that appeal is not allowed below a certain amount is prohibited by the Ukrainian Constitution.

Therefor it is proposed to consider introducing a threshold for appeals in small cases, for instance by excluding appeals against judgments in small litigious cases as described under a value of for instance 50 SL or UAH 113 000. Such a proposal is also in accordance with the old said Roman legal principle 'de minimis non curat praetor'. Such an approach would most certainly fit in the framework of the payment order, as proposed. It is in the clear interest of the Ukrainian society and economy as a whole that small claims are handled in a short and simplified way, preventing and avoiding costs of litigation as much as possible and reducing the burden of work of the courts, so that they can concentrate on the real issues and disputes.

It would require finding a feasible option within the framework of the Constitution excluding very small cases from appeal. Either by interpretation of Article 129 of the Constitution or by way of amending the constitution in that respect, for instance by determining the appeals may be excluded for small cases as defined by procedural law.

iii. Overarching goal

Moreover, in general and even in the situation that the proposals as above cannot be followed, looking at the overarching aim (diminishing the workload and increasing efficiency in civil and commercial disputes) it will be useful to look at possible options to reach that goal in the appeals procedure.

Maintaining the principles in the Ukrainian context (responsibility of parties and parties determining the scope and substance of their dispute) measures can be considered to concentrate the workload on appellate courts on the real issues at stake.

First and foremost, the courts of appeal as well as the SCC have to take the provision of Art. 367 Civil PC (Art. 269 Commercial PC) more seriously: in principle new evidence cannot be brought forward in the appeals procedure. In this respect it may be useful that in the framework of the Monitoring the Civil/Commercial Procedural Codes of Ukraine (Report of 1 October 2019) on the question about the new evidence and facts (No. 49), almost 50% of the respondents answered that the court of appeal accepts new facts.

For a right understanding, the article has to be regarded in such a way that it is the role of the court of appeal not only to see whether the laws have been interpreted and applied rightly, but also if it finds that the conclusions and establishments of facts on which the judgement is based, by the first instance court were right or that the court comes to different conclusions as to proven or not proven facts or circumstances, including the assessment of the wight of these facts.

This implies that the vast majority of the cases in appeals deal with checking whether the first instance court has established the relevant facts properly and interpreted the law correctly to the facts in question. This justifies that appeals only can be instituted by putting forward grievances about wrong establishment of facts – which rarely will be the case – and arguments of legal nature by parties, as well as reasons why from the facts different conclusions must be drawn, necessarily represented by an attorney.

It is not entirely clear whether the following aspect plays a role in the Ukrainian context. The main principles of procedural law imply that that one does not have a right to invoke a violation or infringement, if a party has no interest in it. In other words, if a rule has been applied wrongly, but right application would have resulted in the same decisions or outcomes, a party has no legitimate and relevant interest in invoking this infringement or violation, so such a complaint must be set aside. Application of this principle in the appeals procedure means that if objections against a judgement of the first instance court may be right, but that it still would lead to confirmation of the judgments, the court of appeal can simply deal with these objections by stating that the party does not have any legitimate interest in these objections.

That being so, one may assume that parties and their attorneys have sufficient knowledge and skills to make clear which objections the appealing party has against the judgement in question. Moreover, such know-how is necessary to ensure that not only against the final judgment but, if relevant, also is appealed against interim decisions or preparatory rulings.

Art. 353 Civil PC (Art. 255 Commercial PC) makes it possible to appeal separately against all kinds of interim decisions, preliminary rulings and preparatory judgments, which interferes with a smooth civil and commercial procedure. Many of these kinds of appeals should only be possible together and simultaneously with the appeal against the final judgment in the case. A critical review of this list is necessary.

Some of these decisions have to be made separately, which requires a special track for them. The current Codes don't provide for that.

The distinction between minor cases and normal cases to a certain extent is referred to in Art. 369 § 1 Civil PC (Art. 270 § 10 Commercial PC). As comes from what is mentioned below, there may be a reason to delete such exceptions, as it seems they complicate more than they solve.

iv. Options for the procedure itself – simplification

In the first place one could have a look at aspects dealing with legal certainty. There is a legal and societal interest that people are as much as possible certain about their right and obligations. In other jurisdictions one can see that there is clarity about the moment that the time limit starts and when it ends. Excuses for not complying with these time limits are mostly not accepted, as there should be no doubt as to the unquestionable validity of a judgment.

This aspect of legal certainty also reflects on courts and court decisions: people have a clear interest to know where they stand after a court litigation has taken place and ended up in a judgment. Then parties must know if this decision is final or that an appeal has been raised. This should be as clear as possible This means in the first place that all kinds of uncertainties about the moment that the time limit of 30 day after the judgment starts must be avoided. This means that it should be clear that this time limit starts on the moment that the judgement has been pronounced. There may be a practice of oral pronouncing of judgments, when the reasoning in writing will be given later. The present law opens the possibility that this time limit starts then from the moment that this reasoning becomes available (Art. 354 § 1 Civil PC; Art. 256 § 1 Commercial PC). It goes

without saying that this option may lead to many complications resulting in additional workload and procedural delays.

This provision should therefore be abolished. Judgements should only be pronounced at the moment that the reasoning is available, so that the appealing party can comply with the obligation to raise all the ground for appeal in the appeals request he is submitting.

Secondly, a provision like Art. 354 § 3 Civil PC (Art. 256 § 3 Commercial PC) allowing renewal of time limits for appeals, must be deleted. Parties in the procedure do not only have right, but also obligations. Once a party as applicant or defendant has appeared in the procedure, he has the obligation to follow the progress and the outcomes. If he is not aware of a judgment given in his dispute, the risk lies with this party.

Articles 357 Civil PC (Art. 260 Commercial PC) and following describe decisions to be taken by the court after submitting of the request to appeal. Many of these decisions deal actually with the issues of the case itself. If it has been instituted after the time limit, the appeal will be declared inadmissible, which is a final court decision, which can and should be given as one of the first issues to look into for the court when drafting the final judgment, so after the full procedure. This way all decisions to be taken by the court will be concentrated on one moment.

This implies that all kinds of decisions described as requirement for commencing the case, will be taken later (or not at all). Such a measure will mean a simplification and speeding up of procedures. This is particularly important when it concerns more or less small cases.

However, some provisional measures, mentioned in Art. 353 Civil PC (under 3, 4, 27, 30, 31, 33, 34 35 and 36); (Art. 255 Commercial PC under 3, 4, 25, 28, 29) require swift decisions in appeal, for which a fast track should be made available, to be described more in detail in a separate document, containing a first design for a draft law with explanatory note.

In the third place, anxious to avoid frivolous appeals and appeals for the sake of postponing legal obligations, the request should contain the grounds for appeal: which are precisely the objections that the plaintiff in appeal has against the judgment of the first instance court. Moreover, as a consequence of the principle that parties determine the scope of the litigation, the court of appeal is limited in its consideration to these grounds, which can be brought forward also by the other party.

Following these kinds of ideas, the actual procedure can be simplified and sped up as well.

v. Practical indications for the procedure

In the first place, the content of the request may be simplified by obliging the appealing party to add to the request the file of the first instance, including the judgment. This way mentioning all kinds of details as in Art. 356 Civil PC (Art. 258 Commercial PC) is superfluous.

Given the above-mentioned intended character of the Ukrainian appeals procedure and taking into account the present procedure as well as what was mentioned above about the practical aspects of the handing of cases itself, the following might be an option.

The procedure will be separated in two parts: the preparatory part – in writing – and the oral part, the hearing.

After reception of the request, a copy will be sent to the other party, he can submit his defence and possibly formulate his own objections to the judgment in question. If this is the case, the appealing party may respond in writing. These documents need to be sent to and registered by the registry of the court; only an experienced judge, deputy president or president supervises this exchange of documents, ensuring a case flow that complies with principles of a fair hearing.

When this exchange of documents has taken place (the procedure in writing), the court will determine which judges will hear the case and (starting the oral part) determine the day and time for the hearing. Parties can plead their case there and can give additional information, after which the court of appeal closes the hearing and determines a day for pronouncing the judgment.

The present Codes contain quite some provisions mainly dealing with the internal organisation of the court, which may be reconsidered. Matters as made subject to the work of a reporting judge, sometimes are even subject to the whole panel (Art. 365 sub 5 and 6 Civil PC; Art. 267 sub 5 and 6 Commercial PC, for instance), of which one have doubts as such provisions are necessary or even useful, particularly when it concerns relatively simple disputes. Technical matters like in Art. 365 § 3 Civil PC (Art. 267 § 3 Commercial PC) should only be discussed when a party submits complaints about the issue and that there is a material reason for remedies. The role in Art. 368 § 4 Civil PC / Art. 270 § 5 Commercial PC could be played by the chairman of the panel.

The judgment is, as is already said, the decision of the court about each of the grounds and objections, and the court determines (Art. 374 Civil PC; Art. 275 Commercial PC) as a result what should be the fate of the judgment in first instance: conformation, annulment and putting the right decision in its place or give any further decisions. Referring the case to a first instance court should be avoided, in order to limit the number of appeals and comply with the reasonable time, this implies a critical review of Art. 374 § 1 under 5 Civil PC (Art. 275 § 1 under 5 Commercial PC).

vi. The position of third parties

Also, in the appeals procedure, this issue comes up in Art. 370 § 4 Civil PC (Art. 272 § 4 Commercial PC) and following articles. Reference is made to what was said above about this issue (Section XI). As is stated there, unfettered access to the procedure, even in appeals, by any third party, claiming to have an interest in the outcome of the dispute only complicates and needlessly delays handling of the court case.

XIV. Conclusions and proposals

As follows from this Report, the following proposals can be made:

A. First instance courts

1) Simplify by amending the applicable Codes on payment order for purely monetary claims; submission of purely monetary claims takes place only through requesting a payment order with the exception of cases of higher monetary value, above 500 SL (UAH 1 135 000), for which the rules for the regular procedure apply

2) Allow for an adjusted procedure to contest the payment order, the contestation transforming the dispute into a litigious proceeding

3) Amend the procedure for small claims after contestation payment order of (for instance) below UAH 227 000: contestation, producing documents, no or just a short hearing, judgment

4) Have these claims heard by experienced single judges in special small claims sections

5) Allow in such small claims individuals to act without attorneys

6) Withdraw the current distinction between minor cases and regular cases

7) Simplify for the other cases – with mandatory legal representation - the current civil contentious proceedings, by introducing registry led exchange of procedural documents, subsequent hearing, judgment

8) Simplify pronouncing judgments – making them available to parties and to the public is sufficient

9) Register and differentiate for statistical- and management reasons litigious and non-litigious cases.

10) Avoid as much as possible separate preparatory decisions

11) Draft and issue procedural guidelines

12) Reconsider the position of third parties

B. Appeal courts

1) Consider taking measures allowing very small cases (for instance under UAH 113 000) to be exempt from the possibility to appeal under Art. 129 of the Constitution of Ukraine

2) Determine the start of the time limit for appeal on one date: the date of pronouncement of the judgment being the written text of the judgment available

3) Equal pronouncement of the judgment with the making available of the full text of the judgments and its publication on the website of the court

4) When submitting the appeals request, the party adds an authentic copy of the judgment in questions

5) Appeals can only be instituted through attorneys

6) The appeals procedure and the scope of decision by the court of appeal is limited to the grounds for appeal put forward by parties

7) Parties are obliged in their submission of the appeal to state precisely the grievances

8) Preparatory and interim decisions by the first instance court can only be appealed together and simultaneously with the main appeals (Art. 353 Civil PC; Art. 267 Commercial PC)

9) A fast-track procedure must be introduced for appeals concerning speedy measures (like in art 353 Civil PC under 3, 4, 27, 30, 31, 33, 34, 35, 36 and resp. Art. 255 Commercial PC under 3, 4, 25, 28, 29)

10) The appeals proceedings follow two phases a written phase and an oral phase

11) The first phase of the proceedings will be performed in writing; it follows an administrative order by the registry of the court supervised by a president, deputy president or experienced judge

12) After the completion of the first phase the oral hearing will be determined, which marks the second phase

13) Allocation of the case takes at the start of the second phase

14) Decisions of preparatory nature need to be taken explicitly or implicitly in the final judgement

15) Reconsider third party appeals and participation in the appeals procedure

16) Courts should develop and issue procedural guidelines

23 February 2021