CASE MANAGEMENT IN EUROPE: A MODERN APPROACH TO CIVIL LITIGATION

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Summary: 1. Introduction. – 2. Nikolaus Thaddäus (von) Gönner (1764-1827) and his Prozessmaximen. – 3. Philips Wielant (1441/42-1520) and his Early-Modern Procedural Handbook. – 4. Role of the Judge and the Parties from the 19th century onwards – 5. European Rules of Civil Procedure. – 6. Concluding Remarks.

1. INTRODUCTION

The terminology 'Case Management' became fashionable in comparative legal studies in Europe as a result of the 1998 Woolf Reforms in England & Wales.[1] These reforms attracted much attention in scholarly circles. It was noted that just like many of the Civil Law jurisdictions on the European Continent several or more decades before, now even the major European common law jurisdiction was moving away from an idea that was said to have dominated civil procedure for at least two centuries: the idea that the parties should be able to shape their civil lawsuits in the way they deemed fit since civil litigation is about the protection of their private rights and duties over which they can freely dispose. This idea was, according to Falk Bomsdorf in his 1969 PhD thesis submitted to the law faculty in Kiel and published in 1971, first formulated by the Hessian legal scholar Karl (von) Grolman (1775-1829) in 1800.[2] Grolman's idea was, according to the same author, leading for the Bavarian legal scholar Nikolaus Thaddäus (von) Gönner (1764-1827) when he formulated two contradictory *Maximen* or fundamental principles of civil procedure a few years later: the *Verhandlungsmaxime* (this can roughly be translated as the 'adversarial principle') which in his view dominated the *gemeine Prozess* (common procedure) of various German jurisdictions, and the *Untersuchungsmaxime* (roughly 'inquisitorial principle') which allegedly dominated civil procedure in Prussia as a result of the reforms in litigation in the 18th century.[3]

In the present paper I will first discuss the two fundamental procedural principles distinguished by Gönner (Section 1). Then, in Section 2, I will analyse, as an example, an early-modern Dutch treatise on civil procedural law by the Flemish jurist Philips Wielant (1441/42-1520) focusing on the role of the judge and the parties in civil litigation. In this Section I will demonstrate that a model of civil litigation based on the learned Romano-canonical procedure (the ancestor of most systems of civil procedural law in Europe) took a balanced approach to the role of the judge and the parties, an approach that is present throughout the literature on civil procedure in the early-modern period. Subsequently I will provide a short overview of European developments as regards the role of the judge

[1] Van Rhee 2005, 20. See also Woolf 1995 and Woolf 1996.

[2] Grolman 1800. See also Bomsdorf 1971, 123, and Chorus 1987 and 1992.

[3] On Prussian civil procedure in the 18th century, see Bomsdorf 1971, 65-96.

and the parties in civil litigation from the 19th until the early 21st century (Section 3). And finally I will focus on the current work of the European Law Institute and Unidroit in drafting European rules of civil procedure, more specifically on the rules governing the role of the judge and the parties (and their lawyers) (Section 4). One of the aims of this paper is to show how the suggestions done by the working group responsible for drafting rules governing the judge and the parties fit well in European developments that may have started at the time of the introduction of the Romano-canonical model of litigation in the secular courts of the late medieval and early-modern period.

2. NIKOLAUS THADDÄUS (VON) GÖNNER (1764-1827) AND HIS PROZESS-MAXIMEN

According to his contemporaries, Nikolaus Thaddäus Gönner was not a pleasant person. Bomsdorf summarizes the views of Gönner's contemporaries as follows: 'Sie sind einig in der Kenzeichnung Gönners als eines begabten, aber durch Missgunst und Eitelkeit, masslosen Ehrgeiz und ungehemmte Machtgier sich um die Früchte seines Talents bringenden Mannes' (They agree in the characterization of Gönner as a gifted man who destroys the fruits of his own talent due to envy, vanity, unlimited ambition and an unrestricted appetite for power).[4] Gönner was appointed law professor at Bamberg in 1789, at Ingolstadt in 1799, a university that was moved to Landshut in 1800. In his approach to law he can be characterized as a late natural law scholar (law of reason or *Vernunftrecht* in German).[5] His scholarly legal method was not very sophisticated. He would use the law in force as a starting point or source of inspiration for developing more or less broad principles that in his view governed the law, but he would do so independently from the sources he had used as his starting point. He would not test whether these principles indeed coincided with the actual situation in the legal system he had used. This is also true for the fundamental procedural principles discussed here.[6]

Gönner developed his ideas on the contradictory *Verhandlungsmaxime* (adversarial principle) and *Untersuchungmaxime* (inquisitorial principle) in his *Handbuch des deutschen gemeinen Prozesses* (Handbook on the German Common Procedure), published at the start of the 19th century.[7] The adversarial principle as understood by Gönner was summarized by this very author in the German sentence 'Nichts von Amts wegen' or, in English, 'Nothing ex officio'.[8] It referred to a procedure that was purely adversarial. It meant that in a civil lawsuit the judge could only act at the request of the parties and did not dispose of *ex officio* powers. Since the so-called *Dispositionsmaxime* (party control where it concerns the bringing of an action in court, continuation and early termination) had not been invented at Gönner's time (this would be the work of Ortloff and von Canstein in the second half

[4] Bomsdorf 1971, 112.

[5] Bomsdorf 1971, 112-113.

[6] Bomsdorf 1971, 121ff.

[7] Gönner 1801-1803.

[8] Bomsdorf 1971, 127.

of the 19th century),[9] he defined the *Verhandlungsmaxime* broadly: it not only provided that the parties were in charge of the factual basis of their lawsuit and evidence, i.e. that it were the parties who determined the facts that would be taken into consideration, but it also provided that the parties could decide whether or not to initiate, continue or terminate the action.[10]

According to Gönner, the inquisitorial principle (*Untersuchungsmaxime*) was the opposite of the adversarial principle (*Verhandlungsmaxime*) and meant that the judge should always act *ex officio* in civil litigation. The principle gave rise to an inquisitorial procedure in that the determination and investigation of the factual substratum of the lawsuit was ultimately the task of the judge. Unlike the adversarial principle, the inquisitorial principle was not understood in a broad sense. The principle as developed by Gönner did not comprise what would later be called the *Offizialmaxime*, i.e. the principle that the court action would be initiated *ex officio* by a state authority.[11] This was due to the fact that also in the procedural model of Prussia (on the basis of which Gönner developed his inquisitorial principle), the initiation of the civil action in court was conceived as a task of the parties.

It should be noted here that different from what a modern observer would expect, Gönner was of the opinion that both principles reflected the idea that civil litigation was a private matter of the parties in the sense that both procedural systems left him the free disposition over his private rights and duties. The only difference was that in a procedure dominated by the adversarial principle the parties remained in control of the development of their civil lawsuit in court until judgment, whereas in a procedure dominated by the inquisitorial principle the parties would transfer the power to investigate the matter to the judge at the moment they initiated the action. The judge was nevertheless deemed to act in the private interests of the parties and he did not have an explicit duty to uncover the substantive (i.e. 'real') truth.[12]

As has been demonstrated by Bomsdorf, Gönner's conclusions were *not* based on solid scholarly investigation, even though the idea that the adversarial principle should be leading in civil procedure was very prominent throughout the 19th century and beyond (maybe also due to the fact that the definition of this principle was modified by later legal scholars, especially since the rule 'Nichts von Amts wegen' was changed in the sense that many exceptions to this rule were considered to be justified without leading to the abrogation of the principle itself).[13] Bomsdorf states that the exceptions to the two principles in both the common procedure (*gemeine Prozess*) and in Prussian civil procedure were so manifold, that one could hardly state that these procedures were dominated by any of the two principles.[14] The only thing one could conclude was that the judge in the Prussian procedural model had other, often more extended powers as regards the investigation of the case than in the model of the *gemeines Recht* (such extended powers were needed also due to the initial abolition of lawyers in civil litigation in Prussia), but none of the procedural models

[9] Bomsdorf 1971, 161.

[10] Bomsdorf 1971, 129-130.

[11] Bomsdorf 1971, 127.

[12] Bomsdorf 1971, 129.

[13] Bomsdorf 1971, 170ff.

[14] Bomsdorf 1971, 131ff.

could be qualified as purely inquisitorial or purely adversarial in the sense that either the judge or the parties dominated the development of the civil action. Both the judge and the parties in actual fact contributed to its development in the *gemeine Prozess* and in the Prussian procedural model, and this is actually true for all historical and current models of civil procedure in Europe. The qualification of these models as either adversarial (dominated by the *Verhandlungsmaxime*) or inquisitorial (dominated by the *Untersuchungsmaxime*) is meaningless and the habit of especially American textbook writers to qualify Continental civil procedure as inquisitorial should therefore be condemned. What matters is a study of the individual powers of the judge and the parties in the various stages of the civil lawsuit and their relative strength. It seems that *de lege ferenda* such powers should *not* be shaped by a strict application of one of the theoretical models first distinguished by Gönner (and this remark is important when we discuss the European Rules of Civil Procedure that are currently being developed in a project of the European Law Institute and Unidroit later in this paper). A modern approach to civil procedure requires that one considers it from a more or less practical perspective (fairness, efficiency, speed and low costs), in combination with the functions it should fulfill in our modern age. These functions are in my opinion not limited to the protection of freely disposable private rights and duties of individual parties, as will be explained in Section 3 of the present paper. This is in my opinion not a new approach to civil procedure, but an approach that has dominated civil procedural thinking for centuries, a situation that continued even after the invention of the *Verhandlungs-* and *Untersuchungsmaximen* at the start of the 19th century, as Bomsdorf has shown.[15]

3. PHILIPS WIELANT (1441/42-1520) AND HIS EARLY-MODERN PROCEDURAL HANDBOOK

Around 1519, just before his death, the Flemish jurist Philips Wielant (1441/42-1520) finalized the last manuscript edition of his civil procedural handbook that would later (when it was printed) become known as *Practijke Civile* or 'Civil Practice'.[16] This manuscript in the tradition of the Romano-canonical procedure was originally written in Dutch[17] and it may have been aimed at young apprentice lawyers who were learning how to litigate by observing court practice at the Council of Flanders, one of the regional superior courts in the Low Countries of the time. The manuscript also contains numerous comparative remarks, especially relating to two superior courts, the *Parlement de Paris* in France and the *Grand Conseil de Malines* in the Low Countries. Wielant's treatise would be very influential throughout Europe due to the fact that large parts of his work were later translated into Latin by Joos de Damhouder (1507-1581), who published the Latin text under his own name and under the title *Praxis rerum civilium* in Antwerp in 1566.[18]

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[15] Bomsdorf 1971, 23ff.

[16] Sicking & Van Rhee 2009, 7-8. The first printed edition is dated Antwerp 1558 and was published by Hans de Laet, and the second, modified edition is dated Antwerp 1573 and was published by Henrik van der Loe. The modified 1573 edition would be reprinted several times until 1646 (see Schaap 1927, 111ff). A modern reprint is Wielant 1968.

[17] But French translations circulated in manuscript: see Sicking & Van Rhee 2009.

[18] Damhouder 1566.

In order to get a clear picture of the role of the parties and the judge in the civil process as reflected by the treatise of Wielant, one needs to read through the whole text, since the manuscript does not contain a general part where these respective positions are being explained at length. This is not a surprise, because his work does obviously not contain a general part devoted to fundamental procedural principles as these principles had not been invented yet. I will not try to provide a comprehensive list of all relevant parts of Wielant's work here, since this Section is mainly meant as an illustration of my statement that the approach to the role of the judge and the parties in civil litigation was balanced in European legal history and sometimes surprisingly modern.

Wielant explains that in order to allow the judge to administer the law, he must be requested by the claimant to do so: only when the claimant submits his statement of claim (*conclusion*) to the court, will the judge be able to act.[19] He then states that in many courts (but apparently not at the highest court in the Low Countries known as the Great Council of Malines since this is the central court of the ruler),[20] the statement of claim (and therefore the claimant) determines the issues on which the judge should rule.[21] Even costs may not be adjudged if these are not requested by a party.[22] However, the judge has his own powers to attempt a settlement without being requested by the parties to do so since trying to settle the case is part of his 'office'.[23]

The judge's powers as regards postponements of the hearing (time-limits) are as follows. A distinction is made between ordinary and extraordinary postponements.[24] Ordinary postponements are prescribed by law for specific purposes and these may not be refused if requested by the parties unless the judge can provide reasons for not granting them.[25] If such reasons exist, however, the judge is in control. The judge is also exercising control where extraordinary postponements are concerned. These postponements are granted only at the discretion of the judge and in doing so the judge should be careful, according to Wielant, since it is part of his office to abbreviate the duration of lawsuits.[26] Whether the latter statement is only a hollow phrase may, however, be questioned because it also appears from Wielant's treatise that the progress of the case is largely under the control of the parties: no progress will be made if the case is not 'presented' by the parties, which means a timely request to note it down in the court calendar or 'cause-list' for the next procedural step to be taken.[27]

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[19] Wielant 1573, iv.iii.1.

[20] Wielant 1573, ix.iii.1-3.

[21] Wielant 1573, iv.iii.2.

[22] Wielant 1573, iv.ix.1.

[23] Wielant 1573, viii.ix.1.

[24] Wielant 1573, iv.xv.2.

[25] Wielant 1573, iv.xv.3.

[26] Wielant 1573, iv.xv.4.

[27] Wielant 1573, vii.vii.1.

The judge is exercising more powers where it concerns witnesses: witnesses are questioned by the judge (usually by a delegated or commissioned judge),[28] although this is often done based on questions submitted by the parties.[29] The judge is, however, not bound by these questions.

The parties also determine when the case is ready for judgment: the hearing is closed if both parties renounce from providing further oral or written arguments: it is only then that the judge may close the hearing.[30] After this closure the judge may exercise some *ex officio* powers to obtain additional information: he may interrogate the parties if further details are needed to decide the case.[31]

Judgment is not delivered automatically, but has to be petitioned for by the interested party, often more than once.[32] And after a judgment is obtained, it needs to be executed, and it is again the interested party who is leading in this respect. The interested party will petition for an enforceable copy of the judgment, he will approach a court bailiff (*huissier*) to start enforcement proceedings and all further steps to be taken will have to be initiated (and paid for) by this party.[33]

It is this model of procedure which, obviously with modifications (sometimes with considerable modification such as in Prusia), was predominant on the European Continent in the early 19th century, when Gönner formulated his procedural principles and when in 1806 one of the leading civil procedural codes of the 19th century became effective, i.e. the French *Code de procédure civile*. It is to this Code and the subsequent developments in Europe that we will now turn our attention.

4. ROLE OF THE JUDGE AND THE PARTIES FROM THE 19TH CENTURY ONWARDS

As I have demonstrated elsewhere,[34] it is the French 1806 *Code de procédure civile* that would dominate civil procedural thinking for most of the 19th century. This Code was not a very innovative piece of work since it was based on the famous 1664 Ordinance of the French king Louis XIV that aimed at introducing a uniform procedural model for the whole of the French kingdom.[35] Previously, each court had its own set of procedural rules ('style' or 'stilus curiae', as it was also known), usually based on Roman-Canon law, but with variations. The fact that the 1806 Code was not very innovative also appears from the fact that Eustache-Nicolas Pigeau (1750-1818), member of the drafting committee of the 1806 Code and author of procedural treatises, did not have to change very heavily the structure of his book titled *La procédure civile du Châtelet de Paris et de toutes les juridictions ordinaires du*

[28] Wielant 1573, vi.xv.6.

[29] Wielant 1573, vi.xv.8.

[30] Wielant 1573, viii.i.1-2.

[31] Wielant 1573, viii.1.4.

[32] Van Rhee 1997, 188-190.

[33] Wielant 1573, x.i-x.

[34] Van Rhee 2005

[35] Code Louis 1996.

Royaume (Civil procedure of the *Châtelet* of Paris and all ordinary jurisdictions of the Kingdom), published in 1773, when he used it as the basis of his treatise on the 1806 Code titled *La Procédure civile des Tribunaux de France démontrée par principes, et mise en action par des formules* (Civil procedure of the courts of France demonstrated by principles, en put at work through formulas), published in 1807.[36] It is generally held, however, that the 1806 Code put the emphasis more than the 1664 Ordinance on the role of the parties in civil litigation. The parties were responsible for the written preparation of the case by way of statements of case and the judge would only be involved in a late stage after this had been done in the oral phase of the procedure.[37] A recurring phrase in the 1806 Code is that *la partie la plus diligente* or the most diligent party in the civil lawsuit should take particular procedural steps.[38] The general idea underlying the new civil procedural code was that two parties who were theoretically equal in strength would litigate with each other in the manner they preferred with only limited interference of the judge (although the judge retained many of his powers that were also present in the majority of the other systems of civil procedural law in Continental Europe). It was this idea of civil litigation - later qualified as liberal[39] - that would suit much of the 19th century well. It would spread to other European jurisdictions when they introduced codifications inspired by the French model. We also find it in the 1877 German Code of Civil Procedure, and the tide would only be turned at the end of the 19th century under the influence of the Austrian Code of Civil Procedure of 1895.

As is well-known, the Austrian ZPO was drafted by the Austrian lawyer Franz Klein (1854-1926).[40] Klein especially disapproved of the *Verhandlungsmaxime* as understood at the end of the 19th century and this becomes clear from his seminal series of articles published in the *Juristischen Blättern* in 1890, later published as a book under the title *Pro Futuro*.[41] Klein considered the *Verhandlungsmaxime* to be very detrimental because in his opinion it meant that the parties would control the facts of the case which allowed them to provide untruths to the court.[42] He advocated a stronger position of the judge as regards the factual substratum of the civil lawsuit, leaving, however, what was now called the *Dispositionsmaxime* to a large extent as it had basically always been in the history of Continental civil procedure (so the parties remained in control of the initiation of the lawsuit, and decided about continuation and termination).

Klein's preference for a judge who would have extended powers where it concerned the establishment of the facts of the case and evidence was due to his idea that civil litigation was not a private matter of the parties to the lawsuit, but that it had greater societal repercussions.[43] This was to a large extent a new idea in the history of Continental civil procedure. The Austrian Code of Civil Procedure of 1895 drafted by Klein introduced ex-

[36] Wijffels 2005, 39-40.

[37] Bomsdorf 1971, 229-232.

[38] E.g. Articles 47, 80, 109, 199, 204, 231, 286, 297, 299, 307, 321, 658, 666, 719, 761 and 966.

[39] Van Rhee 2005.

[40] On Klein, see Sprung 1988, and Marinelli, Bajons & Böhm 2015.

[41] Klein 1891.

[42] Klein 1891, 13.

[43] Klein 1891.

tended powers for the judge where it concerned the factual substratum of the civil action in order to allow the judge to establish the substantive truth (this was considered to be in the interest of society at large). When one looks at the Austrian Code of Civil Procedure from a modern perspective (using modern terminology), one could claim that in it the case management powers of the judge were increased in the sense that he was now (also) entrusted with the substantive instruction of the case (*materielle Prozessleitung*) and that the parties had to assist the court in the performance of such a task (e.g. *Wahrheitspflicht*).

It was this Austrian model that would dominate developments in many jurisdictions throughout the 20th century (even though Austrian influence was often not recognized or acknowledged), first in Germany (reforms under Austrian influence in the 1910s, 1920s and 1930s),[44] subsequently in the states that had belonged to the Austrian-Hungarian Empire (where Klein's procedural model was often twisted to the extreme after the erection of the Iron Curtain and Communism) and in France due to scholars who had been influenced by Austrian/German ideas such as Henri Motulsky (1905-1971) who was instrumental in changing the direction of French civil procedure and who was a member of the commission charged with drafting the new 1975 French Code of civil procedure.[45] Later, changes were also introduced elsewhere. The reforms in England and Wales resulting in the Civil Procedure Rules of 1998, were late and in the official documents references to the ideas of Klein are absent,[46] but it is obvious that also in this jurisdiction the case management powers of the judge were significantly increased.[47] In some European countries it took longer for changes in the traditional approach to take effect. Belgium obtained a new Code governing civil procedure and court organization in 1967 without apparently having reconsidered the powers of the judge and the parties in the conduct of the civil lawsuit, whereas the Netherlands were also slow in introducing changes even though far-reaching (but unsuccessful) reform proposals according to the Austrian model had been made in the early 20th century.[48]

Currently, in the second decade of the 21st century, it seems that most European jurisdictions have embraced the new approach to civil litigation, although obviously with local differences. Wide acceptance exists where it concerns enlarging the case management powers of the judge as regards the more organizational or procedural aspects of the civil lawsuit (including time limits), something that has been qualified as 'formal' case management, but sometimes one is more hesitant as regards so-called material or substantive case management powers, i.e. where it concerns the factual and/or the legal substratum of the case (facts, evidence and the applicable legal rules). The latter is even true in civil law jurisdictions, where the *iura novit curia* principle is widely accepted (unlike in common law jurisdictions, where the applicable law is traditionally pleaded explicitly). This is due to the fact that *iura novit curia* is not interpreted uniformly on the European Continent and often the parties are given considerable duties in the legal qualification of their dispute.

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[44] Bomsdorf 1971, 263ff.

[45] Ferrand 2012.

[46] See Woolf 1995 and Woolf 1966.

[47] See Andrews 2013.

[48] Van Rhee 2000.

5. EUROPEAN RULES OF CIVIL PROCEDURE

In Europe, a more active judge has been advocated for quite some time, as has appeared from the previous Section. New is that this activity is currently often framed within the wider context of a duty to cooperate. It is within this context that the terminology judicial case management should be understood in several jurisdictions, notably in France where a genuine *principe de coopération* was developed by legal scholars.[49] We have now reached a stage in which judicial case management in its modern sense is present in many European jurisdictions, although its intensity may vary. This is not to say that the modern approach to civil litigation based on judicial case management and cooperation has been accepted in all European states since especially in some former Socialist countries the active judge meets with resistance given his role during the Socialist period. This is for example very clear in the new 2017 Ukrainian code of civil procedure, where the emphasis is on the adversarial nature of civil litigation. Nevertheless, the Council of Europe has advocated an active role for the judge. Already in a Recommendation from 1984[50] we read in Article 3 the following text:

The court should, at least during the preliminary hearing but if possible throughout the proceedings, play an active role in ensuring the rapid progress of the proceedings, while respecting the rights of the parties, including the right to equal treatment. …

Judicial case management is also present in Principle 14 of the so-called Principles of Transnational Civil Procedure that were not specifically drafted for Europe but for international commercial litigation on a global scale (under the umbrella of the American Law Institute and Unidroit).[51] Principle 14.1, for example, reads as follows:

Commencing as early as practicable, the court should actively manage the proceeding, exercising discretion to achieve disposition of the dispute fairly, efficiently, and with reasonable speed. ...

These case management powers are exercised within a context where the parties also play a prominent role in managing the case, as is for example proven by Principle 11.2, which emphasizes shared responsibilities in this respect:

The parties share with the court the responsibility to promote a fair, efficient, and reasonably speedy resolution of the proceeding. ...

Cooperation of the parties with the court is mentioned in Principle 7.2:

The parties have a duty to cooperate and a right of reasonable consultation concerning scheduling. …

Whether cooperation means that the parties should also cooperate with each other is unclear. If we look at the manner in which the *principe de coopération* is currently explained in France, cooperation between the parties does not seem to be covered. According to Professor Loïc Cadiet the *principe de coopération* summarizes the first 13 *principes directeurs du procès* (guiding procedural principles) of the French *Code de procédure civile*. These 13 principles deal with the respective roles of the parties and the judge in civil litigation and they cover an extensive range of issues which often have a rather long history (some of them

[49] Van Rhee2017.

[50] Recommendation No. R (84) 5 of the Committee of Ministers to Member States on the Principles of Civil Procedure designed to Improve the Functioning of Justice.

[51] ALI/UNIDROIT 2006.

have medieval origins, and some originate in the works of Henri Motulsky).[52]

It should be remembered, here, that not all French authors agree with the existence of a cooperation principle in the broad sense as understood by Professor Cadiet. According to some authors, the *principe de coopération* is much more limited and only concerns provisions stating that the parties should attempt a settlement before bringing the action to court (Articles 56 and 58 French Code of Civil Procedure) and provisions stating that they have to assist the judge in the preparation of their case (implementation of investigatory measures; *mesures d'instruction*) (Article 11 French Code of Civil Procedure).[53] If this is the case, the French principle may not differ very much from the German *Kooperationsmaxime*, which implies that the parties and the court cooperate 'zum Zwecke einer effektiven, raschen Streiterledigung' (with the aim of an effective and speedy resolution of the dispute).[54]

It is within this context that currently the newly founded European Law Institute and Unidroit in 2014 started a project for drafting European rules of civil procedure.[55] These rules are explicitly made for the Member States of the European Union since it is felt that they will facilitate the application of substantive EU law and enhance the four freedoms (free movement of persons, goods, services and capital). It should be remembered here that most EU law has to be applied through the national courts of the member states since a system of federal European courts does not exist in the European Union. Dependence on national courts also means dependence on a variety of national civil procedural models and this situation seems to prevent the creation of a level playing field for the citizens and the businesses in the EU. Although it is often held that the European Union is only competent to legislate in matters concerning cross-border cases, I am convinced that the Rules may also influence civil procedure in purely national cases, first of all because (as we will see) the rules are aimed at formulating best practices in the area of civil procedure, and secondly because the concept of cross-border cases may be subject to reinterpretation. Although initiatives in the area of European Rules of Civil Procedure and best practices have also been taken in other contexts (e.g. by the Commission of the EU), I will only concentrate on the ELI/Unidroit rules here.

Within the context of the project, various working groups are currently drafting rules on various procedural topics[56] and it is anticipated that in 2019 a consolidated set of rules will be published. The author of the present contribution is co-chairing a working group involved in the drafting of rules that concern the obligations of the judge, the parties and their lawyers (together with Professor Alan Uzelac from Zagreb), and at this moment the working group has produced a proposal for inclusion in the consolidated draft. Although the proposal itself cannot be provided here since it is still confidential, some of the leading ideas of the working group responsible for the proposal will be discussed.[57]

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[52] Cadiet 2005.

[53] Van Rhee 2017.

[54] Rosenberg, Schwab, Gottwald 2004, par. 77, marginal no. 5.

[55] Uzelac 2017.

[56] Uzelac 2017.

[57] The text that follows is based, sometimes literally, on text that was produced as a joint exercise by the working group.

The starting point was obviously not the traditional procedural principles like the *Dispositions-* and the *Verhandlungsmaximen*. As has been shown in Section 2 of this contribution, these principles are not instrumental in understanding the civil process. It was the aim of the working group to produce rules that would be balanced in their approach to the powers of the judge and the parties, giving rise to cooperation, quality, efficiency, speed and low costs and taking into consideration both the private interests of the parties and the societal interest in civil litigation which became the focus of attention due to Franz Klein.

When discussing the powers of the judge, the parties and their lawyers, it became clear that a distinction could be made between duties and obligations in civil procedure: duties must be observed and will result in penalties if this is not done, whereas obligations do not result in penalties but in detrimental consequences for the party involved as regards the outcome of the case. The distinction between duties and obligations is, however, not always easy to make, and therefore the working group finally decided to use the terminology 'obligations' throughout and not to incorporate a terminological distinction in the proposed rules. Obviously, from a theoretical perspective this is problematic, but it works in practice.

The obligations of the judge, the parties and their lawyers can be either positive 'duties' to act in good faith or negative 'duties' to refrain from procedural abuse. The rules suggested by the working group provide a modern approach to civil litigation: the leading principle is loyal cooperation between the judge, the parties and their lawyers. The rules are written from the perspective that the judge, the parties and their lawyers have a shared responsibility in putting an end to the dispute in a fair, efficient, speedy and proportionate manner. This may be done either by way of settlement or by way of a court decision based on the true facts. This means that the adversarial-inquisitorial divide is avoided: the parties also have a duty to cooperate with each other. This is new in the sense that the principle to cooperate is usually understood as regulating the relationship between the court and the parties only, but in the understanding of the working group there are no reasons why the parties should not have an obligation to cooperate. After all, litigation is not considered as a battle between two antagonists anymore. The underlying idea of the rules is that there is not a mutually exclusive division of labour between the various participants in a civil lawsuit; there are only shared obligations. This means that apart from the parties, the court also has certain obligations regarding facts and evidence, whereas the parties share the responsibility for the assessment of the pertinent legal issues with the judge. The lawyers should support the parties in the execution of their obligations, but their duties go further since they also have to observe professional duties normally found in codes of conduct, to which the present rules refer when necessary.

The proposed rules are grouped under five headings. Part 1 deals with the duty of loyal cooperation.[58] This duty is leading in the interpretation of all subsequent rules. It therefore serves as a kind of overriding objective.

Part 1 is followed by four specific parts: each part contains separate rules on the obligations of the court, the parties and their lawyers, as well as a section on sanctions for the breach of procedural obligations. As a result, sanctions are mentioned in all parts of the rules. This is due to the fact that no single and uniform rules on sanctions are appropriate, as various actors and elements of the procedural obligations require various types and forms of sanctions. Sanctions can either be negative consequences as regards the manner in

[58] This part was drafted by W. Rechberger and C.H. van Rhee.

which the case is litigated, or positive sanctions such as fines.

Part 2 deals with obligations in regard to management and planning of the proceedings.[59] It is suggested that the judges in implementing their judicial case management tasks are monitored by the court since an adequate performance of such tasks does not touch upon the independence and impartiality of judges in decision making. The courts themselves could be monitored by a Council of the Judiciary or a similar body that is independent from the Ministry of Justice.

It is the court's duty to organize the proceedings in a way that guides all participants in the process to a result that is appropriate, fair and just. It lays down that the court has the responsibility for active and effective case management, but this always in cooperation with the parties. The obligation is discharged by various case management orders and activities, and by continual monitoring of whether the obligations of the parties, the lawyers and other participants in the proceedings are observed. Of course, continual monitoring does not imply that the court needs to check the progress of the case on a daily basis – it means only that throughout the proceedings the court should establish whether procedural timetables and procedural steps and actions, which were agreed or determined by the court, are being enforced, taking appropriate actions if necessary. The court organizes work processes in such a way that sufficient time and resources are available to decide individual cases. The court should also ensure that no more time and resources than necessary or proportionate are spent on any case so that enough time and resources are available for other cases. Active management of proceedings under the court's direction also assumes the duty to consult the parties and, wherever possible, secure agreement on the form, content and timing of particular steps in the proceedings. The court's duty of active case management authorizes judges to openly discuss these matters with the parties. A case management conference is the appropriate moment for this. In its case management decisions, the court should always take account of the nature, value and complexity of the particular proceedings, ensuring that procedures are proportionate to the value and importance of the case.

The parties have a duty to promote the fair, efficient, speedy and proportionate resolution of their dispute. Efficient, speedy and proportionate are related concepts and partly overlap. Proportionality refers to the fact that different types of cases may require a different use of resources and time. This duty of the parties, which largely coincides with an obligation to cooperate in good faith with each other and the court, exists throughout litigation, but also in the pre-action stage and during enforcement. Such a duty may be positive, in the sense that a party is obliged to act, or negative in the sense that a party should refrain from certain undesirable behaviour. Obviously, the obligation to take all reasonable efforts to settle the case belongs to this duty. It also implies that parties have to contribute to the proper management of the proceedings, for example during an initial case management conference when a procedural calendar may be drafted by the judge and the parties.

Part 3 is devoted to the determination of facts.[60] Parties should supply facts and evidence and assist in the proper determination of the facts. They need to provide the judge with information concerning the facts whenever this is deemed necessary. An oral hearing is the best occasion for this, but we do not exclude other possibilities. The presentation of facts and evidence is primarily a duty of the parties and should be effected as early as

[59] This part was drafted by J. Sorabji.

[60] This part was drafted by B. Karolczyk.

possible, preferably even before the action is commenced in the pre-action phase. A later presentation of facts and evidence than in the early stages of the lawsuit is allowed only for justified reasons.

Apart from the parties, the court has certain responsibilities as regards facts and evidence. In so far as necessary, the court has to discuss the factual aspects of the case with the parties and question the parties, to the effect that the parties explain all facts to be considered timeously and completely, especially to supplement insufficient information regarding the claimed facts, to identify evidence and make relevant applications. The court shall manage the proceedings in such a way that all relevant issues in the case are identified and may be decided in a complete and appropriate manner. For this purpose, the court may review the presentation of evidence and decide on the use of particular means of evidence and other related matters.

The rules also provide that the court may consider facts that appear in the case file but that have not been used by the parties to build their argument or take evidence on its own motion if this is necessary for the proper adjudication of the case. This position follows the tradition, common to many European jurisdictions, of allowing the court discretion to actively intervene in factual and evidentiary issues in order to eliminate injustice or an abuse of judicial proceedings. In the understanding of the drafters, these powers will be used only exceptionally.

When the court is satisfied about the facts and the evidence, it closes the hearing. After such closure, the court can only exceptionally request or permit additional facts and evidence necessary to clarify the respective positions of the parties.

The subject matter of Part 4 is findings of law.[61] The rules lay down that both the court and the parties should contribute to the determination of the correct legal basis for decision-making. The parties have an obligation to present contentions of law, something that must be done in reasonable detail. This is in line with the situation in various continental legal systems where the parties are obliged to provide a legal qualification when submitting their claims. Obviously this is also in the interest of the parties since the particular facts that have to be pleaded are dependent on the legal qualification of what is claimed. The Continental European rule of *iura novit curia* does not justify a passive attitude of the parties in this respect. In our opinion the only implication of this rule is that the court bears the final responsibility as regards establishing the correct legal basis of the claim. This means that the court may consider points of law on its own initiative if this is necessary for correct decision-making but obviously these points need to be discussed with the parties.

Finally, Part 5 deals with the duty of the court to promote consensual dispute resolution.[62] The main rule is that parties must cooperate actively with the court in seeking to resolve their dispute consensually, both before and after the proceedings are begun. The rules do not discuss specific types of consensual dispute resolution, since this was outside the mandate of the working group.

Our rules are based on a variety of sources. The starting point are the ALI/Unidroit Principles of Transnational Civil Procedure, especially (but not only) Principles 11 and 14. Furthermore, Council of Europe Recommendations (especially Recommendation No. R (84) 5 on civil procedure), case law of the Court of Justice of the European Union and

[61] This part was drafted by E. Jeuland.

[62] This part was drafted by A. Uzelac and E. Silvestri.

the European Court of Human Rights, the 1994 Storme Project on the Approximation of Judiciary Law in the European Union, model codes such as the *Codigo modelo Iberico-americano*, the national laws of the Member States of the European Union and various professional codes of conduct have been taken into consideration. Obviously we have also taken the shared legal history of the systems of procedural law in Europe in consideration, as I hope to have demonstrated in this paper.

6. CONCLUDING REMARKS

Modern civil procedure has a long history. One of the features of this history is that a balanced approach can be witnessed as regards the obligations of the judge, the parties and their counsel. Extremes did never exist in practice, although the Verhandlungs- and Untersuchungsmaximen created by Gönner may give a different impression. It appears, however, that even though these Maximen may have caused some damage in the scholarship of civil procedure, they did not influence practice as much as may be presupposed. The obligations of the judge, the parties and their lawyers can best be interpreted within the context of the modern cooperation principle. The judge and the parties cooperate in order to produce an acceptable result: a judgment that pays tribute to the facts as they have manifested themselves in reality. Such cooperation must also exist where it concerns the applicable law. The rule of *iura novit curia* should not serve as a starting point, as is true for Gönner's Prozessmaximen when one is shaping the civil procedural law of the future. The observation of a genuine cooperation principle will result in fair judgments that are pronounced after a speedy procedure that is both efficient and low cost.

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