USE OF COURT ORDERS TO CARRY OUT TRIALS AND SECURE EVIDENCE

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The purpose of this session is to focus on what judges can do to effectively and efficiently manage their cases. This session will discuss the use of court orders to carry out trials and secure evidence. I am fully aware that this subject, a familiar one to U.S. judges, does not reflect the practice in the courts of Central and Eastern Europe. It is on the agenda of this conference to stimulate discussion.

The United States is unusual in the amount of power it vests in trial judges to control scheduling, trial proceedings, and evidentiary issues that arise during the course of litigation. In the hands of a capable judge, the use of this authority reduces delays, increases the efficiency of litigation, and it ensures that the lawyers are responsive to the court's needs. And, it is designed to help the court uncover the truth and apply the law properly. This power of the trial judge has two elements – the discretion to resolve issues of case management in a way that is responsive to the needs of each case and the power to enforce these decisions. I will address these elements in turn.

First I will discuss trial court judges' discretion, specifically in decisions about scheduling, managing the trial, and the production of evidence. The legal provisions governing these areas give American trial judges virtually unfettered discretion and the appellate courts are almost never involved. When setting a trial date, for example, a judge may seek input from the parties, but there is no negotiation. The judge is entirely in control. If the parties disagree with the judge's decision, they can attempt to appeal it to a higher court, but such a court has limited power to review it and will intervene only in extreme circumstances. This judge's scheduling authority is inherent in the judicial power.

Civil Procedure Rule 42 illustrates this point and reinforces and expands upon the court's inherent scheduling authority. It permits a court to "issue any orders to avoid unnecessary cost or delay" and to order separate trials on any claim or issue or consolidate actions that involve common questions of law or fact "for convenience, to avoid prejudice, or to expedite or economize."[1] The text of this rule leaves trial judges wide discretion to consolidate trials or order separate trials. In deciding whether consolidation is warranted, a trial court looks at the facts of the case, "to determine if the anticipated benefits of consolidated actions, such as judicial economy and eliminating unnecessary costs to the parties, outweigh potential prejudice to the

[1] Fed. R. Civ. P. 42.

parties."[2]

Civil Procedure Rule 16 gives trial courts a similar degree of latitude in determining how to schedule litigation. The rule empowers the court to order attorneys to appear for pretrial conferences. Such conferences concentrate on ways to resolve the controversy as efficiently as possible by developing a plan for the pretrial activities and preparation, and, where appropriate, by encouraging the parties to settle. At the pretrial conference, the court can limit the issues that will be tried, direct the course of the discovery process and obtaining evidence, dispose of motions, order separate trials, or take other steps "[to facilitate] . . . the just, speedy, and inexpensive disposition of the action."[3] Rule 16 also requires the trial court to issue a scheduling order, which must include a schedule for pretrial activities and can also contain provisions stating what evidence may be discovered by the parties, describing how discovery should proceed, and "other appropriate matters."[4] The two catch-all provisions in this rule give the court almost unlimited latitude to design pretrial proceedings, as long as the court's efforts are aimed at facilitating the just and efficient resolution of disputes. Generally, our appellate courts do not intervene in these decisions.

I also want to highlight the discretion over evidentiary issues vested in American trial courts. This discretion arises in two significant areas: the court's control over the

[2] Reitan v. China Mobile Games & Entm't Grp., Ltd., 68 F. Supp. 3d 390, 394 (S.D.N.Y. 2014) (internal quotation marks omitted).
[3] Fed. R. Civ. P. 16.
[4] Id.

process by which parties make information known to each other – the discovery process; and the court's ability to compel non-parties to testify or provide documents. The discovery process is governed by Civil Procedure Rule 26. The rule describes the kind of information the parties must share. And it also describes the scope of discovery, which extends to "any nonprivileged matter that is relevant to any party's claim or defense."[5] The determination of what constitutes relevant evidence in the particular case is left to the trial judge after learning the competing views of the parties. Again, appellate courts intervene in these decisions almost never.

The final type of court order I will address is the subpoena, which is how trial courts compel non-parties to testify or to produce documents. A subpoena is a fully enforceable court order to a non-party to appear in court with physical evidence (usually documents) on a certain date as described in the order. The process for issuing subpoenas is governed by Civil Procedure Rule 45. First, the trial court issues the subpoena, but thereafter the person who is subpoenaed may move to quash or limit the subpoena by proving that it is overly burdensome.[6] The judge then weighs these arguments against "the interests served by demanding compliance" and determines whether the subpoena should be quashed, limited, or enforced.[7]

Because, in questions about the scope of discovery and whether a subpoena is

[5] Fed. R. Civ. P. 26. As of December 1, 2015, scope of discovery must also be "proportional to the needs of the case."
[6] Leisure Ltd. v. Deutsche Bank Trust Co. Americas, 262 F.R.D. 293, 299 (S.D.N.Y. 2009).
[7] Id. at 300.

proper, the issues of relevance and "undue burden" are left to the discretion of the trial court, trial courts have near-absolute authority over the scope of the evidence that is available to the parties and the methods by which the evidence is supplied. This authority gives the court power to substantially determine the pace and the course of the litigation, and, if used skillfully, it can help to render litigation more efficient and increase the likelihood of a just resolution.

The trial court's discretion to manage scheduling and evidentiary issues would be meaningless without the ability to enforce its decisions. American courts have the power to punish those who violate their orders and they do not hesitate to use it. This power comes from several sources - the Federal Rules of Civil Procedure, specific statutes, and the court's inherent power to sanction lawyers and parties and to hold them in contempt. For the physical enforcement of these punishments, the judiciary relies on the US Marshals, a branch of the Justice Department dedicated to the protection of the judicial process. Depending on the violation, Marshals can remove a person from the court room; arrest and bring to court a witness who refuses to testify; seize documents; and if necessary, immediately jail someone who refuses to comply. American courts often have a jail cell in the same building, or nearby, for such situations.

A court's power to hold litigants and non-parties in contempt is "inherent in all

courts"[8] and is also protected in a federal statute that authorizes courts to punish anyone who "misbehav[es] and thus obstruct[s] the administration of justice" or disobeys any court "writ, process, order, rule, decree, or command."[9] There are two types of contempt – civil and criminal –and fines and imprisonment can be used as punishments for both types.[10]

Basically, holding a person in contempt is civil if it is "remedial, and for the benefit of the complainant" and it is considered criminal if it is "punitive, to vindicate the authority of the court."[11] Civil contempt is used to compel compliance with a court's "affirmative command," such as a demand that a party turn over documents.[12] A contemnor will be imprisoned or repeatedly fined until he complies.[13] Criminal contempt, on the other hand, is a punishment for a completed violation, and the contemnor cannot escape the punishment by changing his behavior.[14]

Civil Procedure Rules 16 and 26, which I previously discussed, give courts the power to sanction litigants for failing to comply with their requirements. Rule 16, in combination with Rule 37, empowers courts to impose a wide range of sanctions – including holding a party in contempt, dismissing the case, or rendering a default judgment– for a violation of any pretrial order, including scheduling orders. Rule 26,

[8] Young v. U.S. ex rel. Vuitton et Fils S.A., 481 U.S. 787, 795 (1987).
[9] 18 U.S.C. § 401 (2015).
[10] See "Int'l Union, United Mine Workers of Am. v. Bagwell, 512 U.S. 821, 827-29 (1994).
[11] Id. (internal quotation marks omitted).
[12] Id.
[13] Id.
[14] Id.

which regulates discovery, empowers the court to impose "an appropriate sanction," including a fine or attorney's fees, on any party or attorney who signs a discovery response or request and knows that it is incomplete, legally or factually incorrect, or unduly burdensome. There are also specific substantive statutes that give courts the power to sanction parties and attorneys in particular situations.

Finally, trial courts have inherent powers to sanction litigants – for example, if a party "destroys relevant and discoverable evidence."[15] This power serves as a backstop to the specific provisions authorizing courts to enforce their orders and exists even if the court has not issued an order that has been violated.

Armstrong v. Guccione,[16] decided by the Second Circuit Court of Appeals in 2006, illustrates the scope of the trial court's discretion in deciding evidentiary issues and its ability to enforce such decisions. Armstrong was a corporate officer who was both criminally charged and sued civilly by the SEC for securities violations. His corporation was ordered to turn over certain corporate records and assets to the SEC as part of the civil ligation and he refused to comply. The district court held him in civil contempt and jailed him for refusing to turn over the records. He continued to refuse and eventually served seven years in jail. He was only released from his civil contempt

[15] Shamis v. Ambassador Factors Corp., 34 F. Supp. 2d 879, 888 (S.D.N.Y.) on reargument, 187 F.R.D. 148 (S.D.N.Y. 1999).
[16] 470 F.3d 89 (2d Cir. 2006).

sentence after choosing to plead guilty to the underlying criminal charge. Armstrong's story shows why parties rarely disobey American court orders – the consequences are real, and can be extremely severe.

I hope that I have provided a helpful overview of how American trial courts regulate proceedings before them. In the hands of a skilled judge, the combination of discretion, the legal authority to make orders and punish violators, and the willingness to use that authority to exact costly punishments gives courts unparalleled power to increase the efficiency and effectiveness of judicial process. All of this is background for what I hope will be a stimulating discussion of how trial judges manage trials in your countries and whether you believe that some of the methods used in the United States would be helpful to your judges.