

Chapter 7

Harmonisation of Civil Procedure and the Interaction with Substantive Private Law

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Abstract This chapter deals with the interaction between procedural law and substantive private law in the context of a partially harmonised but mainly non harmonised substantive law. It also discusses civil proceedings dealing with matters not exclusively governed by domestic law. Procedural law should take into account that the applicable private law is often drafted or developed having regard to different rules of procedure (foreign private law) or without taking into consideration the existing rules of civil procedure. The author illustrates more specifically the possible problems with regard to (1) procedural rules concerning the availability of and access to procedures and the powers of courts, (2) the protection of defendants and (3) a change of parties or their rights under substantive law during the course of the proceedings.

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7.1 Introduction

As a contribution to a conference on the globalisation and harmonisation of civil procedure, this paper is mainly addressed to proceduralists. Its main purpose is to ask proceduralists to direct attention to a range of issues of substantive law that are affected by the rules and practices of civil procedure due to the choices made by proceduralists. Although the reverse exercise is as important, I will devote only a few paragraphs to it, given the focus and aim of this contribution.

The context I use for my remarks is that of a partially harmonised but mainly unharmonised substantive law and civil proceedings dealing with matters not exclusively governed by domestic law; the substantive law to be taken into account may include harmonised or common¹ private law, or just foreign law. In a globalising or at least Europeanising context, drafters of rules of civil procedure, indeed, have to take into account that the applicable private law is often drafted or developed having regard to different rules of procedure (foreign private law) or making, to a very large extent, abstraction from—the existing rules of—civil procedure (harmonised private law).

It is true that the function of procedural law should not be reduced to merely making effective the legal effects stated by substantive law—i.e. mainly protecting and enforcing subjective rights—; its role is also to make the effects of substantive law in a concrete case acceptable, to legitimise them to a certain extent.² But it is, nevertheless, one of the functions of the rules of civil procedure to effectuate substantive law; in that sense civil procedure is an *ancilla iuris*, a helper of the (substantive) law.

¹ Harmonised or ‘common’ private law in the sense of supranational or European common law (and clearly not meaning the common law of England and Wales or any other form of Anglo-American common law).

² I do not mention ‘dispute resolution’ as a specific purpose of civil procedure, as it is rather a purpose of the law as such: the capability of ending disputes by their acceptance when applied to a dispute is one of the criteria for good rules in general (as well for substantive rules as for procedural rules). But it is one of the purposes of rules of civil procedure specifically to legitimise the outcome of the proceedings, or at least to legitimise the fact that those substantive law rules which have been applied were applied.

7.2 Taking into Account Civil Procedure when Drafting and Interpreting Substantive Law

As stated, it is certainly important to draw the attention of drafters of substantive rules to the limitations of their effectiveness which necessarily follow from the fact that in the event of dispute these rules will have to be applied in the framework of proceedings governed by rules of procedure and especially by rules of evidence. For the reasons mentioned, I will not develop this perspective at length but will limit myself to some examples, the first one dealing with the rules on initiating proceedings, the second dealing with evidence.

The fact that judicial proceedings and/or dispute resolution proceedings and/or enforcement proceedings have been started is a relevant fact for the application of several rules of substantive law. My main examples come from the rules on prescription (or limitation of actions): in most systems of substantive law, the course of prescription will be suspended and/or interrupted by initiating proceedings. However, different systems of civil procedure may use different categories of proceedings and may have different rules on the way proceedings are initiated and on the way the date of commencement of proceedings is determined. The relevant rule should take this into account, and the drafter should try to use neutral terms in order to cover the functional equivalents existing in different systems of civil procedure. It may be that the drafters judge that the initiation of certain types of proceedings is not functionally equivalent and should, therefore, not have the same effect (e.g. proceedings which aim at collecting evidence but cannot as such lead to a decision on the merits of a claim). But the rules should not be drafted in such a way that the initiation of functionally equivalent proceedings does not have the same effect simply because of the way the rule is drafted, not taking into consideration the formulations used in civil procedural law in other countries and the types of dispute resolution available there.

The authors of the Draft Common Frame of Reference (DCFR) have taken this into account in drafting Article III-7:302 on the effect of judicial and other proceedings on the running of prescription of rights to performance. Paragraph (3) provides that the rules of paragraphs (1) and (2) on suspension of prescription in the event of judicial proceedings to assert the right 'apply, with appropriate adaptations, to arbitration proceedings, to mediation proceedings, to proceedings whereby an issue between two parties is referred to a third party for a binding decision and to all other proceedings initiated with the aim of obtaining a decision relating to the right.'³ As to acquisitive prescription, another criterion has been

³ The 1980 New York Convention on the Limitation Period in the International Sale of Goods, on the other hand, basically deals only with judicial proceedings and arbitration proceedings (see Artt. 13 to 15).

used in the corresponding Article VIII-4:203 paragraph (4) DCFR: ‘These provisions apply, with appropriate adaptations, to arbitration proceedings and to all other proceedings initiated with the aim of obtaining an instrument which is enforceable as if it were a judgment.’

Apart from the rules of prescription, there may be other instances where rules of civil procedure should be taken into account—depending on the chosen solution—such as certain rules on plurality of debtors or on dependent personal security (suretyship), on the running of interest, et cetera.

In general, drafters of rules of substantive law should pay attention to the appropriateness, in the light of the rules of evidence, of the facts chosen as conditions for subjective rights or other legal effects. This is already the situation in a purely domestic setting, but even more so when one takes into account that the rule may have to be applied in a foreign court using the rules of evidence of the *lex fori*. One can probably not take into account all the possible peculiarities of the laws of evidence, but one can at least try to give preference to facts that can generally be proven more easily or with more certainty. I limit my examples again to the rules on prescription of rights to performance.

A first example concerns the effect of the initiation of judicial or other proceedings on the running of prescription. In comparing laws, one finds mainly three solutions as to the situation when the proceedings have ended: prescription was merely suspended and the creditor disposes only of the period which remained at the date of initiation of the proceedings; or prescription is also interrupted or renewed and a new period of prescription of the same length as the original period begins to run; or prescription is extended and a new period of a fixed length begins to run, which is usually shorter than the original one. In all three solutions, it is necessary to determine the exact date the proceedings ended, but only in the first solution it is also necessary to determine the exact date the proceedings were started. The first solution (two points in time to be determined) thus creates twice as many possible disputes as the two other solutions.⁴

A second example concerns the commencement of prescription in the event of defective performance. The modern rule for the commencement of prescription in general is to let prescription begin to run when the creditor knows or can reasonably be expected to know of the facts giving rise to the right to performance and the identity of the debtor (e.g. Article III-7:301 DCFR). However, that moment in time

⁴ The drafters of the DCFR have chosen a mixed solution in Art. III-7:302 (2): in principle, judicial proceedings only suspend the running of prescription, but ‘where the proceedings end within the last six months of the prescription period without a decision on the merits, the period of prescription does not expire before six months have passed after the time when the proceedings ended.’ In my opinion, a simpler solution has to be preferred, but at least the solution is better than Art. 14:302 PECL (Principles of European Contract Law), which provided a mere suspension without any fixed period of extension.

is often difficult to prove with certainty. In the event of defective performance of an obligation to supply goods or services, many systems of substantive law provide that the creditor may not rely on the lack of conformity unless the creditor gives notice to the debtor within a reasonable time after the creditor discovered or could reasonably be expected to have discovered the non-conformity. In the event of dispute about the prescription of the right of the creditor, it is much easier to obtain certainty on the date of notification by the creditor than on the date the creditor discovered or could reasonably be expected to have discovered the non-conformity. As certainty is of the essence of rules of prescription, it is wiser to provide that in cases where there is such a duty to notify and there has been a timely notification, prescription only commences at—or is suspended until—the date of notification. Unfortunately, this wisdom has not been implemented in contemporary harmonisation projects such as the New York Convention on the Limitation Period in the International Sale of Goods (see Article 9 (2)(a); see, however, also Article 11) or the DCFR (Article III-7:301).

7.3 Taking into Account Substantive Law when Drafting and Interpreting Procedural Law: General Remarks

Let me now turn to my main topic, that being the expectations towards procedural law from the perspective of substantive (particularly private) law, especially harmonised and foreign substantive law.

Generally speaking, these expectations are evidently the same whether the applicable substantive law is domestic law or common/harmonised law or foreign law. One expects from procedural law the rules required to protect and enforce subjective rights, wherever self-help is not an option, in an effective way within an appropriate time and at reasonable cost. But one also expects from procedural law the rules required to protect defendants against the burdens and costs of procedures for unfounded claims.

Nevertheless, as national procedural law was (and is) evidently developed in relation with national substantive law, it usually does not take into account substantive law rules and remedies foreign to its national law. This may affect the protection offered by substantive law as well as the protection offered by remedies that have to be sought in a foreign court, as the protection against interference by plaintiffs resorting to a foreign court.

In [Sect. 7.4](#), I will check possible problems with procedural rules concerning the availability of and access to procedures and the powers of courts. In section V, I will devote some attention to the protection of defendants. In section VI, I will check how procedural law responds to a change of parties or their rights under substantive law, especially when a change happens during the course of proceedings.

7.4 Availability of Procedures and Powers and Rules on Their Initiation and Scope

7.4.1 Powers of the Court

The first and most evident requirement is the availability of courts and of accessible procedures before these courts to give legal protection to private law rights. Most private law rights are, indeed, effective only when they can be protected—by recognition and where necessary enforcement—by courts in procedures accessible to the holders of those rights. Courts should in general have the power to order a party to do something which is due (including an order not to do something), to make a declaration on the existence or non-existence of a right and to modify a legal relationship where substantive law provides that a party is entitled to have the relationship modified by the court. Given the length of normal procedures, summary proceedings and/or the possibility to obtain provisional measures (interim relief) are necessary where substantive rights would become meaningless or illusory without quick protection.

The main problems arising in this respect are of a general nature and are not specific to cases where foreign or harmonised law has to be applied: duration, costs, unequal quality of judgments, difficulty to enforce judgments. Nevertheless, there are cases where substantive rights granted by common/harmonised or foreign law are not protected because they are unknown in the country of the forum and courts do not have the power to grant them or at least believe they do not have such power, based on limitations in the law on the organisation of the judiciary or civil procedure (whether based on constitutional, statutory or just customary rules or ideas).

A first example concerns immunities of jurisdiction and enforcement and similar rules, which can be found especially in favour of public authorities. Whereas in some cases they are of a substantive nature (in the sense that in that case there simply is no subjective right against the public authority), in others the applicable substantive law (e.g. foreign contract law, European Union law) does grant a subjective right, probably unknown to domestic law. The most famous example where domestic limits to jurisdiction have been set aside in favour of the effective legal protection of subjective rights derived from European Union law is the judgment of the European Court of Justice (ECJ) in the first *Factortame* case⁵ in which the Court ruled that a rule of national law which would prevent a court seised of a dispute governed by Community law from granting interim relief—in *casu* suspending an Act of Parliament—must be set aside where this is necessary in order to ensure the full effectiveness of the judgment to be given on the existence of the rights claimed under Community law.

⁵ ECJ 19 June 1990, Case C-213/89, ECR I-2433 (*Factortame*).

As to immunity against enforcement, the Belgian Court of Cassation ruled in three judgments of 21 December 2009⁶ that the traditional rule of immunity of international organisations must be set aside as contrary to Article 6 of the European Convention on Human Rights where it is disproportional, i.e. where there are no other reasonable possibilities for the effective protection of the rights of the creditor. Although these cases were not specifically dealing with rights granted by harmonised or foreign law, the decision is also relevant for them.

Rights granted by harmonised or foreign law are, on the other hand, directly affected by procedural rules limiting the content of remedies that can be granted by courts. The most typical example is a rule exempting courts from granting the remedy of specific performance even if the applicable substantive law grants it. There is no problem for harmonised or foreign law where the rule is not a rule of civil procedure, but of domestic substantive law, as it would precisely then not be applied where domestic law is not the law to the merits of the case. However, it is not always clear in national law how such limitations are qualified. The applicable substantive law may grant a party a right to obtain certain documents from another party, which may be unknown under domestic law and exceed the possibilities granted by the procedural law of the forum in the form of a procedural right (*actio ad exhibendum*). Parties may be entitled by the applicable substantive law to remedies preventing damage to be caused by another future party but not obtain it because in the country of the forum it is considered as a matter of civil procedure and not recognised in the case. A party may be entitled to an adaptation of the content of a contract by the court, whereas the country of the forum ignores this possibility. Or the applicable substantive law may provide that where a court imposes a judicial penalty (*astreinte*) in the event of non-compliance with the court order the penalty shall be paid to the aggrieved party (this is the principle in, e.g., Article 7.2.4 of the UPICC (UNIDROIT Principles for International Commercial Contracts)) and by doing so may come into conflict with the law of the forum which considers this to be a matter of procedural law and has a procedural rule that the *astreinte* does not have to be paid to the aggrieved party (but to the public authorities).

A possible simple solution would be to have a rule in the civil procedural law stating that nothing in the rules on civil procedure forbids national courts from applying such rules of the applicable harmonised or foreign law granting remedies that the court would not grant under its own law in respect of similar legal relationships. This form of comity was, however, not accepted when the UN Convention on Contracts for the International Sale of Goods (CISG) was concluded in 1980, as it contains exactly the opposite rule in its Article 28: 'If, in accordance with the provisions of this Convention, one party is entitled to require performance of any obligation by the other party, a court is not bound to enter a judgement for specific performance unless the court would do so under its own law in respect of similar contracts of sale not governed by this Convention.'

⁶ Cass. (B) 21 December 2009, *Journal des Tribunaux* 2010, 129 note E. David.

The solution just proposed could also have the following disadvantage: that the court would still remain free to grant injunctions or other remedies in cases where such a remedy is precisely excluded by the applicable substantive law. In the light of the considerations I will develop under section V, it would be better to solve the problem on the basis of conflict of law rules qualifying a number of rules on such questions as questions of substantive law.

Civil procedural law traditionally classifies claims and judgments by categories such as (claims for) ‘condemnations’, declaration of rights (or declaration of the absence of a right, the so-called *negatoria*) and constitutive judgments. Such qualifications should, however, again not affect the subjective right as granted by substantive law, especially by harmonised or foreign law. This may happen, for example, in the event of the termination of a contractual relationship for non-performance: in some systems of contract law the intervention of a judge is seen as merely declaratory, i.e. as confirming that the contract was correctly terminated by the plaintiff; whereas in other systems it may be qualified as constitutive, i.e. the contract is terminated only by the judgment itself. But the rights and obligations of the parties in the event of termination should be determined by the applicable substantive law.

7.4.2 *Standing*

Substantive rights granted by common or foreign law may also be affected by the rules of civil procedure on standing. Again, these rules have largely been developed in harmony with domestic substantive law, but may sometimes prevent the exercise of subjective rights conferred by common or foreign law. The ECJ has, therefore, dealt with this question in several judgments. In *Verholen*,⁷ the ECJ decided that

(24) While it is, in principle, for national law to determine an individual’s standing and legal interest in bringing proceedings, Community law nevertheless requires that the national legislation does not undermine the right to effective judicial protection (see the judgments in Case 222/84 *Johnston v Chief Constable of the Royal Ulster Constabulary* [1986] ECR 1651 and in Case 222/86 *UNECTEF v Heylens* [1987] ECR 4097) and the application of national legislation cannot render virtually impossible the exercise of the rights conferred by Community law (judgment in Case 199/82 *Amministrazione delle Finanze dello Stato v San Giorgio* [1983] ECR 3595).

Again, preferably, civil procedure should have rather open rules which, to a large extent, leave the question of standing to substantive law. Where substantive law allows a person to exercise the rights of another person (e.g. his debtor), procedural law should allow this and grant this person standing; an example is the so-called *action indirecte* of Article 1166 of the French and Belgian Civil Codes

⁷ ECJ 11 July 1991, Case C-87-89/90, ECR I-3757 (*Verholen*).

(allowing a creditor to exercise the rights of his debtor in the event of inactivity of the debtor).

Procedural law should in principle allow subjective rights to ‘appear’ in court as they are under substantive law rather than to try to fit them into the categories of domestic law. A trustee should be able to sue in a foreign court in his capacity as trustee (see Article 11 of the 1985 Hague Trusts Convention: ‘A trust created in accordance with the law specified by the preceding Chapter shall be recognised as a trust. Such recognition shall imply, as a minimum, that the trust property constitutes a separate fund, that the trustee may sue and be sued in his capacity as trustee, and that he may appear or act in this capacity before a notary or any person acting in an official capacity.’). Where, however, the applicable substantive law does not use the model of the trust (granting legal title to the trustee) but an alternative model, such as the model of a collective investment fund based on co-ownership, whereby the administrator may equally sue (and be sued) for the common interest of the joint owners, an administrator of such a foreign fund should equally have standing although he has no legal title and the fund has no legal personality. And a foreign insolvency administrator or liquidator should in principle have standing to exercise the collective rights of the creditors of the insolvent person or estate (see in this respect Article 18 of the Insolvency Regulation⁸).

More generally, it is advisable to allow persons not entitled to the substantive right themselves but authorised by contract or law to act for the owner of the right to figure as plaintiff or defendant in the proceedings (to be a ‘party’ in the formal sense). Evidently some formal requirements of legitimation and identification could be imposed by procedural law; but the old adage ‘*nul ne plaide par procureur*’ restricts judicial protection unnecessarily. Where under substantive law a person has the authority entitling him to exercise a right without being the ‘owner’ (without having legal title), procedural law should not deny standing as this would merely require the ‘owners’ to transfer or assign assets or rights in a fiduciary

⁸ Regulation No. 1346/2000 on insolvency proceedings, OJ 2000, L 160, Art.18:

- ‘1. The liquidator appointed by a court which has jurisdiction pursuant to Art. 3(1) may exercise all the powers conferred on him by the law of the State of the opening of proceedings in another Member State, as long as no other insolvency proceedings have been opened there nor any preservation measure to the contrary has been taken there further to a request for the opening of insolvency proceedings in that State. He may in particular remove the debtor’s assets from the territory of the Member State in which they are situated, subject to Art. 5 and 7.
2. The liquidator appointed by a court which has jurisdiction pursuant to Art. 3(2) may in any other Member State claim through the courts or out of court that moveable property was removed from the territory of the State of the opening of proceedings to the territory of that other Member State after the opening of the insolvency proceedings. He may also bring any action to set aside which is in the interests of the creditors.
3. In exercising his powers, the liquidator shall comply with the law of the Member State within the territory of which he intends to take action, in particular with regard to procedures for the realisation of assets. Those powers may not include coercive measures or the right to rule on legal proceedings or disputes’

manner, whereas under substantive law the mere granting of authority is sufficient. Typical examples are the authority to collect a debt, the authority to administer copyrights or other intellectual property rights, et cetera. Summarising, I would say that standing in the sense of authority is a matter of substantive law, whereas the identification of the parties and the other formalities to be fulfilled are in principle a matter of procedural law.

7.4.3 Plurality

The effective protection of substantive rights may also be affected by the procedural rules on plurality of parties. Here again, procedural law should be sufficiently flexible to allow a plurality of plaintiffs or defendants where a plurality of parties to the substantive relationship is invoked, such as a plurality of debtors (joint debtors, solidary debtors (joint and severally), et cetera) or a plurality of creditors or of co-owners. This also concerns the rules of (personal) jurisdiction.

7.4.4 Counterclaims

Substantive rights may also be affected by the procedural rules on—especially restrictions on—counterclaims. I take an example from the different systems of set-off. Under some legal systems, set-off can only be invoked by way of defence (*exceptio*) where the active right is already ascertained, whereas a counterclaim is necessary if the right is still unascertained; in other systems, set-off may, nevertheless, be declared (sometimes when other requirements are met—see, e.g., III-6:103 DCFR). There may be some substantive differences, especially as to the question whether invoking set-off has a retrospective effect or not. But, preferably, procedural law should not prevent set-off where a set-off would be effective in the country of the applicable law given the combination of substantive and procedural law which would be applied there. This does not exclude that the judge may, on the basis of the procedural law of the forum, divide the lawsuit and deal first with the original claim and postpone the counterclaim (where the first is sufficiently certain and the second is not).

7.4.5 Evidence

Evidence is another topic where the delimitation between the provinces of civil procedure and substantive law is unclear and varies from country to country. Specific evidential requirements for specific acts or facts will normally be a matter for substantive law. The procedures for obtaining evidence allowed by substantive

law will be governed by the procedural law of the forum, but should not render the obtaining of evidence allowed by substantive law excessively difficult. The burden of proof is, in my opinion, primarily a matter of civil procedure, but where the law imposes upon a party specific ‘pre-procedural’ burdens of proof (the burden to pre-establish proof), this is again rather a matter of substantive law. Drafters of substantive law should, therefore, take into account the procedural rules that may apply elsewhere, and drafters of procedural law should take into account the different substantive law rules that may be applicable. It would, however, require an additional chapter to develop this question in more detail.

7.4.6 Rules on the Task of the Judge and on Belated Submissions by a Party

At first sight, the rules on the task of the judge, and especially on the question whether the judge may or even should invoke certain defences *ex officio*, is purely a matter of procedural law.

Nevertheless, at least in some countries substantive law will contain some specific rules, especially rules dictating that a certain defence should not be raised *ex officio* by the judge. Thus, Article 2223 of the Belgian Civil Code (and of the Code Napoléon) provides that a judge is not allowed to invoke *ex officio* that a right is prescribed, and a similar rule is found in most European legal systems. In the DCFR, it is not explicit, but follows from the rule in Article III-7:501 that the expiry of prescription only gives the creditor a right to refuse performance and does not end the obligation *ipso iure*. Where the applicable substantive law makes a defence dependent upon a declaration of the party entitled to assert it, procedural law should not allow or even oblige the court to raise it *ex officio*.

On the other hand, substantive law may in some cases impose upon procedural law an obligation for the courts to apply certain legal provisions *ex officio* in order to protect certain substantive rights or interests. This is clearly the situation with a number of rules of European Union law. Thus, European consumer law, as interpreted by the ECJ, contains an obligation for judges to invoke certain rules of consumer protection *ex officio*—a rule which I believe is rather a rule of substantive law. One of the roles this doctrine plays is to allow a consumer to request avoidance of an unfair term even where according to national procedural law the consumer should have already done this in an earlier stage—see the ECJ judgment in *Mostaza Claro*,⁹ where the consumer requested annulment of an arbitral decision because of the unfairness of the arbitration clause, although the consumer had not pleaded that invalidity during the course of the arbitration proceedings, but only in that of the action for annulment.

⁹ ECJ 26 October 2006, Case C-168/05, ECR I-10421 (*Mostaza Claro*).

There is evidently much more case law of the ECJ on the duty of the judge to invoke European Union law *ex officio* and/or to set aside national rules of procedural law restricting the possibilities for the judge to invoke European Union law.¹⁰ But among these decisions, consumer law cases such as *Mostaza Claro* are, in my opinion, probably the clearest examples of setting aside the autonomy of civil procedure.

7.5 Protecting Defendants

The doctrine of effective judicial protection of subjective rights, especially in the case law of the ECJ, plays an important role for the effectiveness of substantive law in general. However, there is a serious risk that it leads to a one-sided view giving too much preference and protection to the claims—founded or unfounded—of parties asserting certain types of rights to the detriment of the defence of the other party, equally asserting a right, be it a subjective right in the strict sense or a freedom or privilege, an immunity or a similar right.¹¹ Procedural law should as far as possible enable the protection of the rights of the plaintiff, but equally of those of the defendant. It must maintain the blindfold, meaning that the assertions of both parties have to be taken into account in an impartial manner. It is true that, in the interest of social peace and security, ‘innocent’ defendants do have to bear the burden of a lawsuit and will have to defend themselves as much as ‘innocent’ plaintiffs do have to bear the burden of a lawsuit¹² and cannot take the law into their own hands. The interest of the ‘innocent’ defendant not to be sued (or at least to be compensated when unjustly sued) must be protected as much as the interest of the ‘innocent’ plaintiff to obtain legal protection (and to be compensated if suing is necessary to obtain his right).

Certainly, there is also an important responsibility of substantive law itself here. Substantive law cannot make it impossible for plaintiffs to start lawsuits for unjustified claims, but lawsuits should not become lotteries due to the unclarity of substantive law. Furthermore, where rules of substantive law are too harsh or of a punitive nature, even defendants who are quite convinced of their innocence will prefer a bad settlement over the small risk of incurring such a sanction, and the substantive rules become an instrument of blackmail. The ‘chilling effect’ of vague or imprecise rules has been identified especially in criminal law (e.g. a criminal law rule restricting free speech)—and is one of the reasons why the legality principle, understood as requiring also a precise description of a punishable

¹⁰ See especially ECJ 14 December 1995, Case C-312/93, ECR I-4599 (*Peterbroeck, Van Campenhout v. Belgische Staat*).

¹¹ In using privilege and immunity, I am implicitly referring to the terminology of Hohfeld 1913/1917.

¹² Degenkolb 1877.

offence, is so important—but is not absent from private law either, especially where private law contains punitive elements.

Nevertheless, procedural law also plays a role in limiting legal harassment and more generally in limiting the procedural burden of ‘innocent’ defendants. I would like to mention three topics.

The first concerns the rules on verifying jurisdiction. Procedural rules should help to settle issues of jurisdiction as quickly as possible, and they should, therefore, in principle already be settled in a preliminary stage. An effective protection of defendants against lawsuits started before a court that lacks jurisdiction requires that courts check their jurisdiction *ex officio*. Some of the case law of the ECJ on the duty of the court to apply consumer protection rules on their own motion precisely concerns the protection of consumers against unfair jurisdiction clauses—the judgment in *Pannon*¹³—and unfair arbitration clauses—the judgment in *Asturcom*.¹⁴

Secondly, while the requirement of effective legal protection of rights implies that procedural law should not render the obtaining of evidence allowed by substantive law excessively difficult, nevertheless procedural law could still have rules to dismiss quickly claims which are not based on evidence as required by substantive law for such rights.

Thirdly, it is important to have good rules on the costs of legal proceedings and on cost shifting. On the one hand, there are the costs the judiciary may charge for the public service. This is no doubt a matter of procedural law. On the other hand, legal systems differ as to the question whether the rules on the shifting of attorney’s fees and similar costs are a matter of procedural law or rather of substantive law. The procedural solution has the advantage that it can shift costs to any party winning the lawsuit, irrespective of the type of legal relationship; substantive law solutions are usually only partial and one-sided, often providing relief only to creditors that win their case and not to defendants against whom unfounded claims have been addressed. Moreover, the matter is complex, as uniform substantive law tends to contain such partial rules as is, for example, the situation with the European Late Payment Directive. The old Directive 2000/35¹⁵ provided that ‘unless the debtor is not responsible for the delay, the creditor shall be entitled to claim reasonable compensation from the debtor for all relevant recovery costs incurred through the latter’s late payment’ (Article 3, 1e). The new Directive 2011/7¹⁶ provides, ‘The creditor shall, in addition to the fixed sum referred to in paragraph 1, be entitled to obtain reasonable compensation from the debtor for any recovery costs exceeding that fixed sum and incurred due to the debtor’s late

¹³ ECJ 4 June 2009, Case C-243/08, ECR I-4713 (*Pannon GSM*), annotated by Ancery and Wissink 2010, 307–316.

¹⁴ ECJ 6 October 2009, Case C-240/08, ECR I-9579 (*Asturcom*), annotated by Ebers 2010, 823–846; Schebesta 2010, 847–880.

¹⁵ Directive 2000/35/EC on combating late payment in commercial transactions, OJ 2000, L 200/35.

¹⁶ Directive 2011/7/EU on combating late payment in commercial transactions, OJ 2011, L 48/1.

payment. This could include expenses incurred, inter alia, in instructing a lawyer or employing a debt collection agency' (Article 6, 3). The Directive only deals with late payments in commercial transactions. But in legal systems where statutes can be reviewed under a constitutional principle of non-discrimination, it is very difficult to justify that plaintiffs recovering a late payment can shift their legal fees to the defendant when they win their case, whereas there would be no shifting in all other cases. Thus, the Belgian legislator was obliged to introduce a general rule on cost shifting as a consequence of the European Directive. This may be, after all, a reasonable solution in general, but nevertheless it is not a good thing that the general solution for this difficult question is dictated by a very specific rule strengthening the effective legal protection of just one type of subjective right.

7.6 Taking into Account the Changes During the Proceedings Relevant Under Substantive Law

My last topic concerns the question of how procedural law responds to a change of parties or their rights under substantive law, especially when a change happens during the course of the proceedings.¹⁷ Preferably, procedural rules should be drafted in such a way that proceedings simply continue in the event of a change of one or more parties in the substantive legal relationship at stake. A substitution of the creditor or other holder of the subjective right at stake during the lawsuit should have no adverse effect, and in particular not terminate the lawsuit nor influence the jurisdiction of the court.

As the applicable substantive law may differ as to the different modes of transmission of rights or succession in rights, procedural law should again use as far as possible neutral formulations, not confined to the specific form of, for example, assignment of a right under the *lex fori*. The 'new' creditor should have an easy possibility to substitute himself as a party to the lawsuit for the old creditor and the 'old' creditor should have an easy possibility to get out of the lawsuit and be substituted by the new creditor. The form of such a procedural substitution will be determined by procedural law. But procedural law should not prevent, for example, an assignment of a right by a consumer to a non-consumer by terminating the jurisdiction of the forum of the consumer in such a case.

On the other hand, as long as there is no substitution, procedure should continue between the original parties, who are presumed to have the authorisation from their successors. The fact that the plaintiff has assigned his rights should not prevent the

¹⁷ Most of the relevant questions have at some length in an article dealing with Belgian and Dutch law by Storme 1994, 178.

plaintiff from continuing the proceedings, even if he thus acts on the hidden assignee's account. And a defendant should not be obliged to take an initiative when the plaintiff remains passive.

The problem arises more specifically when appellate proceedings or similar proceedings are started. Under Belgian law, the typical case is one where a minor is represented by his or her parents in the first instance, and reaches majority during the lawsuit or after the judgment, but before the other party starts appellate proceedings. The first judgment will indicate the parents as the opponent, but procedural law may, nevertheless, require the appellant to direct the appeal against their child, as the parents have no authority anymore in appeal. Also in a case such as this, I would plead that a change in the position of a party under substantive law should not adversely affect the other parties in the proceedings as long as the change has not been notified.

Finally, a flexible procedural law will also use neutral formulations for the rules dealing with the adaptation of the 'content' of the lawsuit to new facts and circumstances. A similar factual change may be qualified in different ways by different substantive laws. I found an illustration of the necessary flexibility in a decision of the Belgian Court of Cassation of 1994¹⁸ in a dispute concerning a right-of-way easement: during the lawsuit, the plaintiff, who was co-owner of a tract of land, became sole owner of part of the land; the plaintiff was allowed to change his claim (to modify the cause of action) during the proceedings. Different substantive laws may qualify the change differently; whether the lawsuit can be continued or a new lawsuit should be initiated should as far as possible not depend upon these qualifications.

7.7 Conclusion

The interaction between procedural law and substantive law is a vast and fascinating topic, which I have evidently not exhausted. I have merely tried to illustrate with a variety of issues that it is important for drafters of substantive law rules to take into account the various procedural contexts in which the rules may apply and for drafters of procedural rules to take into account the variety of substantive law solutions that may have to be applied in the procedures. Because, as Darbellay put it so nicely: 'La procédure conditionne la saisie du droit au fond, la perception et la délimitation du droit matériel comme la lumière conditionne la perception des couleurs.'¹⁹

¹⁸ Cass. (B.) 6 May 1994, annotated by Storme 1995, 43–44.

¹⁹ Darbellay 1964, 427.

References

- Ancery AGF, Wissink MH (2010) ECJ 4 June 2009, Pannon GSM Zrt. v. Erzsébet Sustikné Györfi. *Euro Rev Priv Law* 18:307–316
- Darbellay J (1964) *Le droit d'être entendu*, 98. Referate und Mitteilungen des schweizerischen Juristenvereins, Helbing und Lichtenhahn, Basel
- Degenkolb H (1877) *Einlassungszwang und Urteilsnorm*, Beiträge zur materiellen Theorie der Klagen, insbesondere der Anerkennungsklagen. Breitkopf and Hartel, Leipzig
- Ebers M (2010) From Océano to Asturcom: Mandatory Consumer Law, Ex Officio Application of European Union Law and Res Judicata. *Eur Rev Priv Law* 4:823–846
- Hohfeld H (1913/1917) *Fundamental legal conceptions*, Yale Law Journal 1913 and 1917, reprinted in *Fundamental legal conceptions as applied in judicial reasoning and other legal essays* by W N Hohfeld, Yale UP New Haven 1919
- Schebesta H (2010) Does the national court know European law? A note on ex officio application after Asturcom. *Euro Rev Priv Law* 4:847–880
- Storme ME (1994) Rechtsopvolging onder bijzondere titel tijdens het burgerlijk geding in België en Nederland, *Rechtskundig Weekblad (RW)* 1993–94, 169–186. Available at <http://storme.be/rechtsopvolging.html> (accessed July 2011)
- Storme ME (1995) De Lebbeekse uitweg uit een processuele valstrik: ten processe optreden in een andere hoedanigheid en optreden krachtens een ander recht, *Proces & Bewijs* 1995, 43–44. Available at <http://www.storme.be/lebbeekseuitweg.pdf> (accessed July 2011)