Ius Gentium: Comparative Perspectives on Law and Justice 31

C.H. (Remco) van Rhee
Fu Yulin *Editors*

Civil Litigation in China and Europe

Essays on the Role of the Judge and the Parties

Springer

Civil Litigation in China and Europe

IUS GENTIUM

COMPARATIVE PERSPECTIVES ON LAW AND JUSTICE

VOLUME 31

For further volumes:
http://www.springer.com/series/7888

C.H. (Remco) van Rhee • Fu Yulin
Editors

Civil Litigation in China and Europe

Essays on the Role of the Judge and the Parties

Springer

China-EU School of Law 中欧法学院
At the China University of Political Science and Law 中国政法大学

Editors
C.H. (Remco) van Rhee
Faculty of Law
Maastricht University
Maastricht, Netherlands

Fu Yulin
School of Law
Peking University
Beijing, People's Republic of China

The Work was first published in Chinese in 2013 by Huazhong University of Science and Technology Press with the following title: "Role of the Judge and the Parties in Civil Litigation in China and Europe".

ISBN 978-94-007-7665-4 ISBN 978-94-007-7666-1 (eBook)
DOI 10.1007/978-94-007-7666-1
Springer Dordrecht Heidelberg New York London

Library of Congress Control Number: 2013955022

Printed on acid-free paper

Springer is part of Springer Science+Business Media (www.springer.com)

Acknowledgements

This publication was sponsored by China-EU School of Law (CESL) at the China University of Political Science and Law (CUPL). The activities of CESL at CUPL are supported by the European Union and the People's Republic of China.

Special thanks are due to Mr. Randolph W. Davidson (Pavia) for the English language revision, and Ms. Marina Jodogne (Maastricht University) for editorial assistance. Ms. Han Jingru (Peking University Law School) rendered invaluable assistance in the preparation of this volume and the conference of which it is a result. Mr. Lau Yip Wai (Ray) (City University Hong Kong) assisted in the preparation of the Hong Kong contributions and in the translation of some of the Chinese contributions into English.

Contents

List of Abbreviations

ADR	Alternative Dispute Resolution
AOS	Acknowledgement of Service
CA	Court of Appeal
CEPEJ	European Commission for the Efficiency of Justice
CFA	Court of Final Appeal
CFI	Court of First Instance
CJR	Civil Justice Reform
CMC	Case-Management Conference
CMS	Case-Management Summons
CPC	Code of Civil Procedure
CPL	Civil Procedure Law
CPR	Civil Procedure Rules
DC	District Court
ECJ	European Court of Justice
ECHR	European Court of Human Rights
EMS	Express Mail Service
EU	European Union
GDP	Gross Domestic Product
GNP	Gross National Product
HC	High Court
HCO	High Court Ordinance
HKIAC	Hong Kong International Arbitration Court
ICC	International Chamber of Commerce
IMF	International Monetary Fund
IP	Intellectual Property
JORC	Judicial Officers Recommendation Commission
KWO	Klantwaarderingsonderzoek
LAD	Legal Aid Department
LOD	List of Documents
LQ	Listing Questionnaire

LT	Labour Tribunal
N/A	Not Available
NGO	Non-Governmental Organisation
NMI	Netherlands Mediation Institute
PD	Practice Direction
PTR	Pre-Trial Review
RHC	Rules of the High Court
SCT	Small Claims Tribunal
SOC	Statement of Claim
SOT	Statement of Truth
TQ	Timetabling Questionnaire
USA	United States of America
ZPO	Zivilprozessordnung

Chapter 1
The Role of the Judge and the Parties in Civil Litigation in China and Europe: An Introduction

C.H. (Remco) van Rhee and Fu Yulin

Organising the administration of justice before the civil courts in an adequate manner is a complicated task. First, there are the legitimate claims of thoroughness and high quality in the adjudication of civil matters that need to be taken into consideration, since these guarantee a just outcome of the civil lawsuit and finally the observance of the rule of law in a given jurisdiction. At the same time efficiency, timeliness and costs are central issues. Unfortunately, thoroughness and high quality do not necessarily go hand in hand with efficiency, timeliness and low costs and, therefore, it is the task of the lawmaker, the Judiciary and also the parties and their counsel to balance the various interests involved in the civil action.

The primary task of the lawmaker is to provide procedural rules that guarantee thoroughness and quality, allow as much as possible the efficient and timely progress of a case through the courts and the control of litigation costs, and prevent the litigants from adopting delaying tactics or disregarding and twisting the application of the rules. The primary task of the Judiciary is to make sure that the procedural rules are applied in the intended manner and with the intended outcome; judges should use the powers that have been given to them by the lawmaker to guarantee timeliness, efficiency, thoroughness and quality in the adjudication of individual cases while keeping costs under control (as will appear in this volume, judges do not always use their powers in an optimal manner or are too lax in enforcing rules aimed at the efficient adjudication of cases). And finally the litigants and their counsel have certain responsibilities as well: according to the majority opinion in many

C.H. (Remco) van Rhee (✉)
Maastricht University, Maastricht, Netherlands
e-mail: remco.vanrhee@maastrichtuniversity.nl

Fu Yulin
Peking University, Beijing, People's Republic of China
e-mail: fuyulin@pku.edu.cn

C.H. (Remco) van Rhee and Fu Yulin (eds.), *Civil Litigation in China and Europe*, Ius Gentium: Comparative Perspectives on Law and Justice 31,
DOI 10.1007/978-94-007-7666-1_1,

modern legal systems they should co-operate in reaching the various goals just mentioned, something that may be asked of them since they are making use of a public service financed to a considerable extent by the taxpayer's money. And it should be remembered that all of this is of interest not only to the litigants involved in the individual lawsuit, but also to the legal system as a whole, since disregarding the above issues in individual cases will, in the end, affect the administration of justice in other cases as well because it will, amongst other things, give rise to mounting backlogs in the courts and an increasing scarcity of resources.

The administration of justice in civil cases has proven to be problematic in mainland China, Hong Kong and the European jurisdictions studied in this volume since finding an acceptable balance between the various claims on the civil justice system is a difficult task. In these jurisdictions, complaints about the adjudication of private actions before the state courts have a long history[1] and have resulted in attempts to settle cases in ways other than litigation (e.g. various schemes of court-annexed or other types of mediation). However, such a development is – at least to a certain extent – problematic since the ordinary adjudication of private actions before state courts is often preferable: it serves goals which go beyond the individual action and may help to reinforce the rule of law. For example, the public nature of litigation before the state courts serves legal certainty since potential litigants will be able to evaluate their cases in the light of previous judgments in similar cases. As a result, they might decide not to bring an action. Alternative types of dispute resolution often lack publicity and consequently cannot influence the decisions of potential litigants.

In an attempt to improve the administration of justice before state courts the rules of civil procedure have progressively been reformed throughout the world. In this context, often the terminology 'case management' is used. In the present volume, case management is used in a broad sense. It refers to procedural rules aimed at the efficient adjudication of civil cases, including the powers of the judge or the court to influence the progress of a case through the court, not only from a procedural perspective but also where it concerns more substantive aspects of litigation (e.g. in the area of establishing the facts of the case and evidence taking). Case management in this volume also includes the powers of the court in the area of the supervision of judges, for example where automated data collection is used in order to establish the efficiency of individual judges and confront judges with the outcome of such data collection, something that happens in Austria. It also includes the monitoring of court performance by the president of the court as is the case in Croatia and the even further reaching system of supervision in mainland China (case management agencies). Obviously, in this context issues of judicial independence may arise, something that is also addressed in this volume.

China has witnessed an impressive shift in procedural responsibilities from the judge (or the court) to the parties. Different from the Chinese approach during

[1] See e.g. C.H. van Rhee (ed.), Within a Reasonable Time – The History of Due and Undue Delay in Civil Litigation (Comparative Studies in Continental and Anglo-American Legal History, Vol. 28), Berlin: Duncker & Humblot, 2010.

part of the twentieth century, where for example the onus of proof was not so much an issue for the parties due to the far-reaching powers of the judge and/or the court as regards, *inter alia*, collecting evidence, currently a development can be witnessed in the direction of a procedural model where the parties are in charge of proving their case, with the court becoming less active in this particular field (although it should be mentioned that developments in the opposite direction may also be noted, as becomes clear from Chap. 2 by Wang Yaxin and Fu Yulin in this volume). At the same time, however, in China the court system is managed in a very different manner than in Western countries. The Chinese contributions to this volume show that individual judges, who are responsible for case management in Western countries, often have a limited degree of independence, since they are subject to the authority of 'the leaders of the court' (e.g. the president of the court or the chief judge of a division; also the so-called 'case management agencies' at the Chinese courts should be mentioned here). These 'leaders' have the final say in how cases are managed. In various European jurisdictions, on the other hand, reforms have brought an increased ability of individual judges to actively manage cases, often not only as regards purely formal and procedural questions, but also as regards more substantive issues (e.g. proof). Just as in mainland China, these reforms are motivated by a desire to increase the efficiency and the quality of civil litigation.

Even though mainland China on the one hand and various European countries and Hong Kong on the other are moving in opposite directions (more responsibilities for the parties in mainland China as opposed to more responsibilities for the judge in Europe and Hong Kong), the common theme in all of these reform attempts is finding an acceptable balance between the powers of the judge and the parties in the conduct of civil litigation in a society under the rule of law. Finding this balance is a difficult task, since preventing undue delay, reducing costs and promoting efficiency may – according to Western European observers – for example point in the direction of increasing the case management powers of the judge, whereas the right of individuals to dispose of their private rights and duties – an important feature of Western legal systems under the rule of law – may point in the opposite direction. In addition, in Europe Article 6 of the European Convention on Human Rights and the case law of the European Court of Human Rights contain certain restrictions in this respect.

The European civil procedural systems discussed in the present volume (including Hong Kong, which in this respect may be classified as somewhat European since it has an English-based common law type of procedure) offer different approaches to the management of civil cases. These may in part be the result of differing views as regards the effectiveness of civil litigation and of a different history in the field of litigation (e.g. Croatia being part of former Yugoslavia, where a Socialist model of civil litigation prevailed, and Hong Kong being a former British crown colony with a common law tradition). Consequently, different case management techniques are used. Examples are the compulsory court appearance after the submission of the statement of defence (*comparitie na antwoord model*) in the Netherlands, the introduction of a specific introductory hearing in civil litigation, dominated by the judge, in

Austria (*vorbereitende Tagsatzung*) and an introductory stage dominated by the parties in Italy. In Croatia, on the contrary, the preliminary hearing (*pripremno ročište)* was practically abolished by the introduction of a mandatory written reply to the statement of claim in 2003, failing which a default judgment (*presuda zbog ogluhe*) can be entered. In Hong Kong, the plaintiff may invoke the summary judgment procedure to speed up the process if the plaintiff can show that the defendant has no arguable defence. However, similarities also exist. In various jurisdictions discussed in this volume judges have the ability to promote Alternative Dispute Resolution and the early settlement of a claim. From a foreign law reform perspective it is important to understand the reasons for these differences and similarities, which may reflect different ideas about the organisation of society as well as different historical, economic and social conditions in these jurisdictions. This is important in order to make an informed choice as regards the adoption or rejection of particular procedural rules and models.

The contributions to the present volume discuss the case management powers in mainland China, various European jurisdictions and Hong Kong from an historical and comparative perspective. Apart from the present introductory chapter, the book consists of seven main parts devoted to: (1) Mainland China, (2) Hong Kong, (3) Austria & Germany, (4) Croatia, (5) Italy, (6) the Netherlands and (7) Romania. Each main part contains a first chapter that provides a general analysis of the legal system under consideration and one or more appendices containing relevant data on that jurisdiction. These parts may also and in addition to the general analysis contain contributions on specific aspects of the procedural system under consideration written by invited authors (this is the case in the parts on Mainland China, Hong Kong, Austria & Germany, Croatia and the Netherlands). An Annex at the end of this volume contains two chapters, one on England & Wales by Neil Andrews and another on France by Emmanuel Jeuland. Although these jurisdictions were not focused on specifically in the research project which gave rise to the present book, we thought that the reader might benefit from these chapters which are written by very prominent procedural lawyers in their respective jurisdictions.

It should be noted that the general analysis, i.e. the first chapter in each of the seven main parts of this volume, will contain a discussion of case management in the jurisdiction concerned, charting the development of the current civil procedural rules in historical perspective. This discussion will, in particular (but not exclusively), focus on (i) the court's powers to actively manage the progress of a civil case and, to the extent possible, on (ii) how and why such powers have been granted.

Having charted the rationale behind the procedural regime under discussion, the genesis and content of the current rules and practices will be considered in the first chapter in each part of this volume. The authors were asked – if possible – to pay particular attention to:

1. The extent and the manner in which powers to drive civil litigation have been transferred from the parties to the judge or vice versa in the jurisdiction under scrutiny since the middle of the twentieth century;

2. The particular powers that have been transferred and why these powers were selected;
3. The judge's current ability to control the proceedings and the parties' conduct before proceedings have actually been issued. For example, the judge's power to (i) promote the exchange of information prior to the commencement of proceedings, (ii) order some form of Alternative Dispute Resolution ('ADR') and (iii) hear interlocutory applications before proceedings have been commenced;
4. The judge's current ability to control the proceedings and the parties' conduct after proceedings have been issued. For example, a judge's ability to make an order *ex officio*, a judge's power to decide (unilaterally) which matters must be proved and which law must be applied;
5. The sanctions (if any) the judge can impose if the parties fail to adhere to the procedural rules or to any particular order, or in their general duty to co-operate with the court. Furthermore, the power which the judge has vis-à-vis the parties' costs and what inferences (if any) can be drawn by the judge as a result of, for example, a party's failure to co-operate;
6. The results of the shift in case management powers from the parties to the judge and vice versa as regards costs, delay and the perceived thoroughness and quality of the investigation.

Obviously, the choice of the seven main jurisdictions under consideration needs some justification.

Mainland China has been chosen because in the area of civil procedure – as in many other areas – the country is undergoing rapid changes. It is the fastest growing economy in the world and the largest country population wise, but unfortunately information on its judicial system is only available to a limited extent in other languages than Chinese. The present volume, which is published in both English and Chinese,[2] therefore serves the purpose of providing in-depth information on the Chinese system of civil procedure to a foreign audience. Hong Kong has been included since it is a common law jurisdiction which has been influenced by the 1998 Woolf reforms in England, and also because it has become part of China as a Special Administrative Region (SAR). The Civil Justice Reform in Hong Kong (2009) introduced an elaborate regime of procedural rules for judicial case management (e.g. the introduction of milestone dates). These rules extended the powers of the judge in case management and imposed greater obligations on the parties to meet deadlines. Austria has been selected because this is the jurisdiction where experiments with modern judicial case management have the longest tradition, starting with the 1895 Code of Civil Procedure drafted by Franz Klein. Germany followed suit in the early twentieth century and has currently one of the most efficient and high quality justice systems in Europe. Croatia has been included since it is a country in transition, having changed relatively recently from a guided economy to a market economy, something which is reflected by the changes in the rules of civil procedure in that country. Italy has been selected because it is an example of a

[2] Huazhong University of Science and Technology Press.

jurisdiction where efficiency of civil procedure is still largely absent despite a large number of reform attempts during the last decades and a staggering number of Italian courts, judges and lawyers (a 'failure' may also provide important comparative data). The Netherlands have been chosen since this country introduced a successful comprehensive reform in the area of civil procedure in 2002, aiming at strengthening the position of the judge in order to increase efficiency. Additionally, the Netherlands serves as an example where a business-like, no-nonsense approach is taken as regards civil procedure. Information on the reform programme that was recently announced by the Dutch minister of justice could not unfortunately be included in this volume since the research project had already been closed at that moment in time. The reforms concern, amongst other things, considerably strengthening the use of IT technologies in litigation and a further reduction of formalities.

The various contributions in this volume are meant to provide relevant information for law reformers aiming at an improvement of their domestic procedural systems and litigation practices. The main focus is on the period from the middle of the twentieth century; from then onwards the growing welfare state and its increasing volumes of litigation resulted in a growing interest in case management techniques in Western Europe. A large number of such techniques will be discussed. Just to mention a few examples, apart from the ones already mentioned in this introduction, the reader will encounter (1) pre-action proceedings or measures to stimulate the parties to exchange information before the case is brought before the court, (2) the compulsory order for payment procedure preceding court proceedings, (3) powers for the court to stimulate or even order alternative dispute resolution as well as the institution of the multi-door courthouse where formal adjudication is only one of several available options, (4) case management conferences and agreements as regards scheduling (sometimes referred to as the 'contractualisation' of civil litigation), (5) specific remedies for parties who feel that the court is handling their case in an inefficient or otherwise unsatisfactory manner, (6) strict time-limits and milestone dates, (7) a 'cards on the table' approach forcing parties to be truthful and to present all relevant aspects of their case at an early moment in time (this may lead to a reduction of the number of statements of case), (8) the obligation for the parties to be personally present in court when their case is being heard and to co-operate with the judge, (9) attempts to 'outsource' aspects of the procedure such as the taking of evidence by the attorneys of the parties instead of by the court, (10) differentiation in the sense of providing different procedural tracks of varying complexity for different types of cases, (11) agreements between local bars and courts about the structure of statements of case, (12) the use of information technologies, (13) sanctions in case of non-observance of the rules, (14) the reduction of interlocutory appeals and remittals of cases after an appeal has been lodged, and (15) the possibility to adjudicate a sub-issue of the case that keeps the parties divided in order to facilitate an out-of-court settlement as regards the remaining issues.

Obviously, for law reformers who would like to use this volume, an important question is to what extent the approaches to case management in the jurisdictions under consideration can be transferred to their own jurisdictions. They may ask themselves what limits are imposed as a result of specific features of their own

procedural system and procedural culture as well as ideas on the balance of powers between the judge and the parties. Clearly, we have to leave the task of answering these questions to the respective law reformers, as the answer will differ from jurisdiction to jurisdiction. However, it is already obvious that due to the contrasting legal traditions – also as regards the extent of the powers to dispose of private rights and obligations – it is only natural that the role of the judge in a country's proceedings (and his or her ability to control the progress of the proceedings) must vary to some extent. But how large do these differences need to be in practice? They may have to be smaller than one might expect at first sight. The Dutch Code contains, for example, Article 20, which provides that the judge should guard against undue delay and should take the necessary measures against such delay (either *ex officio* or on request of one of the parties), a rule that is accepted both in mainland China and in Hong Kong and in most other European jurisdictions with their different traditions.

We think that the theoretical significance and practical importance of this volume is large. The problem of court delay, inefficiency and high costs, but also the lack in quality and thoroughness of adjudication, is currently one of the major issues that threatens access to justice in China and Europe. Since justice delayed is, in most cases, justice denied, the volume has a high practical, societal relevance. It is also highly relevant from the perspective of the rule of law, which presupposes an efficiently functioning civil justice system that meets relevant standards. The volume focuses on a topic that is a central theme in current legal academic and public debate, both in China and in the EU. From a Chinese perspective, it is important that the present volume will provide integrated information on the respective roles of the judge and the parties in various European jurisdictions and Hong Kong specifically aimed at a Chinese audience, whereas a European audience may benefit from the various Chinese contributions.

We also think that the present volume offers a relevant approach to the subject matter of case management in that it will take into consideration a relatively long period of time – studies in this particular field often ignore the historical perspective even though the discussion of the powers of the judge and the parties is comparatively old – and allows comparisons between European jurisdictions and Hong Kong with mainland China as regards the ability of the judge (or court) and the parties to actively manage the proceedings. The rationale for the applicable rules and practices are explored in the context of the role of the judge and the parties under the rule of law in the Continental civil procedural traditions, the common law tradition of Hong Kong and the tradition of mainland China, as well as the similarities and differences in these jurisdictions' approaches to the same procedural problems.

Part I
China: Mainland

Chapter 2
China: Mainland. Efficiency at the Expense of Quality?

Wang Yaxin and Fu Yulin

2.1 Introduction

The concept of 'case-management', from the perspective of comparative civil procedure, mainly relates to the issues of efficiency and costs of litigation, that is, how to shorten time for litigation and to reduce the parties' expenses. In this connection, Chinese civil justice seems to be more efficient compared with its European Union counterparts. According to the judicial statistics of 2010, 6,090,622 first instance civil and commercial cases were accepted (and docketed) in Chinese courts and 6,112,696 were disposed of in the same year (including a small part of pending cases from the previous year).[1] More than 95 % of first instance civil cases were disposed of within 6 months; the same proportion of second instance cases (as the final level) were disposed of within 3 months. According to the Civil Procedure Law of the People's Republic of China (CPL), the courts shall complete the adjudication of ordinary proceedings within 6 months and summary/specified and appellate proceedings within 3 months.[2] Under special circumstances and with the permission of the President of the Court, there could be an extension of time, which should be no more than 6 months (in total, 12 months) for ordinary proceedings and

[1] All judicial statistics referred to in this contribution are available at the website of the Supreme People's Court. See Annual Report of Judicial Cases of the People's Courts (2010) in 'Judicial Statistics', available at: http://www.court.gov.cn/qwfb/sfsj/ (last consulted in June 2012).

[2] Summary proceedings are used in almost 70–80 % of cases in local courts and hence it can be estimated that most cases in the local courts are completed within a period of 3 months.

Wang Yaxin (✉)
Tsinghua University, Beijing, People's Republic of China
e-mail: lawwyx@mail.tsinghua.edu.cn

Fu Yulin
Peking University, Beijing, People's Republic of China
e-mail: fuyulin@pku.edu.cn

C.H. (Remco) van Rhee and Fu Yulin (eds.), *Civil Litigation in China and Europe*, Ius Gentium: Comparative Perspectives on Law and Justice 31,
DOI 10.1007/978-94-007-7666-1_2,

3 months (in total, 6 months) for appellate proceedings.[3] This extension is not available in summary proceedings.

Ninety-five % of cases at first and second instances are concluded within the statutory time-limit. Therefore, parties need not wait a great deal of time before the proceedings are concluded.

In the past 30 years, the case acceptance fee was calculated as a percentage of the disputed amount. This considerable expense used to be unavoidable for the parties in many cases. However since 2008, after the implementation of a regulation which aimed at substantially reducing litigation expenses, the mandatory case acceptance fee has been lowered for a majority of the parties. In addition, Chinese civil procedure does not know the requirement of mandatory legal representation in civil cases. As a result, in a large proportion of civil cases (approximately 50 % or more) either one of the parties or both of them do not hire a legal representative, hence there is no need to pay any fees in this respect.[4]

From the brief discussion above, one may see that Chinese civil procedure appears to be time-efficient and low-cost. Still, two subsequent questions might arise. Firstly, how does Chinese civil justice attain this? Secondly, what is the cost for or the lurking problem beneath the high efficiency as such? In order to answer these questions, a macro perspective, a micro perspective and even various other perspectives may have to be adopted. This contribution focuses on the allocation of the roles of the judge and the parties in civil proceedings as a stratum of the micro perspective. An introductory background of Chinese civil litigation will first be provided below.

2.2 Institutional Background and Stages of an Ordinary First Instance Case

The CPL was introduced in China in 1982. In 1991 and 2007, there was, respectively, a complete amendment and a partial amendment made to the CPL. A new amendment was adopted in 2012. Besides legislation, civil procedural rules promulgated by the Supreme People's Court (called 'Judicial Interpretations') are important procedural norms in China which have legal effects no less than that of legislation in Chinese legal practice.

Since the 1980s, the courts have set up two divisions, i.e. civil divisions and commercial divisions. On top of that, some of the courts have further instituted intellectual property divisions and matrimonial disputes divisions. Furthermore, a handful of courts also run labour disputes divisions and traffic disputes divisions. That being said, in all of these cases virtually identical procedural rules are applied.

[3] See CPL Arts. 135, 146 and 159.

[4] The case acceptance fee has not been substantially reduced for civil cases involving large sums of money. Additionally, for most complicated commercial cases parties normally will engage lawyers as their representatives.

In accordance with the relevant legislation and judicial interpretations, the procedural steps in an ordinary first instance case can be summarised as follows:

Stage 1: Filing of the claim by the plaintiff (which in principle means that the plaintiff files a writ with the court). In this stage, the court will examine the writ and decide whether or not it will proceed with the claim. If the court decides to dismiss the claim, the plaintiff can appeal against this decision.
Stage 2: The court will serve the writ to the defendant. The defendant may defend within 15 days upon receipt of the writ. The defendant has a right of defence. Such right may be waived by the defendant.
Stage 3: The trial, which includes submissions by the parties, cross-examination and closing submissions. The court will attempt mediation.
Stage 4: The court pronounces its judgment.

From an academic perspective, this coincides with the following four stages: (1) Filing and Acceptance of the Claim (Docketing), (2) Pre-Trial Preparation, (3) Trial and (4) Conclusion of the lawsuit.

An important feature of Chinese civil proceedings is that the judge will actively participate in mediation, and this can be carried out at any stage of the proceedings.

2.3 Example of a Civil Case

In order to give a more vivid picture of the daily operation of civil litigation in China, a real first instance commercial case will be analysed. This case occurred in 2010 in a basic people's court ('Court A') in a city ('City A') in the Pearl River Delta Region in Guangdong province. In this court, there are more than 210 staff members who are civil servants, with 120 of them being qualified as judges. Since the court accepts more than 30,000 civil and commercial cases of first instance each year (over 43,000 cases in aggregate when cases of other types are included), Court A has hired more than 200 sundry auxiliary staff members.

2.3.1 The Facts

Company B, a developer registered in City A of Guangdong province (the plaintiff), entered into a construction contract with Company D, a contractor registered in City C of Hunan province (the defendant). By virtue of the contract, the defendant undertook to carry out maintenance construction work at a building which belonged to the plaintiff. During the construction work, an employee of the defendant fell from an altitude and died. In order to deal with the issues arising from the accident, the defendant asked the plaintiff to pay RMB 205,000 of the contract remuneration in advance. Subsequently, the construction work was stopped. After settling the

account for the construction work, the plaintiff held that it had overpaid RMB 203,097.76. Failing to recover this amount through negotiations, the plaintiff decided to file a claim against the defendant in Court A.

2.3.2 Filing and Acceptance

In the morning of 20 September 2010, the legal representatives of the plaintiff, along with the writ, arrived at the Docketing Hall of Court A and requested an appointment. Whilst they waited to be called upon, the guiding personnel on duty performed a routine examination of the identity of the plaintiff and the formalities involved in the filing of the documents. Plaintiff's legal representatives (P's legal representatives hereafter) signed a form in which they confirmed the address that could be used by the court for service known as the 'Confirmation of Address for Service of Process form'. After being called upon, the guiding personnel led P's representatives to the docketing window where they handed in all of the documents to the docketing staff member behind the window. The docketing staff member examined both whether the necessary formalities had been observed as well as the merits of the filing documents, and accepted the plaintiff's case. P's legal representatives then filled in a document which listed all the evidence to be handed over to the court and submitted it along with all the evidence to the docketing staff member. Afterwards, based on the amount claimed by the plaintiff, the docketing staff member calculated the case acceptance fee to be RMB 2,174. The officer then filled in a Notice of Advance Payment of Case Acceptance Fees and handed it over to P's legal representatives, who then proceeded to pay at the payment window set up by the bank in the Docketing Hall of Court A. A receipt was issued for the payment of the fee at the payment window. P's legal representatives returned to the docketing window, handed in the receipt to the officer and completed the whole filing process. The docketing officer compiled all the filing documents into a case file and handed it over to the Associate Chief Judge of the Docketing Division for review. On the next day, 21 September 2010, the associate chief judge approved the materials and signed to confirm case acceptance. He then handed back the case file to the docketing staff member for registration. Afterwards, the Notice of Case Acceptance was issued.

2.3.3 Pre-trial Preparation

2.3.3.1 Service of Documents

On 21 September 2010, a transcriber of the Docketing Division informed P's legal representatives of case acceptance by phone, and required them to file pertinent documents of the case. In the morning of 22 September 2010, P's legal representatives arrived at the Docketing Division. The transcriber delivered to them the Notice of

Acceptance of Action, the Notice of Submission of Evidence,[5] the Notice of Rights and Obligations of the Parties and the Card for Monitoring Corruption,[6] and asked whether the plaintiff contemplated mediation. P's legal representatives expressed their willingness to carry out mediation under the aegis of the court and stated that they were satisfied if the defendant would reimburse the plaintiff RMB 200,000.

After P's legal representatives left the court, the transcriber promptly contacted the defendant in Hunan province by phone. During the phone call, the transcriber informed the defendant of the plaintiff's version of the case and asked the defendant about his willingness to resolve the dispute through mediation. The defendant signified that he needed to authorise legal representatives to deal with his dispute in view of the plaintiff's filing documents, and that he would reply to the court after receiving these documents. After learning about the defendant's view, the court mailed the documents to the defendant by express mail service (EMS), a postal service provided by the post office. The documents in the mail included a duplicate of the plaintiff's writ, evidence submitted by the plaintiff, the Notice of Response to Action, the Notice of Submission of Evidence, the Notice of Rights and Obligations of the Parties and the Card for Monitoring Corruption.

One week later, the defendant confirmed to the transcriber that he had received the pertinent documents, and that he would promptly authorise legal representatives to handle the dispute. The legal representatives would return the Receipt of Service signed by the defendant. In addition to that, the transcriber arranged a court mediation session with the defendant and set it at 3 p.m. on 8 October 2010 in the mediation room of the Docketing Division. The transcriber also confirmed the time and venue of the mediation session with the plaintiff by phone afterwards.

2.3.3.2 Property Preservation

Whilst filing the case on 20 September 2010, P's legal representatives also filed an application for property preservation with the court. The docketing staff member transferred this application to the Property Preservation Group of the Docketing Division, which is responsible for reviewing the application. On the next day, 21 September 2010, after examination, the Property Preservation Group of the Docketing Division found that all the legal requirements were satisfied and made an Order of Property Preservation. It informed the plaintiff by phone that the court had accepted the application, and further instructed the applicant to provide security for the application. Since both the defendant and the property to be preserved (a bank

[5] The Notice of Submission of Evidence normatively records the burden of proof, the time-limits for submission of evidence (30 days in the ordinary procedure and 15 days in summary proceedings), the legal consequences of violating the time-limits for the submission of evidence, and the parties' rights to apply to the court for collecting evidence in certain exceptional circumstances.

[6] This card is used to remind the parties to report corruption and illegal acts of judges to the supervisory division of the court.

account in a county bank in City C in Hunan province) were located in a non-local region, the Docketing Division considered it desirable to conduct property preservation directly at that place. To do so, the judge of the Docketing Division who handled the case filed a report with Court A, in particular with the Chief Judge of the Docketing Division and the leader of Court A. Finally, Court A decided to send a judge and a clerk to conduct property preservation in City C of Hunan province, the place where the bank was located. In the morning of 23 September 2010, both officials arrived in Changsha, the capital of Hunan province, after a 4-h trip by high-speed rail. They then spent an additional 2 h in a taxi before arriving at the particular bank and successfully froze the defendant's deposit of RMB 200,000 in his bank account before the bank closed for the day. To avoid possible interference with the preservation, the judge who conducted the property preservation did not immediately serve the Order of Property Preservation to the defendant. Instead, the judge informed the defendant of the property preservation by phone after he returned to the court on 27 September 2010. With the consent of the defendant, the judge delivered the Order of Property Preservation and the List of Preserved Properties by post. Several days later, the defendant signed a Receipt of Service and delivered it to the court. Meanwhile, the plaintiff was informed by the court on the phone to visit the Docketing Division to sign the Receipt of Service there.

2.3.3.3 Court Mediation After Acceptance of the Case

The respective legal representatives of the parties arrived at the mediation room of the Docketing Division before 3 p.m. on 8 October 2010. The defendant's legal representatives (D's legal representatives hereafter) returned a Receipt of Service signed by the client, a Letter of Authorisation issued by the client and documents verifying the identities of the legal representatives. Mediation began at 3 p.m. sharp. Firstly, the transcriber verified the identities of the parties and their legal representatives, respectively. Then the docketing judge presiding over the mediation briefed on the cause of action and other contingent matters. With no objections raised by the parties, the plaintiff and the defendant advanced their respective submissions and settlement proposals.

P's legal representatives submitted that the facts of the case were crystal clear, and the rights and obligations of the parties stipulated in the construction contract were also unequivocal in the sense that the defendant should be responsible for safety mishaps during construction work. When the accident happened, the foreman of the construction team hired by the defendant absconded and no other people in charge for the defendant could be found at the site. Under the coordination of the Local Bureau of State Administration for Work Safety (Local Bureau hereafter) and in place of the defendant, the plaintiff paid RMB 200,000 of the construction fee in advance as compensation for the casualty to the deceased's family. The plaintiff further submitted that an amount of RMB 3,097.76 of payment for construction had been overpaid. This meant that in his opinion a total amount of RMB 203,097.76

was owed by the defendant. The plaintiff attempted to recover this amount through numerous negotiations, but this was in vain. In the present case, the plaintiff agreed to limit his claim to the repayment of RMB 200,000.

The defendant argued that he was not on the building site when the incident was being addressed and argued that he was not sure whether the plaintiff had indeed paid the compensation for death in the amount of RMB 200,000 to the deceased's kin. He argued that even if the plaintiff had done so, the defendant was still willing to carry on the construction work for the plaintiff and that the money paid as compensation for death could be offset by the plaintiff when paying the remuneration for the construction work.

During mediation, the defendant proposed to pay the plaintiff a lump sum of RMB 100,000. As regards this proposal, P's legal representatives stated, firstly, that the amount was unacceptably low, and secondly, that proposals to pay less than RMB 200,000 needed to be communicated to the plaintiff company for further advice. However, the defendant insisted that the settlement amount should be fixed at RMB 100,000. Accordingly, mediation failed. The judge presiding over the mediation instructed both parties that after the necessary arrangements had been made, the parties would be informed of the exact date and time for trial. They were advised to start preparation for trial. The process of mediation was briefly recorded and filed with the court by the transcriber.

2.3.3.4 Appointment of Judges and Arrangement for Trial

After failed mediation, the judge of the Docketing Division decided to transfer the case to Civil Division No. 2 of the court.[7] Subsequently, the clerk of the Docketing Division transferred all the documents of the case to the clerk of Civil Division No. 2. On 10 October 2010, the court clerk reported the case to the associate Chief Judge of Civil Division No. 2, who then decided to have the case heard by a collegial bench consisting of Judge Z, as the presiding judge, Assistant Judge H and the People's Juror Y. On behalf of Assistant Judge H, the clerk fixed the hearing time at 9 a.m. on 3 November 2010 in Trial Courtroom IV. After confirming the hearing date, the clerk contacted both parties to inform them of a number of important matters, such as matters concerning burden of proof. Upon the request of the lawyers, the court served the summons and a notice that the case would be heard by a collegial bench to both parties by post. The Receipt of Service from both parties was mailed back to the court several days later.

[7] There are four civil divisions in this court. Division No. 2 is responsible for complicated cases, in which usually the ordinary procedure is followed. There is no express provision except for some rather vague principles under the CPL on the choice between the ordinary and the summary procedure. As a matter of fact, most cases filed in local courts in China are handled in the summary procedure with a single judge in charge so as to save judicial resources.

2.3.3.5 Collection of Evidence

After court mediation in the docketing stage, both plaintiff and defendant were familiar with the gist of the likely arguments of their opponent. Even though the defendant did not advance a defence or produce any evidence, the plaintiff understood that he needed to submit further evidence to justify that on behalf of the defendant he had paid the deceased's kin a compensation for death of RMB 200,000. Since the plaintiff merely relied on the two receipts of payment signed by the deceased's kin, and the kin were reluctant to testify in court due to difficulties as regards travel and also because of financial difficulties, his position was difficult.

According to the plaintiff's statements, after the defendant's employee fell from an altitude and died, the foreman absconded. Meanwhile, the person in charge of the defendant's company was not in City A, hence the company could not send a representative to deal with the aftermath of the accident. Furthermore, the deceased's kin rallied a group of relatives and other people and caused grave disruption to the plaintiff's company. The plaintiff subsequently called for the aid of the Local Bureau. In order to maintain public order and to secure the running of the company, the plaintiff, under the coordination of the Local Bureau, paid the deceased's kin RMB 200,000 in advance to settle the dispute. Therefore, procuring the pertinent documents from the Local Bureau was the best way to acquire evidence to corroborate the plaintiff's averments. However, when the plaintiff contacted the Local Bureau, due to a variety of reasons, the Local Bureau refused the plaintiff's request to provide the necessary documents or the dispatch of representatives of the Local Bureau to testify in court.

On 18 October 2010, after two rejections of the Local Bureau to co-operate, the plaintiff filed an application with Court A to retrieve evidence from the Bureau in order to find out the truth. Upon acknowledgement of the receipt of the application and after review of the facts of the case, Assistant Judge H held that the Local Bureau, being the supervisory government authority and being in charge of dealing with the aftermath of the accident, was the most impartial witness that could be called. He also held that the requirements of Article 64(2) of the CPL – an article allowing the court to collect evidence that the parties themselves cannot obtain – were complied with, and that the evidence of the Bureau was crucial to the proceedings.

On 20 October 2010, Assistant Judge H served a Letter of Investigation and Evidence Collection to the Local Bureau and ordered the Bureau to provide a statement on the handling of the accident and its final outcome. After hearing the judge's explanation on the importance of the statement and the legal duties and obligations owed by the Local Bureau to testify in the trial, the head of the Local Bureau agreed to produce a written statement concerning the accident. On 27 October 2010, the court received 'Statement 4.15 on Work-Related Accident Injuries' from the Local Bureau.

2.3.4 Trial

On 3 November 2010 at 9.30 a.m., the legal representatives of both parties arrived at the courtroom. After the transcriber checked the basic information provided by

both parties and their legal representatives and informed them of their rights and obligations, Presiding Judge Z announced the commencement of the trial. He introduced the members of the collegial bench and asked the parties whether they intended to disapprove any of the aforementioned members of the court. Both parties indicated that they would not do this and, subsequently, the trial commenced.

2.3.4.1 The Plaintiff's Statement of Claim

Since the plaintiff's statement of claim coincided with the claim in the writ of summons, the judge handling the case requested the plaintiff's legal representatives to elaborate on the essential facts of the case and the reasoning underlying the claim. The main content of the claim was:

1. On 17 November 2006, the plaintiff from City A and the defendant Company D from City C entered into a construction contract. By virtue of the contract, the defendant, being the contractor, was responsible for an anti-corrosion project regarding the steel structure of a building owned by the plaintiff. The price of the work would be based on the actual acreage of the building after valuation and acceptance of the construction work. The contract also stipulated that the defendant would be responsible for any loss caused to the plaintiff or a third party arising from the construction project. He would also be responsible for any safety mishaps during the construction work. The total period of time allowed for the construction project was 1 year.
2. On 15 April 2007, an employee of the defendant incautiously fell from an altitude and died when carrying out construction work at Company B's building. After the accident, the defendant was perfunctory in disposing of the matter. In order to maintain public order and to settle the incident properly, the plaintiff, under the coordination of the Local Bureau, entered into a death compensation agreement with the deceased's kin, in which the plaintiff would pay them in advance a reimbursement of RMB 200,000 as relevant compensation on behalf of the defendant. The plaintiff fulfilled the terms of the agreement by paying the compensation in cash to the deceased's wife.
3. The construction work was aborted as a result of the accident, and was never recommenced. After tallying the accounts between the parties prior to the trial, it appeared that the defendant had completed 2,931.59 square meters of the construction project. The total remuneration for the work done was RMB 36,644.88. The plaintiff had paid the defendant a remuneration for construction work on two occasions: RMB 20,199.38 on 28 December 2006 and RMB 14,543.26 on 13 February 2007, respectively. On 19 April 2007, since the defendant requested another payment from the plaintiff in order to pay off the deceased's funeral, the plaintiff paid the defendant a further RMB 5,000 as an instalment in advance of the construction remuneration. After the plaintiff had paid, he sought repayment from the defendant by way of telecommunication many times, but in vain.

2.3.4.2 The Defence

The defendant did not submit any written defence within the statutory time-limit (15 days after receipt of the writ). However, he provided the following oral defence during trial:

(i) The death compensation agreement was concluded between the plaintiff and the deceased's kin without the presence of any representatives of the defendant. However, the death compensation agreement was intended to confer on the defendant contractual obligations. This already rendered the agreement void. Furthermore, the plaintiff breached the contract by paying compensation to the deceased's kin in the form of an advance payment for the construction work, without obtaining any approval from the defendant.
(ii) The incident occurred on 15 April 2007. The plaintiff brought his court action on 20 September 2010, which was after the statutory time-limit. Based on this, the plaintiff's action should be dismissed on the grounds of lack of factual and legal bases.

2.3.4.3 The Plaintiff's Reply

After the defendant's oral defence, the plaintiff's legal representatives replied as follows:

(i) The plaintiff's action was not brought outside the limitation period. On 18 April 2009, the plaintiff had sent a letter of interpellation by fax to the defendant, requesting that he repay the overpaid construction remuneration of RMB 3,097.76 and the death compensation amount of RMB 200,000. The letter of interpellation was also posted to the defendant by EMS on 20 April 2009. This meant, in his opinion, that the plaintiff had averred his rights against the defendant in a timely manner, and this had stopped the limitation period from running.
(ii) It was not the plaintiff who unilaterally fixed contractual obligations for the defendant. It was explicitly stipulated in the construction contract that the defendant would be solely accountable for all liabilities of safety incidents during the construction period. When the accident happened, the defendant did not assign any representative to straighten out the matter. In a context in which the deceased's kin caused uproar, the plaintiff paid RMB 200,000 as death compensation in order to secure public order and under the coordination of the Local Bureau to settle the dispute.

2.3.4.4 Production and Examination of Evidence

The plaintiff submitted the following evidence to the court:

1. The construction contract between the plaintiff and the defendant;
2. The final construction statement, proof of payment and the receipt of payment signed by the defendant;

3. The death compensation agreement and two receipts signed by the deceased's kin;
4. The deceased's entrance permit to the construction site;
5. The letter of interpellation and a dispatch note of EMS;
6. Copies of company registration at the Administrative Bureau for Industry and Commerce.

After verifying the above evidence, the defendant's legal representatives reacted as follows:

– They did not object against the credibility and legality of the evidence listed under Nos. 1, 2, 4, 5 and 6 above. However, an objection was raised against the credibility of evidentiary item No. 3. The reason for this was that the relationship between the plaintiff and the deceased employee was in doubt since none of the deceased's kin agreed to testify for the plaintiff at the trial. In addition, evidentiary item No. 2 illustrated that the plaintiff asserted his claim on 19 April 2007, but filed the action on 20 April 2010, which was after the statutory time-limit had expired. Furthermore, evidentiary item No. 5 could not be used to prove any discontinuance of the limitation period because the defendant had never acknowledged the receipt of the letter of interpellation.
– The defendant neither produced any evidence within the statutory time-limit nor submitted any further evidence during trial.
– During trial, 'Statement 4.15 on Work-Related Accident Injuries' provided by the Local Bureau to both parties was handed over to the court for examination. After examination, the plaintiff submitted that the statement could be used to prove the employment relationship between the deceased employee and the defendant, as well as the facts that the accident happened on 15 April 2007 and the plaintiff had paid death compensation in the amount of RMB 200,000 to the deceased's kin under the coordination of the Local Bureau. The defendant did not challenge the credibility of the statement, but argued that the Local Bureau did not have the authority to confirm the employment relationship between the deceased employee and the defendant. Instead, the existence of an employment relationship should be determined by the Labour Dispute Arbitration Committee. Even if the defendant was obliged to compensate the plaintiff, the amount should be around RMB 160,000 instead of RMB 200,000. The difference between these two amounts was paid without the authorisation of the defendant.

2.3.4.5 The Key Questions

On the basis of the information acquired during the trial, the judge who handled the case pointed out that the key questions to be answered were the following:

1. Whether the limitation period for bringing the action had expired when the action was brought (i.e. the Limitation Period Issue);
2. Whether the defendant should reimburse the plaintiff the overpaid construction fee of RMB 3,097.76 and the death compensation amount of RMB 200,000 paid by the plaintiff.

As regards the aforementioned issues summarised by the judge, none of the parties raised an objection and, therefore, they endorsed that these were the key questions to be answered.

2.3.4.6 Oral Debate

In order to improve efficiency, before commencement of the oral debate the judge reminded the parties to focus on the two key questions identified by the judge.

As regards Question 1, i.e. the Limitation Period Issue, the plaintiff reiterated that based on the receipts and the invoice issued by the defendant, the last advance payment by the plaintiff had been made to the defendant on 19 April 2007. Subsequently, the construction contract had been terminated as a result of the accident. The plaintiff asked the defendant for repayment many times after construction work had been suspended, but this was refused by the defendant. Accordingly, the plaintiff faxed a letter of interpellation to the defendant on 18 April 2009. The letter contained the plaintiff's claim against the defendant and, consequently, would result in a discontinuance of the limitation period on 18 April 2009. Therefore, when the plaintiff brought the claim on 20 September 2010, this happened within the statutory limitation period.

The defendant, by contrast, stated that the last advance payment was made by the plaintiff on 19 April 2007. As prescribed by law, the limitation period for bringing an action in general is 2 years, which means that the plaintiff should have filed his claim for repayment with the court on or before 19 April 2009. Since the plaintiff filed his claim on 20 September 2010, this was ostensibly exceeding the limitation period.

As regards Question 2, i.e. whether the defendant should repay the overpaid construction fee of RMB 3097.76 and the compensation for death in the amount of RMB 200,000, the defendant held that when both the plaintiff and the deceased's kin negotiated and signed the death compensation agreement, none of the representatives of the defendant was present. Since the death compensation agreement intended to impose contractual obligations on the defendant, the agreement was void. Besides, the death compensation payment was made by the plaintiff in the form of an advance construction payment, which amounted to a breach of contract and should therefore be considered illegal. Consequently, the plaintiff should not be allowed to recover the overpaid construction fee and the death compensation payment from the defendant.

2.3.4.7 Court Mediation During Trial

After the preceding stages in the trial, the collegial bench inquired once again whether the parties were willing to settle their case. The plaintiff was willing to do this, but stated that according to the director of the company the defendant should at least pay RMB 180,000 to the plaintiff. The defendant also indicated that he was

willing to settle, however only if an amount of RMB 150,000 could be agreed upon and if the construction contract would not be considered terminated. If this approach were chosen, any outstanding balance could be deducted from the construction fee. According to the plaintiff, the proposal of the defendant was unacceptable. As a result, court mediation failed, and the court started deliberation for judgment.

2.3.4.8 Deliberation for Judgment

After the trial, Assistant Judge H convened the members of the collegial bench into his office. Based on the findings in the case, the legal and factual issues of the case were discussed. All bench members took the view that the legal issue to be decided was whether the limitation period had been barred by the plaintiff when initiating the action. The factual issues to be decided were: (i) Whether the construction fee of RMB 3,097.76 had been overpaid by the plaintiff; (ii) Whether the deceased worker was an employee of the defendant; and (iii) Whether the plaintiff had paid compensation for death in the amount of RMB 200,000 to the deceased's kin.

As regards the limitation period, the court was of the opinion that since the two sums of money claimed by the plaintiff were paid at different times, the limitation period should be dealt with separately for each payment.

As regards the overpaid construction fee, the judge who handled the case, Assistant Judge H, held that the construction contract signed between the plaintiff and the defendant provided that the total amount to be paid under the contract would be based on the actual acreage of the building after valuation and acceptance of the construction work, which would last for a period of 1 year. The defendant, being the contractor, had completed 2,931.59 square meters of the construction project and consequently the construction fee should be RMB 36,644.88. The plaintiff had paid the defendant twice in advance, i.e. RMB 20,199.38 on 28 December 2006 and RMB 14,543.26 on 13 February 2007. A third time, i.e. on 19 April 2007, he had paid RMB 5,000 in order to settle the funeral of the deceased, which should be considered to be part of the construction fee payable to the defendant. Based on the above, the plaintiff had paid the defendant a total of RMB 39,742.64 in construction fees in advance on three separate occasions. Hence, the plaintiff had overpaid the defendant RMB 3,097.76 (RMB 39,742.64 minus RMB 36,644.88 equals RMB 3,097.76). As laid down in the General Principles of the Civil Law of the People's Republic of China, the time-limit for commencing an ordinary lawsuit is 2 years. Here, the payment of the last construction fee occurred on 19 April 2007, and, therefore, the limitation period ended on 19 April 2009. Since it could not be proven that the defendant had received that plaintiff's letter of interpellation faxed on 18 April 2009, the limitation period could not have been discontinued. Although the plaintiff produced evidence that the letter of interpellation was posted by EMS on 20 April 2009, this was after the expiry date of the limitation period. Even though the plaintiff also asserted that he asked many times for repayment by telephone, he did not provide any evidence to justify this assertion. Therefore, the plaintiff's claim for recovering the overpaid construction fee should be dismissed, according to

Assistant Judge H. Both Presiding Judge Z and People's Juror Y did not object to this conclusion.

As regards the factual issue of the existence of an employment relationship between the deceased worker and the defendant, Assistant Judge H held that the entrance permit to the construction site submitted by the plaintiff clearly showed that the deceased worker was an employee of the defendant. As such, he was authorised to enter the construction site from 26 March 2007 to 26 June 2007.

As to the argument of the defendant, who asserted that since the entrance permit was issued by the plaintiff, it could not serve as evidence, the following was stated. The evidentiary value of the Entrance Permit had to be analysed in conjunction with 'Statement 4.15 on Work-Related Accident Injuries' issued by the Local Bureau which was responsible for coordination and dealing with the incident. It was unlikely that the Local Bureau would not have ascertained the facts of the incident, as it is clearly stated in the statement that the deceased worker was a construction worker recruited by the foreman of the project, who himself was hired by the defendant. Presiding Judge Z further pointed out that, viewing this evidence in conjunction with the Advanced Payment Application Form dated 17 April 2007, carrying the signature of a staff member of the defendant – the authenticity of which was verified by the defendant in court – and the 'Reason of Expense Column' of the application form which was used to request funds from the plaintiff, it was proven that the deceased construction worker was an employee of the defendant.

As regards the factual issue of whether the plaintiff had paid the compensation for death on behalf of the defendant, Assistant Judge H held that the compensation agreement signed between the plaintiff and the deceased's kin stipulated that the deceased's kin should receive compensation in the amount of RMB 200,000 in total. This would be achieved by two separate payments made by the plaintiff on behalf of the defendant. Afterwards, the plaintiff would be entitled to reclaim the compensation paid from the defendant. In addition, based on the two receipts issued by the deceased's kin dated 21 April 2007 and 23 April 2007, it could be shown that the plaintiff had actually paid RMB 200,000. However, the defendant asserted that this did not become clear because in his view the receipts were not issued by the deceased's kin. In addition, the deceased's kin did not testify in court, so one could not obtain any confirmation as regards whether the plaintiff had actually paid compensation for death. This view was, however, contradicted by 'Statement 4.15 on Work-Related Accident Injuries' issued by the Local Bureau in City A indicating that the death compensation agreement was indeed signed between the plaintiff and the deceased's kin, and that the plaintiff did pay the amount of RMB 200,000 in cash to the deceased's kin on behalf of the defendant. Based on the above, the plaintiff's assertions were justified.

Assistant Judge H was of the opinion that since the plaintiff stated that the date on which the death compensation payment was made on behalf of the defendant was 22 April 2007, the limitation period for bringing an action by the plaintiff for reimbursement of the amount paid in compensation should be 22 April 2009. Since the plaintiff mailed the defendant a letter of interpellation on 20 April 2009, the limitation period had indeed been interrupted. The remaining two bench members expressed concurrence with Assistant Judge H's opinion.

Finally, the collegial bench unanimously reached the following verdict: (1) The construction contract between the plaintiff and the defendant was valid. The terms of the contract did not violate any compulsory laws and administrative regulations. As such, the construction contract was legally binding for both parties. (2) The defendant had completed 2,931.59 square meters of the construction project and therefore the construction fee should be RMB 36,644.88. The plaintiff actually paid the defendant a total amount of RMB 39,742.64 in the form of advanced construction payments, as a result of which RMB 3,097.76 was overpaid. However, since the plaintiff filed his claim after the expiry date of the limitation period, the court would not adjudge the claim. (3) The deceased worker, an employee of the defendant, fell from an altitude and died during the course of his employment. Due to the passive attitude of the defendant in handling the aftermath of the accident, the plaintiff had to pay the compensation for death to the deceased's kin on behalf of the defendant under the coordination of the Local Bureau. Hence, the plaintiff was entitled to recover compensation for death in the amount of RMB 200,000 from the defendant. (4) Based on the findings in this case, the defendant should pay the larger part of the court fees that had been paid in advance by the plaintiff.

A transcript of the above views was made by the transcriber, and subsequently signed by the collegial bench members. On this basis, the judge who handled the case drafted the judgment.

2.3.5 Judgment

On 18 November 2010, Presiding Judge Z reviewed the draft judgment and handed it to the Chief Judge of Civil Division No. 2 who then confirmed and signed the judgment. The transcriber stamped the judgment and contacted the legal representatives of the parties for collection of the judgment. P's legal representatives arrived at the court to sign for delivery of the judgment on 19 November 2010. At the request of the defendant's legal representatives, the transcriber posted the judgment to them on 19 November 2010, and the defendant signed the receipt of service statement on 22 November 2010. The parties did not file an appeal within the 15-day time-limit for appeals. Hence, the first instance judgment acquired the force of *res iudicata*. The court soon after notified the bank in City C of Hunan province to transfer the frozen amount of RMB 200,000 of the defendant's savings to the plaintiff's bank account, as well as the litigation fees for which the losing party, i.e. the defendant, was accountable.

In summary, the above case went through the following stages: the plaintiff files his claim and applies for property preservation (20 September 2010) → Court A accepts the case and makes an order for property preservation (21 September 2010) → Court A serves the writ of summons on the defendant (22 September 2010) → The defendant's bank account is frozen on the basis of the order for property preservation (23 September 2010) → Court A serves the documents regarding property preservation on the defendant (27 September 2010) → Court Mediation in

the Docketing Division and transferral of the relevant documents to the court panel (8 October 2010) → Appointment of the judges of the panel, setting trial schedules and serving the summons (10 October 2010) → The plaintiff applies for the collection of evidence (18 October 2010) → The court sends a letter of investigation (20 October 2010) → The court receives a written statement from the Local Bureau (27 October 2010) → Trial and deliberation of the court panel (3 November 2010) → Draft judgment handed to the presiding judge for review and subsequently to the Chief Judge of the civil division for signing and issuance (18 November 2010) → Court A serves the judgment to both parties (receipt signed by the plaintiff on 19 November 2010 and by the defendant on 22 November) → Judgment becomes *res iudicata* since none of the parties filed an appeal within the statutory term of 15 days after receipt of the judgment.

2.4 Analysis and Discussion

Although the case was dealt with using the ordinary procedure, it was concluded within a period of about 2 months. This short time frame is not exceptional in Chinese civil justice. In order to answer the question of why Chinese courts are capable of being so time-efficient, it is imperative to explain the Chinese procedural model in relation to the case discussed above.

2.4.1 Case-Management at Chinese Courts

As stated above, the plaintiff's filing of an action in court and the court's acceptance of the case are known as the 'docketing stage' under the CPL. All courts in China have a separate 'Docketing Division'. In the above case, the Docketing Division of Court A had 13 staff members; 7 of them were qualified judges. Apart from receiving and examining writs as well as determining the acceptance of cases at its Docketing Window (to 'accept' means exercising jurisdiction in the case), the Docketing Division is also generally responsible for serving court documents, deciding and executing requests for property preservation, conducting court mediation at the initial stages of proceedings, recording each accepted case, making case files and entering preliminary data of the case into the court computer system. This is known as 'procedural management'. The 'procedural management' system allows the tracking of information concerning the case at any stage of the trial.

Generally, a basic people's court has three to five civil divisions. In addition, some courts have set up specialised divisions responsible for handling family cases, civil cases and commercial cases. After the case is accepted by the court, the Chief Judge of the Civil Division appoints or chooses (by case number rotation) a judge to take charge of the case (this judge is known as 'the judge handling the case'). When there is a collegial bench, the judge handling the case must be one of the members

of the panel, but this does not need to be the presiding judge. The judge handling the case is responsible for all the subsequent substantial and procedural matters that arise in the case during the proceedings, including the establishment of the trial date, pre-trial preparations, trial, the drafting of the judgment, the service and pronouncement of the judgment, and court mediation when necessary.

Although the trial of each case is led by the judge handling the case, Chinese courts have set up a system to monitor and govern the process and the result of each case.

Firstly, after the case has been accepted, the record of it, including the case number and basic information, is registered in the court's computer system so that senior judges such as the President of the Court and the Chief Judge of each division are able to monitor the latest developments in every case and provide direction to judges where necessary. Secondly, for some important procedural decisions, junior judges must report or give notice to the senior judges for review and approval (senior judges are the Chief Judge and the Associate Chief Judge of each division, the President of the Court, and the Judicial Committee presided over by the President of the Court). In the case discussed above, the decision of property preservation and the approval of the judgment were subject to such supervision. It should be noted that the scope of procedural decisions which require approval from senior judges varies among different courts.

Finally, there is a centralised system to keep a record of each case file after its conclusion. Furthermore, in each year or in another certain period of time, the courts carry out reviews and inspection of case files that have already been closed through a permanent institution such as the 'Trial Supervision Tribunal' or other specialised personnel. Case files will be investigated by way of sampling or selection based on certain characteristics such as the specific category of lawsuits to which the file belongs, in order to appraise and evaluate the quality and performance of the trial work done by each judge. The result of these appraisals and evaluations is used when deciding on the promotion of judges or their remuneration. Whether the case has been concluded within the time period stipulated by law is one of the important issues that are taken into consideration in the appraisal. The President of the Court and other high ranking officials carry out the evaluations, taking into consideration the performance of judges, their ability and work attitude. In addition, the Chinese court system has developed an index framework to appraise the court, the judges and other staff of the court.

To a large extent, the reason why most civil and commercial cases in China can be completed within a short period is closely related to the rules of civil procedure. In the Chinese system, the management of and the control over the proceedings by the judge handling the case is interwoven with the management of and the control over the specific judge by the court. This system relies on issues such as the hierarchical structure of the court and the mechanism of incentives to perform well for judges.[8]

[8]For details on the hierarchical structure of the Chinese courts and the incentive mechanism for judges, see Yaxin Wang 2010, pp. 132–137.

Since the 1980s, in order to respond to the drastic increase of civil cases as a result of the rapid growth of the Chinese economy, Chinese courts have endeavoured to accept and dispose of more cases. To digest as many cases as possible in a short period of time has become an important goal and has resulted in competition among different courts. On the one hand, this is a positive response to social needs, and thus contributes to economic growth in itself. On the other hand, the efficiency-oriented features of civil justice are motivated by the courts' own economic and political interests, i.e. to obtain higher financial benefits by receiving more court fees through disposing of more cases and to promote their political status by interfering in the key cases concerning public interests.

Recently, however, the courts' organisational goals have changed from accepting more cases and disposing of more cases into restricting the acceptance of cases. In addition, due to changes such as a reduction of litigation fees and financial support from the government, the economic motivation for courts to handle cases in a highly efficient manner has declined. Nevertheless, an efficiency-oriented culture still remains within the Chinese court system.

2.4.2 Standing and Roles of the Parties

The factors which determine the speed of proceedings or the efficiency of litigation are not merely the judges and the courts, since the role of the parties should not be overlooked.

From an historical perspective, parties play a quite limited role in facilitating civil litigation in China. Until the mid 1980s, an 'inquisitorial approach' was adopted. The approach practically meant that after the plaintiff had filed the originating writ, judges would actively participate in the investigation of the facts of the case and suggest court mediation at different points throughout the whole proceedings. These two procedural matters formed the main feature in Chinese civil proceedings. Judgment would be entered only when the parties had refused mediation and the case was found ready for adjudication. Before pronouncing judgment, the court was required to hold a 'symbolic hearing', and the judgment itself was subject to the approval of the President of the Court. Within such a procedural framework, the parties did not bear the burden to collect and produce evidence, or even to facilitate the proceedings. Nevertheless, the judges would still frequently interrogate the parties on various matters and require them to submit relevant documents where appropriate. As such, it was the judges who were responsible for the collection of evidence and the fact-finding process. These duties were guaranteed within the system of administrative supervision in the court hierarchy.

The above pattern has changed considerably since the late 1980s. Due to market economy reform and the Open Door Policy, various resources such as human capital, goods and services started to enjoy a higher degree of economic freedom. As such, a remarkable number of civil disputes, in particular contractual and property disputes, entered the court. The court could no longer afford the unbearable burden

of investigating and collecting evidence and repeatedly conducting mediation as it was used to do before. In addition, the promotion of the 'adversarial system' from common law jurisdictions justified the shifting of the burden of proof from the courts to the parties. Since the Trial Pattern Reform in the late 1980s, Chinese civil justice considers the parties responsible for the collection and submission of evidence (especially in commercial cases), whereas the judges are in principle responsible for checking the submissions and the evidence of the parties during the trial. Today, the concept of 'burden of proof' and the notion of the 'adversarial system' have become key features of Chinese civil procedure. Furthermore, the Judicial Opinions on Evidence in Civil Litigation of the Supreme People's court, issued in 2001 ('Evidence Rule'), provided that the judge can exercise discretion to exclude delayed evidence and in such a manner impose sanctions on reckless parties (this is the so-called 'evidential time-limit' approach). Meanwhile, with regard to decisions concerning setting the procedural timetable and court mediation, the judge is still actively involved.

In recent years, the aforementioned trends in civil litigation have again changed. In response to a re-emphasis on court mediation and the judges' role in promoting it, the courts and academics have started to question whether indeed the parties are subject to burden of proof rules to a considerable extent, and whether they are obliged to exercise their duties under these rules within specific time-limits. Some academics suggested that the provisions relating to time-limits in Evidence Rule 2001 should be amended, and raised different views on the possibility of sanctions if parties failed to collect evidence within the specified time-limits. They pointed out that parties who fail to comply with the time-limits should be made to pay part of their opponent's litigation fees. With regard to the idea that the court should in principle no longer collect evidence *ex officio*, some argued that this should be changed in certain matters in order to guarantee that justice is done in the case and the equality of the parties upheld. For instance, the court should exercise its powers *ex officio* where types of evidence such as expert witnesses, views of a locality and the examination of witness statements is concerned, in addition to situations where such evidence is being collected by a weak party. In court practice, judicial interpretations relating to evidential time-limits are rarely applied. In order to enhance the use of mediation, judges are more likely to use different instruments (either formal or informal ones), or conduct more negotiations with the parties in the stages of the procedure before trial. Even though it is still considered to be exceptional for the court to take the initiative in collecting evidence, compared with past years it is becoming more common. These changes are not only the result of political pressure placed on the courts, but also of the societal response triggered by the side effects of the transition from an 'inquisitorial' to an 'adversarial' system during the past 20 years. In order to reduce its workload, the court has shifted part of the burden to prove their case to the parties, which is unacceptable to some members of the general public. Against the background of rapid economic growth and drastic changes in social norms, parties in litigation are less willing to accept court rulings. This is also reflected by larger numbers of appeals. In order to solve this problem, courts and academics have attempted to adjust the various roles, functions, duties and burdens

of the judges and the parties. Since this process of adjustment can be qualified as a work in progress, it is difficult to evaluate how far the changes will go and which pattern of litigation will in the end be adopted in China.

2.4.3 Allocation of Roles Between the Judge and the Parties

Even though the above developments are taking place, modern Chinese civil procedure still allocates the main role in civil litigation to the judges. Judges in general tend to contact both parties in the early stages of litigation in order to learn the facts of the case and the respective averments of the plaintiff and the defendant, the reason why the dispute has come into being and the relevant evidentiary material. In addition, they enthusiastically advise parties to reconcile. In the example case discussed above, the judge of the Docketing Division attempted to bring the parties together already in the docketing stage (i.e. after accepting the case in court) in order to attempt mediation. This 'mediation in the docketing stage' approach has been adopted and recommended by numerous courts in recent years. In addition, there is a variety of other approaches such as so-called 'pre-litigation mediation' or 'agency mediation' performed by mediators stationed inside court buildings or with organisations outside the court. Even in courts which do not adopt this kind of early mediation approach, after the case is remitted to the Adjudicative Division from the Docketing Division, the judge handling the case will try to contact the parties (e.g. by telephone) to explore the possibility of settlement and to urge them to adduce evidence and to arrange the proceedings for the next stages in the lawsuit. This is also one of the reasons why, although Chinese civil procedural law does not consider the submission of a statement of defence as one of the compulsory obligations of the defendant in the early stages of the proceedings, serious delay does not occur in the early stages of litigation. In addition, at any time in the litigation process, judges can order one or both parties to adduce evidence if they feel that this is necessary for the ascertainment of the facts of the case. They may also, even *ex officio*, investigate and gather evidence.

It should also be noted that in China legal practitioners do not play a significant role either in improving the efficiency of the handling of cases or in causing serious delay. In Western jurisdictions, this is obviously different since legal practitioners play a significant role both in the routine operation of civil procedure and in civil procedural reform projects. In addition to this, the number and the percentage of civil cases in which legal practitioners are involved are quite low. Even for those cases in which they are involved, their role is not much different from the role of parties who are self-represented. Therefore, in the context of Chinese civil justice, it is difficult to consider lawyers as being an 'independent variable' or an important factor when one discusses 'case-management' and the allocation of tasks between judges and parties.

Generally speaking, parties in Chinese civil litigation are used to the fact that civil cases will be concluded within 2 or 3 months time, and they will be seriously

dissatisfied if the cases last longer. Academics in China who specialise in civil procedural law, including the authors of this contribution, hardly realise how efficient it is to conclude a case within 2 or 3 months unless they make a comparison with, for example, European Union jurisdictions. It seems that like the rapid economic growth in China, the high efficiency in Chinese civil procedure is based on a common understanding between the courts and the parties, that is, the common belief shared by ordinary people and experts that it is better to have disputes disposed of in a quick manner than to deliberate about cases forever.

2.4.4 The Costs of High Efficiency

The above text tries to provide an answer to the question of why civil proceedings in China are time-efficient. However, one should not forget the heavy price Chinese civil justice is paying for achieving high efficiency. It should be remembered that every coin has two sides; hence the pros and cons often go hand in hand.

The most serious problem of Chinese civil justice is that judgments often suffer from a lack of convincing grounds and insufficient public trust. This is reflected by the fact that appeals are often brought both on procedural and on substantial grounds. Judgments are even challenged through other channels, e.g. by way of the Judicial Supervision Procedure (this procedure allows final and effective judgments having force of *res iudicata* to be challenged by the public prosecutor), the public media and by political means. On the one hand, the approach of the courts is heavily criticised by the media as well as on the Internet. On the other hand, it is quite common to try to overturn a valid judgment by resorting to the Judicial Supervision Procedure and the Petition System by Letters & Visits, which ultimately challenges the finality of the judgment. Based on the figures for 2010, for example, courts in China disposed of 6,112,695 civil cases at first instance, of which 1,894,607 were concluded by way of a judgment. At second instance, there were 583,856 civil cases disposed of. The appeal rate was therefore 31 % (583,856 out of 1,894,607). There were 40,906 civil cases which were re-adjudicated through the Judicial Supervision Procedure (most of them challenging appellate judgments). Over 1,000,000 cases were petitioned through Letters & Visits. These data are not exceptional; they have been like this for years now. This means that tens of thousands of civil cases are not concluded within the time-limit prescribed by law each year. Instead, they are repeatedly challenged by the parties, and this can protract a case for several years or even for a period over 10 years. For these cases, the aforementioned high efficiency as regards time is clearly absent.

To a large extent, these problems are the result of the courts' current management system and their system of control over judges, which, at the same time, brings about high time efficiency. This is because the system is not only aimed at influencing procedural matters and 'case-management', but also at influencing the judge's decision on substantive matters. In fact, if a case has encountered substantive difficulties or involves sensitive social or political issues, the judge who handles the case will

usually report to the leaders of the court for further instructions or consultations. In other situations, senior judges might also actively participate in deciding substantive matters of a specific case. For significant and complicated cases, social, economic or political factors may become significant. As such, the final judgment in these cases is more likely to be determined by these external factors than by the judge. These factors are invisible to the public and the parties, and thus are hardly predictable. Although cases in which this happens only represent a small proportion of all civil cases, they often involve the most complicated interests and have a high social impact, so that they have become the symbol of Chinese courts, which results in a deep legitimacy crisis of Chinese civil justice.

Needless to say, such an internal management system of the court contradicts the principle of judicial independence. In fact, since the management system suffers from a lack of institutional transparency, it has already brought about a 'black box effect' in Chinese civil justice. This means that the parties and the public always doubt whether or not the procedure and the final decision have been subject to externalities such as power dynamics and acquaintanceship. When corruption is repeatedly revealed in the Chinese legal system, whether true or not in the particular case at hand, the doubts regarding the legitimacy of the court system are not easily eliminated. Such a paradox reflects the on-going crisis of legitimacy and public confidence of Chinese civil justice. However, on the other hand, it is important to point out that the Chinese civil procedural system more or less illustrates a 'collective policy' nature of institutional arrangements. This is something difficult to change in the context of current social and economic developments since it still plays a necessary role which is indispensable for the near future (at least for a period of 2 years). From the late 1990s until 2004, Chinese academics criticised the influence of the Administration on the Judiciary under the influence of Western authorities and advocated the independence of the Judiciary in adjudicating cases. As a result, the control and interference of the Administration regarding the judges' adjudication of cases has been reduced. In recent years, however, such control has been strengthened as a matter of judicial policy under the name of 'judicial management'. Although the authors are not in favour of this tendency, one of the explanations might be that it is still not the right time to implement judicial independence in China, especially if one considers the qualifications of the individual judges and the general setting of the trial.

The interweaving of the judges' management of cases and the courts' management of judges gives rise to other problems in respect of the efficiency of proceedings. On the one hand, every judge who handles a case has to deal with all procedural matters personally, including serving writs, filing documents and reporting to higher levels in the court.[9] Besides, in order to fulfil organisational goals, each court has had to

[9]To solve the problems, some courts in large cities are trying to establish a 'Judicial Service Centre', which will be in charge of service, property preservation, getting expert testimonies, contacting the parties, etc., so that the presiding judges can focus their attention on court hearings and making decisions which are the key to the administration of justice. This is another practical style of case-management in China.

set up a number of departments, most of which do not directly participate in litigation matters. There are 320,000 public servants in the current Chinese court system,[10] 190,000 of whom are qualified judges. Approximately 30,000 to 40,000 judges are engaged in handling civil cases. Therefore, it seems that Chinese civil procedure is quite efficient from the perspective of the time spent on each case and the number of cases handled by each judge. However, the system might not be that efficient if one considers the court system as a whole and compares the number of cases with the total number of 320,000 staff in the court system. Even worse, there is an uneven distribution of caseload among different levels of judges within the same court, since many senior judges do not adjudicate cases, and the workload has been transferred to junior judges. Without an established court budget system, it is impossible to calculate, or even approximately estimate, the amount spent by the taxpayer on the Judiciary.

In addition, it has to be pointed out that in the Western legal tradition the development of the civil procedural system is the result of interaction between procedural rules and various members of the court system, including judges and legal practitioners. The study of 'case-management' in the West aims at exploring the development of the relationship between the procedural rules and the court system as a whole. However in China, the procedural reforms or institutional transformations may be implemented in a different manner in each of the 3,000 courts. During the process of reform, judicial policies of the Supreme People's Court may play an important role next to legislative reform. In addition, competition between lower courts may trigger reform. One may even argue that substantial development and change of civil procedure in China is often embodied in the process of competition between a 'good' court and a 'bad' or 'typical' court, or between 'active' courts and 'passive' courts.

As regards the court's relationship with the parties, when the court is evaluating its performance, the question of whether it has achieved the standard of being a 'model' court is a more important issue than the question of whether it has observed all the procedural rules. Therefore, from the perspective of the legitimacy of the civil justice system, which is to a certain extent reflected by the degree of public confidence, it is paradoxical that some 'model' courts are reported by the mass media to provide good service to the litigants, but at the same time, parties and lawyers complain that these courts and the judges do not comply with basic procedural requirements.

It is a good sign that Chinese society, ranging from politicians to legal professionals, and from litigious parties to individual citizens, is not satisfied if only the 'bottom line' has been reached. Instead, the courts' procedural performance will be evaluated from a highly moral perspective. Although this does not necessarily coincide with the perspective of 'the Rule of Law', one should notice that it is currently too early to draw conclusions since the legal development of Chinese civil justice is still in progress.

[10]The factual amount is more than the number mentioned if casual staff and non-civil servant workers are taken into account. The Supreme Court plans to add up to 400,000 public-servant positions to the court system in the coming 10 years to cope with the heavy burden of cases.

2.5 Conclusion

In the context of the current Chinese civil justice system, the concept of 'case-management' is more likely to be understood from the perspective of the court's internal management powers than from the perspective of the allocation of roles between the judges and the parties in the proceedings. This contribution attempts to combine the Western and Chinese perspectives in order to explain the paradox of 'high efficiency' but 'low legitimacy' within the Chinese civil justice system. As a result of the drastic changes in Chinese society as well as the rapid economic growth, the high efficiency of Chinese civil litigation has almost become a self-explanatory phenomenon. Whilst it contributes to the economic development of the country, the procedural system is creating a structural paradox which has caused a dilemma. Just as the Chinese economy is encountering a transition from high-speed growth towards a more sustainable development, the current moment in time might be the turning point for Chinese civil justice to slow down its pace, improve its legitimacy and ultimately gain public confidence. All in all, the ultimate aim should be to restore justice based on 'the Rule of Law' and to establish a structural relationship between the judges and the parties in civil procedure. All this will help to improve the quality of Chinese civil justice.

Appendix: Facts and Figures Relevant for the Powers of the Judge and the Parties in Civil Litigation

China

Year of Reference: 2009

Part I: General Data on the National Civil Justice System

1. Inhabitants, GDP and average gross annual salary

Number of inhabitants	1,328,020,000[11]
Per capita GDP (gross domestic product)	¥22,698
Average gross annual salary	¥10,744

2. Total annual budget allocated to all courts ¥405,976,000,000[12]

[11] All data in this table are based on *China Statistical Review 2009* published by the National Statistical Bureau.

[12] The figure refers to the expenses for public safety, including the police, prosecution, courts, judicial administration, prisons, labour re-education, national security and anti-smuggling.

3. Does the budget of the courts include the following items?

	Yes	Amount
Annual public budget allocated to salaries	☒	N/A
Annual public budget allocated to computerisation	☒	N/A
Annual public budget allocated to court buildings	☒	N/A
Annual public budget allocated to training and education	☒	N/A
Annual public budget allocated to legal aid	☒	N/A
Other (please specify)	☒	N/A

4. Is the budget allocated to the public prosecution included in the court budget?

☐ Yes
☒ No

(a) If yes, give the amount of the annual public budget allocated to the prosecution services

Legal Aid (Access to Justice)

5. Annual number of legal aid cases and annual public budget allocated to legal aid

	Number	Amount
Civil cases (other than criminal)	422,642[13]	N/A
Other than civil cases (criminal)	124,217	N/A
Total of legal aid cases	546,859	670,475,800

Organisation of the court system and the public prosecution

6. Judges, non-judge staff and *Rechtspfleger*

	Total number	Sitting in civil cases
Professional judges (full time equivalent and permanent posts)	189,413[14]	N/A
Professional judges sitting in courts on an occasional basis and paid as such	0	N/A
Non-professional judges (including lay-judges) who are not remunerated but who can possibly receive a defrayal of costs	55,681	N/A
Non-judge staff working in the courts (full time equivalent and permanent posts)	79,674	N/A
Rechtspfleger	0	N/A

[13] All data in this table are based on: http://www.chinalegalaid.gov.cn/ (last consulted in May 2013).

[14] All data in this table are based on *Report on Law Development in China in 2012*.

The performance and workload of the courts

7. Total number of civil cases in the courts (litigious and non-litigious): 6,982,594

8. Litigious civil cases and administrative law cases in the courts

		Litigious civil cases in general	Civil cases by category (e.g. small claims, family, etc.)		
Total number of first-instance cases	Pending cases by 1 January of the year of reference	N/A	N/A	N/A	N/A
	Pending cases by 31 December of the year of reference	31,406[15]	N/A	N/A	N/A
	Incoming cases	5,412,591	Family division: 1,320,364	Contract division: 2,933,514	Tort division: 1,158,713
	Decisions on the merits	1,960,452	Family division: 416,077	Contract division: 1,095,945	Tort division: 448,430
Average length of first-instance proceedings		N/A	N/A	N/A	N/A

References

Cohen JA (1966) Chinese mediation on the eve of modernization. Calif Law Rev 54:1201–1202
Fan Y (2004) The reconstruction of mediation: centering on the reform of judicial mediation (I). Law Soc Dev (2):113–125 (in Chinese)
He W (1997) Two problems in the judicial administrative system of China. Soc Sci China (6):124–129 (in Chinese)
Jiang W (ed) (2007) Civil procedure law. Higher Education Press, Beijing (in Chinese)
Li H (1996) The separation of mediation and trial in civil litigation. Cass J Law (4):57–68 (in Chinese)
Li H (2005) Comparison on the methods to solve a factual non-liquet situation. Stud Law Bus (3):104–111 (in Chinese)
Pan J, Liu Z (2010) On the relationship between judicial mediation and dispute resolution: from the perspective of constructing a harmonious society. J Comp Law (4):70–81 (in Chinese)
Renmin University Trial Section (1957) The trial of civil cases should be emphasized. In: Renmin University Trial Section (ed) The reference book [materials] on the courts' litigation procedure in the PRC. Renmin University, Beijing, pp 27–32 (in Chinese)
Resnik J (1982) Managerial judges. Harv Law Rev 96:374–448

[15] All data in this table are based on the website of the Supreme People's Court of the People's Republic of China: http://www.court.gov.cn/qwfb/sfsj/201002/t20100221_1407.htm (last consulted in May 2013).

The Law Yearbook of China Editorial Staff (1991–2002) The law yearbook of China (1991–2002). The China Law Yearbook Press, Beijing (in Chinese)
Wang Y (1994) On the reform of the civil and economic trial mode. Soc Sci China (1):3–22 (in Chinese)
Wang Y (2004) Procedure, institution and organization: routine procedures in grass-roots courts and the transformation of governance structure. Soc Sci China (3):89–90 (in Chinese)
Wang Y (2010) Judicial efficiency and judicial cost: the financial guarantee for courts and incentives to the judges in China. Jurists Rev (4):132–137 (in Chinese)
Zhang W (1996) Restatement of the debate principle in civil litigation in China. Cass J Law (6):45–56 (in Chinese)
Zhang W (2000) On the de-administration of the court system in China: a basic framework for the reform of the court system. Stud Law Bus (3):3–11 (in Chinese)
Zhang W (2007) Judicial mediation: analysis and consideration of current trends. Leg Sci (5):18–27 (in Chinese)
Zhu S (2010) On the active justice and grand mediation. Cass J Law (1):5–16 (in Chinese)

Chapter 3
Case Management in China's Civil Justice System

Cai Yanmin

3.1 Establishment of Case Management in China's Civil Justice System

Case management in civil justice is a concept closely related to procedural fairness and judicial efficiency. It is also an important strategy for using judicial resources reasonably, reducing judicial costs and heavy caseloads, and preventing delays so as to increase the quality and efficiency of civil litigation. It is not only the goal striven for by various countries over the past few decades, but also a common issue focused on by civil judicial research circles around the world.

In the past 30 years, under the reform and opening-up policy and with rapid economic growth, the number of civil and commercial disputes in China has increased substantially. Since the Chinese system of civil litigation does not differentiate sufficiently between different types of cases, the threshold for filing cases is set too low and thereby all the disputes brought to the courts are accepted without regard to the nature of the case, the pleadings, the amount of the claim or the degree of complexity. This results in heavy caseloads for the first instance courts, puts a severe strain on the relationship between caseload and judicial resources and makes for incessant tensions between the courts, the litigating parties and the public. The consequence is that the fairness and efficiency of civil justice has become one of the momentous issues of concern for Chinese society. Faced with too many cases, with limited judicial resources and time limitations, in order to deal with long-pending cases and reduce heavy caseloads, front-line judges, constantly overburdened, have to work 'five' plus 'two' and 'white' and 'black' ('five' plus 'two' refers to weekdays and weekends; 'white' and 'black' refers to daytime and night-time)[1]; this is especially

[1] See the speech delivered by Yu Lingyu, who was the director of the judicial reform office of the Supreme People's Court, at the 2011 Annual Conference of China's Civil Procedure Society.

Cai Yanmin (✉)
Sun Yat-sen University, Guangzhou, People's Republic of China
e-mail: caiyanmin@hotmail.com

C.H. (Remco) van Rhee and Fu Yulin (eds.), *Civil Litigation in China and Europe*, Ius Gentium: Comparative Perspectives on Law and Justice 31,
DOI 10.1007/978-94-007-7666-1_3,

true for judges in local and intermediate courts. From 1991 to 2010 the number of civil first instance cases accepted by the courts in China increased at an annual rate of more than 10 %. In 2010, there were 6.09 million civil first instance cases, which was 87 % of the total number of first instance cases.[2] As Deputy Chief Justice Xi Xiaoming stated:

> The judges in local and intermediate courts are under heavy work pressure, which damages the quality and efficiency of handling cases; the legal procedure lacks flexibility, which leads to inconvenience for the litigating parties, and causes a waste of limited judicial resources.[3]

The local courts constitute the broad base of the pyramid-shaped Chinese court system. The more than 3,100 local courts comprise 80 % of the total number of courts and resolve approximately 90 % of the total number of cases brought to all courts.[4] However, as to first instance civil procedure, there is only a distinction between the ordinary and the simplified track. Under the stress caused by the large number of cases, and with a limited number of judges and heavy caseloads, overworked local courts take measures to expand the application of the simplified procedure. As such, most civil and commercial cases are heard according to the simplified procedure, and most cases handled according to the ordinary procedure are more easily disposed of. Accordingly, these measures shape an unconventional trial model for first instance cases which decreases the level of judicial professionalism and the technical quality of the judicial process. This approach absolutely promotes the speed of the proceedings, and from official statistics we can conclude that efficiency in Chinese civil justice is not low but in fact very high. However, high efficiency in Chinese civil justice does not simultaneously enhance the legitimacy of the administration of justice; rather, it leads to the paradoxical phenomenon of high efficiency but low legitimacy.[5] A leader of the Supreme People's Court has anxiously pointed out that 'the public's lack of trust in the administration of justice has gradually developed into a general social psychology, and this is a horrible phenomenon'.[6] Additionally, one of the civil procedure scholars concerned about the core values of 'fairness and efficiency' has called for 'slower but better'[7] civil

[2] See the speech delivered by Deputy Chief Justice Xi Xiaoming of the Supreme People's Court at the 2011 Annual Conference of China's Civil Procedure Society.

[3] *Ibidem*.

[4] Although under the Civil Procedure Law all four levels of people's courts have first instance jurisdiction (original jurisdiction), the number of cases accepted by the Supreme People's Court and the High People's Court is very limited; thus heavy caseloads and the strain they put on the limited number of judges can especially be observed in the local and intermediate courts. See *Several Opinions on Improving the Infrastructure of the Local People's Courts under the New Circumstances* issued by the Supreme People's Court, available at: http://www.110.com/ziliao/article-202038.html (last consulted on 30 May 2013).

[5] See the contribution of Yaxin Wang and Yulin Fu, Chap. 2 in this volume.

[6] See Sheng Deyong, 'The Public's Lack of Trust in the Administration of Justice has Gradually Developed into a General Social Psychology', available at: http://www.china.com.cn/policy/txt/2009-08/19/content_18362992.htm (last consulted on 27 July 2013).

[7] Li Hao 2010.

justice. Therefore, it is a matter of urgency to strengthen case management, to use judicial resources reasonably, to reduce heavy caseloads and the strain they put on the limited number of judges, to promote the quality of justice and to construct a fair and efficient judicial system. And in fact in recent years the judicial system has explored proactively the possibilities to strengthen case management so as to actively respond to the worsening situation described above.

Case management in China originated from judicial administration and organisational management. In January 2008, the Supreme People's Court issued the *Guiding Opinions on Case Quality Evaluation (Test Implementation)*. This established indexes for case quality evaluation: judicial fairness, judicial efficiency and effectiveness (it also established 33 further and more specific indexes).[8] The leaders of the Supreme People's Court also paid much attention to case management. At the end of 2010, at the National High Courts Presidents Conference, the Chief Justice of the Supreme People's Court addressed the need 'to establish and improve the case management systems through a series of quality evaluations, case examinations, process management, rewards and punishments, supervision and guidance, etc., as well as [the need] to promote a more standardised, scientific and informative trial management'.[9] At the beginning of 2011, the Supreme People's Court published *Several Opinions for the People's Courts on Reinforcing Case Management*, which created a specialised case management office. The Court provided that this office would be in charge of the daily affairs of the trial committee, trial proceedings management, case quality evaluation, trial analysis, etc. In March of the same year, the Supreme People's Court formally published the *Guiding Opinions on Case Quality Evaluation* and added a few amendments to the case quality evaluation indexes that had been used on a pilot basis for a period of 3 years by then.[10]

Under this stimulus, up to the end of 2011, 31 high courts and 1,369 local and intermediate courts had created specialised case management offices. This accounted for 39.3 % of the total number of courts in China. For those courts which did not create case management offices, the trial supervision divisions took up the role of case management office. According to a report by the Case Management Office of the Supreme People's Court, the creation of specialised case management offices has led to a new approach to trial management. It has also integrated decentralised case management functions and laid down the foundation of the case management systems of the people's courts.

[8] See Guiding Opinions on the Evaluation of Case Quality (Test Implementation), available at: http://wenku.baidu.com/view/eb0b4ffd700abb68a982fb0e.html (last consulted on 20 June 2013).

[9] 'Important Speech of Wang Shengjun at the National High Court Presidents Conference in Beijing', available at: http://www.court.gov.cn/xwzx/fyxw/zgrmfyxw/201012/t20101220_12360.htm (last consulted on 3 May 2013).

[10] The Supreme People's Court has published *Guiding Opinions to Improve the Case Management System*, available at: http://www.zjdpc.gov.cn/art/2012/6/25/art_791_77413.html (last consulted on 27 June 2013).

3.2 Overview of the Indexes for Evaluating Case Quality

The creation of specialised case management offices, increasingly spread across the various levels of courts, and the establishment of indexes for case quality evaluation are a reflection of the determination and action of China's judicial system to strengthening the efficiency of case management, as well as a response to the on-going development of case management in other jurisdictions. The Supreme People's Court highly recommended the indexes for case quality evaluation, and argued that these indexes 'have become the "baton" of strengthening case management for courts in China. They are also the "health form" for case trial and enforcement, and are of great importance for promoting the trial, the enforcement of quality and social and economic development.'[11] Officials from the Supreme People's Court argued that judicial statistics of courts throughout the country relating to the pilot of the case quality evaluation system in the previous 3 years reflected that the key indexes for case quality continued to improve, with the key indexes of judicial efficiency and effectiveness improving significantly: for example, the rate of cases *not* proceeding to appeal continued to increase, and the rate of cases in which judgments were amended or in which they were remitted for retrial by the second instance courts decreased. This indicated that the quality of first instance judgments had been enhanced. In addition, the number of cases that were finalised within the applicable time limits continued to increase. This indicated that judicial efficiency had been enhanced. Moreover, the number of cases settled by mediation or withdrawn after mediation increased substantially, and complaints and petitions clearly decreased, indicating that case quality and public trust in the Chinese civil justice system had also been enhanced.[12]

In the author's opinion, however, whether the specialised case management offices have enhanced the quality of and public trust in the Chinese civil justice system – as indicated by the indexes for evaluating case quality and procedural efficiency – remains to be seen. Even if the requirements of the case management system have been met, maybe this only reflects on the performance of the courts with regard to procedural fairness and efficiency, but not on the substantive requirements of the law. In addition, the legitimacy of the Chinese civil justice system and the public confidence in it are not solely determined by indexes: the perceptions and opinions of the parties involved, of the legal representatives and of people from different sectors of society, who all witness the operation of the civil justice system, should not be ignored. With regard to all of the indexes established by the Supreme People's Court for evaluating case quality, the internal high marks and appreciation of the judicial system, and also the appraisal of the mass media, do not represent the views of the general public and the legal profession. This can easily be concluded from the drastic contrast between the high self-appraisal of the courts and the plain

[11] *Ibidem*.

[12] *Ibidem*.

social image of Chinese civil justice. Therefore the truth concealed behind the data cannot be ignored. What also cannot be ignored is that the social perception of judicial fairness and efficiency has not improved, but in fact worsened. So as to promote our understanding, in the following I will proceed to discuss (1) the jury trial rate regarded as an index of judicial fairness, (2) the mediation rate as an index of effectiveness, (3) the usage rate of the simplified procedure as an index of judicial efficiency and (4) the percentage of cases that are finalised within the applicable time limits.

3.2.1 The Jury Trial Rate as an Index of Judicial Fairness

For the judicial fairness index, the jury trial rate at first instance is one of the key sub-indexes for assessing whether the trial was fair or not. As jury trial (i.e. trial involving assessors) is regarded as an important mechanism for the public to participate in judicial adjudication, to promulgate judicial democracy and to promote judicial fairness, the jury trial rate is designed to be an index closely related to the judicial fairness index: an increase in the jury trial rate at first instance means that judicial fairness at first instance also increases. As the introduction to the *Decision on Improving the People's Jury System* (hereinafter the *Jury Decision*) by the 10th Standing Committee of the National People's Congress in 2004 stated, jury trial in civil practice was revived rapidly, and the number of jury trials in local courts increased greatly. Based on an analysis of court statistics and a survey on the number, level of education and background of people's assessors and their role in practice, the supreme legislative branch and the judicial branch argued that the *Jury Decision* was generally enforced well, that the people's jury system had already become 'a key element in the fair, authoritative and efficient Socialist justice system' and that it was 'a necessary element for building a harmonious society'.[13] However, some empirical studies and media reports did not agree with this 'generally enforced well' conclusion: they noted that perhaps the people's jury system was indeed beautiful, but only on the surface, because actually there were many problems in enforcing the people's jury system, which had 'functionally dissimilated' to some extent, from a judicial supervisor to a judicial assistant, and played the role of 'supplementing human resources, mediators and knowledge suppliers'.[14] So, the key problems are *how* the people's jury system is implemented and *how* the jury trial rate is calculated. What needs special attention are the phenomena of professional assessors, permanent assessors, their 'accompanying rather than trying' attitude and the assessor's participation in two simultaneous court hearings.

[13]On media reports that the *Jury Decision* was generally enforced well as put forward by the supreme legislature and the supreme judicial branch, see Chen Yonghui 2007; Shi Ying 2008.

[14]Peng Xiaolong 2011.

According to the author's interviews with judges from Guangdong and other regions, in quite a few courts the people's jury system is not used for the right reasons; it rather serves the self-interests of the judges. Since some cases must be tried according to the ordinary procedure and heard by a collegial panel, and given that the number of judges is limited, assessors are brought in to make up the collegial panels. With regard to the questions of whether assessors are allowed to become part of a collegial panel and which assessor should be allowed to become part of such a panel, all are determined by the court. Sometimes an assessor is a member of two different collegial panels, sitting in two different courts and hearing two different cases at the same time. In this situation, the assessor may be compelled to quit one court, even though the case has not been concluded, to attend the other court. What may be worse is illustrated by what one of the author's lawyer friends, after receiving a judgment from a court, related to her about one of his cases: It was a property dispute concerning parties from Hong Kong that had to be heard and tried by a collegial panel, and an assessor's name was printed on the judgment; but from the beginning to the end of the proceedings, no assessor and no judge of the panel could be seen in court, but only the presiding judge who heard the case all by himself. Apparently, it was not necessary for all members of the 'collegial panel' to show up in court.

I believe that this case would be counted as a jury trial case in order to increase the jury trial rate and to promote the judicial fairness index accordingly. But from the viewpoint of the parties and the public, in cases like this there is no true substance to the assessor's participation, the court hearing is hasty and careless, and judicial fairness is not enhanced but hindered.

The above situation of the people's jury system reflects another ubiquitous, serious problem of the Chinese civil justice system in practice – the deformation and dissimilation of the collegial panel. In recent years there has been a trend towards simplifying the application of the ordinary procedure, and the underlying key problem is that the panel exists in form only, but the *unus iudex* in practice. Although the Civil Procedure Law provides that the ordinary procedure must be applied by the collegial panel, and that the principal judge (not the presiding judge) is in charge of the case, the principal judge dominates the trial and the decision of the case. This is why in practice there is usually only a principal judge in the courtroom, the other panel members being absent. The author herself along with quite a few parties and legal representatives have had the experience that the legal documents served by the court stated that the case would be tried by a collegial panel, but that at the hearing the principal judge announced that the other panel members (judges and assessors) were busy with other work and could not participate in the hearing. Since the parties could not blame the judge in public, they complained in private that their case had been set for a collegial panel, but that the court hearing was only attended by the principal judge, the other two judges or assessors not being able to appear in the courtroom due to 'certain reasons', whilst their names were printed on the judgment. Consequently, the parties could not understand how the other two judges or assessors, who had been entirely absent, could claim any role in the trial.

According to a court survey report, judicial power is increasingly centralised in the principal judge; 24 % of the judges interviewed said that only a few difficult and significant cases would be discussed by the panel. Some judges even said that most cases were not sent for panel discussions at all or that the panel discussion existed merely in form. In addition, 33.5 % of the judges interviewed indicated that their primary opinions were to a certain extent based on the principal judge's report.[15]

To sum up, information from both the parties and the courts has proved that the people's jury system is formalised in its practical application, and the collegial panel exists only in form whilst the sole-judge system exists in essence. Therefore, the high jury trial rate does not necessarily result in the conclusion that judicial fairness has been enhanced, and it probably conceals the reality of the 'accompanying rather than trying' attitude of the assessors and the 'panel in form whilst sole judge in essence' approach that harm procedural guarantees and damage the level of fairness of Chinese civil justice.

3.2.2 The Mediation Rate as an Index of Effectiveness

Court-annexed mediation in China's civil justice system has a typical Chinese character. Briefly, court-annexed mediation in China is a way for the parties to resolve their dispute through negotiation in court proceedings presided over by the judge in charge of the case. Court-annexed mediation is regarded as a way for the court to exercise its judicial power. The Civil Procedure Law not only makes court mediation a fundamental principle of law, but, in a special chapter, also institutionalises it along with, for example, the mediator, mediation principles, the mediation process and the legal validity of the mediation agreement. Comparatively speaking, provisions for the settlement of lawsuits are frail in the Civil Procedure Law, Article 51 of which provides that 'the parties may settle on their own', whilst the requirements for the settlement of a lawsuit and its legal validity are not stipulated. The Supreme People's Court's judicial interpretation treats the settlement of lawsuits effected by the parties as court-annexed mediation, providing that in cases 'where the parties concerned reach a settlement agreement by themselves during the process of litigation, the people's court may, on application of the parties concerned, confirm the settlement agreement in accordance with the law and issue a mediation statement.'[16]

The Chinese policy of building a harmonious society provides an opportunity for the revival of mediation in China. Under a national policy which strongly encourages mediation, decision makers in civil justice attach an ever greater importance to mediation, promote the 'mediation movement' and in 2008 explicitly

[15] Li Hao 2010, p. 938.

[16] Art. 4 of Provisions of the Supreme People's Court on Several Issues Concerning the Civil Mediation Work of the People's Court.

changed the name of their programme from 'Combination of Mediation and Adjudication with Proper Mediation and Adjudication' to 'Mediation as Priority'. Meanwhile, the Supreme People's Court has included the mediation rate in the indexes for evaluating the effectiveness of the Judiciary in its relevant case management documents, and the various levels of courts have refined the relevance of these indexes by taking them as a point of departure when evaluating judges and courts in their assessments at the end of the year as well as when selecting senior judges. This stimulates the judges to actively (perhaps excessively) increase the mediation rate. In some regions, this mediation rate has acquired a predominant role under the name of 'innovation', and courts in a few regions even initiate 'none-judgment campaigns', which results in judges viewing mediation as a mandatory step in litigation, consciously or subconsciously, and persuading or even threatening the parties to mediate. To avoid being criticised, judges usually do not use explicit mandatory language, but use implicit terminology having a mandatory meaning to exert pressure on the parties.[17] The parties that understand the judge's language are forced to cooperate with him and to accept mediation. However, this usually gives rise to the parties later regretting having cooperated in mediation. For example, according to a survey of 784 cases brought by way of petition, the parties in 279 cases (i.e. 35.59 % of the cases) complained about the judges' mandatory approach to mediation. Mandatory mediation also leads to more difficulties in the enforcement of coerced-mediation agreements than in the enforcement of judgments, and the rate of petitions for retrial of cases resolved by way of mediation is higher than that for the cases decided by way of a judgment. All this indicates that judges pursue mediation and ignore the effects of it.[18] If we comprehensively evaluate the effects of mediation on the final disposition of cases, the results are limited. Zhang Jiajun, a civil procedure scholar, after conducting serious empirical studies on the mediation rate in civil procedure, pointed out that the negative effects of the mediation movement are becoming more and more apparent in judicial practice, and that China should re-examine mediation and revise it accordingly.[19]

The author of the present contribution appreciates Zhang's argument. Chinese policies in civil justice and the case quality evaluation system should abandon the excessive pursuit of mediation, recognise and follow the laws of civil dispute resolution, and deal with the relationship between 'mediation' and 'settlement' in a correct manner. In the author's view, on the one hand, the current mediation system should be dismantled, and mediation should be organised as an alternative dispute resolution mechanism prior to litigation; on the other hand, a system for the friendly settlement of lawsuits should be established, the right of the parties to settle should be institutionally safeguarded and the principle of court-annexed mediation provided by the current legislation should be replaced by the principle that 'judges shall promote the parties to settle their dispute'. As to the issue of consensual dispute

[17] Xiao Jianguo and Huang Zhongshun 2011, p. 72.

[18] Zhang Jiajun 2012, p. 44.

[19] *Ibidem*.

resolution, the attention should be focused on negotiation and cooperation between the parties, stimulate the parties to negotiate a settlement rather than be involved in reaching a mediation agreement passively, increase the level of collaboration of the parties during dispute resolution – all this in order to enhance the positive effects of dispute resolution.

3.2.3 The Simplified Procedure Usage Rate as an Index of Judicial Efficiency

According to the Civil Procedure Law, the simplified procedure is applied in local courts to hear and try uncomplicated cases. Although the Civil Procedure Law has always considered the ordinary procedure and the collegial-panel system the normal approach in first instance cases, and has explicitly limited the scope of the simplified procedure and the single-judge system, it is a known fact that local courts in China have expanded the application of the simplified procedure. As a local court president once stated, in China's local courts, the relationship between the collegial panel in ordinary procedure and the single judge in simplified proceedings can be described as the '80-20 rule', that is to say, only 20 % of all the cases are heard by the collegial panel in the ordinary procedure, and the remaining 80 % are heard by the single judge in the simplified procedure.[20]

As to whether to apply the simplified procedure or not, it is not a matter of the parties' choice, but an issue decided by the court, and the court has almost absolute control over this decision. This also appeared where the author of the present contribution attended a conference on the national court system where a guest speaker, a professor from Tsinghua University, related the following case in which he had been the legal representative for one of the parties. This party argued that the dispute was highly controversial and required the court to form a collegial panel and apply the ordinary procedure. However, the court paid no attention to him and applied the simplified procedure instead, arranging for a single judge. In reaction to this, the party appealed to the intermediate court, but the second instance court did not recognise his ground of appeal, and decided that the facts had been clearly ascertained and the laws had been correctly applied. The intermediate court then dismissed the appeal and sustained the original judgment. As regards the issue concerning the application of the simplified or the ordinary procedure raised by the Tsinghua professor, most of the judges attending the conference considered this to be an issue within the discretion of the court, whereas the parties' preferences were irrelevant.

A shocking case, which took place in Sihui City of Guangdong Province, is closely related to the increasing number of cases in which the simplified procedure is used. A married couple acted as defendants in a case concerning a debt. They did

[20] See the record of the 2010 Annual Procedural Law Conference at the Guangdong Legal Science Society.

not appeal after receiving the first instance judgment, but went to the entrance of the court and committed suicide by taking poison. In this case the existence of the debt was highly controversial. In addition, the defendant couple had persistently stated that they did not know the plaintiff and that the IOU (i.e. an informal document acknowledging debt) had been signed by force under threat of their daughter's former boyfriend and the plaintiff who, armed with knives, had broken into their house. A case so fiercely contentious ought to have been tried by using the ordinary procedure, but the court insisted on applying the simplified procedure and allowed the case to be tried by a single judge who soon decided that the defendants should repay the allegedly borrowed money to the plaintiff. According to relatives of the defendants, the reason that the defendant couple did not appeal was not that they accepted the judgment but was due to their despair caused by the judgment, the injustice of which they chose to fight by means of suicide. Subsequently, the judge who had tried the case was publicly prosecuted by the procuratorate on suspicion of committing the crime of dereliction, which raised debate between the court and the procuratorate; although eventually the judge was not convicted, he was dismissed from the court, becoming a victim of the expansion of the simplified procedure.[21] However, this tragedy was like a stone dropped into a pond. With a splash it broke the peacefulness of the still water and the ripples spread outward; but the water calmed quickly, and the tendency to favour the expansion of the application of the simplified procedure remained as before. As reported, in recent years Haidian District Court in Beijing accepted and finalised more than 50,000 cases per year, with every judge finalising about 300 cases per year. The number of cases being finalised by the deputy chief justice of the Hongqiao Law Division was the highest, with 1,134 cases in 2008 and 1,038 cases in 2009. There were also three judges who finalised more than 1,600 cases in Dongguan No. 1 Court in Guangdong, with the highest number of these being 1,924 cases.[22] The judge who finalised the highest number of cases in Yiwu Court in Zhejiang Province once heard more than 10 cases in a single day, and a senior judge in that same court more than 20 cases in 1 day. This record was later surpassed by another judge who heard 35 cases in a single day.[23]

Every court hearing is set on a tight schedule, and consequently a very busy judge does not have much time to listen patiently to the parties' statements. The judge may even have to interrupt or forbid arguments because he must close the court hearing on time so as to prepare for another court hearing. Thus, the usage rate of the simplified procedure increases and cases are finalised within the relevant time limits, or even in a much shorter period of time. However, quantity never ensures quality, and even the judges themselves know this quite well. For example, in the Liaoning Province court system in 2009 a front-line judge finalised 410.4 cases on

[21] 'The Mo Zhaojun Tragedy: Defendants Losing their Case and Committing Suicide and the Accused Judge not being Convicted in First Instance Criminal Proceedings', available at: http://www.kaixin001.com/repaste/11747837_14198953.html#relation=parent&message=%7B%22loginprobe%22%3A1%7D&_=0.5245289303232721 (last consulted on 23 June 2013).

[22] Ma Shoumin 2010a, p. 5.

[23] Li Hao 2010, pp. 934–935.

average per year, with the highest number of such cases being 962. When asked how he could assure quality when handling so many cases a year, he tellingly asked: 'Is it worth pursuing efficiency at the expense of quality?' The judges interviewed by me invariably admitted that problems did exist.[24] Additional communications with local court judges in recent years also verify this view.

The Civil Procedure Law provides the scope for the application of the ordinary procedure, the simplified procedure and the relationship between both procedures. However, because the number of cases brought to the courts is so large and the law and the case quality evaluation system require that all cases must be finalised within the relevant time limits, expanding the scope of the simplified procedure has become a priority for the courts in order to avoid unfavourable appraisals caused by violating time limits and to enhance the evaluation data. Even in the internal assessment procedure for the court system, expanding the scope of the simplified procedure is not used as an indicator for violations of the procedural law but as an assessment index for efficiency. Expanding the scope of application for the simplified procedure is considered to be the best choice among the limited choices for local courts in this area. However, from an objective point of view, this expansion may be described as 'drinking poison to end thirst'. Early in 2003, the *Reports on Civil Procedure Reform* issued by the Supreme People's Court already admitted that 'the provisions and application of the simplified procedure by the local courts in various regions have positive consequences for civil dispute resolution. They also perform a supplementary function given the slowness and shortage of legislation and judicial interpretations. However, in the long run these measures go against the legal rules and the rule of law.'[25] It is therefore a disappointment that the recent amendments to the Civil Procedure Law in 2012 did not counter the above problems, and along with the negative consequences of the quality evaluation system, the present situation will therefore be difficult to change.

3.2.4 The Closing Rate of Cases Within the Legal Time Limits

The time limitation system provides explicit time limits in civil and commercial cases. This system is designed to guarantee the parties' right to an efficient trial, prevent court delays and ensure judicial efficiency as well. The Civil Procedure Law provides for the time limits for first and second instance proceedings. In the ordinary procedure cases should be finalised within 6 months after the case has been accepted by the court. As to appeals in cases challenging the original judgments, the second instance courts shall terminate the case within 3 months after its acceptance by the court. Given that there may be reasons for exceptions in complicated cases, the law provides that in first instance proceedings a 6-month extension of the relevant time

[24] Li Hao 2010, p. 942.

[25] Survey Group of the Supreme People's Court 2003, pp. 9–10.

limit may be given upon approval of the president of the court where this is necessary for specific reasons. Any further extension must be reported to the superior people's court for approval. As for second instance proceedings, the law provides that any extension of the time limit for special reasons shall be subject to the approval of the president of the court. What is more, given that there may be complicated issues in cases with foreign aspects, the provisions in the Civil Procedure Law state that the ordinary time limits shall not apply for handling civil cases involving foreign elements by the people's court.[26]

The closing rate of cases within the relevant time limits is a key index in the court quality evaluation system in order to assess judicial efficiency; leaders of various levels of courts all pay great attention to the data indicating the number of cases being closed within the legal time limits. This is a direct driving force for speeding up civil and commercial cases. From the data published by the courts, the closing rate within the legal time limits is high: for example, in 2010 China's courts accepted 6,090,622 first instance cases and closed 6,112,695 of such cases (including a number of cases that had been accepted in the previous year), and up to 95 % of all the cases were closed within the relevant time limits. The Supreme People's Court accordingly concluded that 'the closing rate of cases within the legal time limits continues to increase, and this indicates that judicial efficiency has been enhanced.'[27]

However, in my opinion, it is too simple to conclude that judicial efficiency is enhanced based upon an increase in the closing rate within the legal time limits; there exist less favourable stories behind this high closing rate. A few years ago, an annual report submitted by the Guangdong High People's Court to the Guangdong People's Congress stated: 'Quality and judicial efficiency have been further enhanced, and 99.85 % of all cases can be finalised within the applicable time limit.' As a provincial congress representative at the time, the author of the present contribution was sceptical of the truth of this high finalisation rate and therefore exercised her right to inquire whether the time for the court president to approve the draft judgment was covered by the relevant time limit. The court answered that the time for the court president to approve the draft judgment was not covered; as to cases that could not be closed within the relevant time limit due to the time needed for approving the draft judgment, postponements would be granted with the court president's permission under the Civil Procedure Law. The court also held that the number of times a case could be postponed was not limited and the postponement was not regarded as contravening the relevant time period but as abiding by the relevant rules. Here an obvious loophole in calculating the time limits is exposed. Under the applicable statistical methods, no matter how long the time period for the court president to approve the draft judgment is, it would not be counted as part of the relevant time period. Therefore, even postponements seriously delaying cases

[26] See the provisions on time limits for first and second instance civil proceedings and civil proceedings involving foreign aspects in the Civil Procedure Law.

[27] The Supreme People's Court publishes *Guiding Opinions to Improve the Case Management System*, available at: http://www.zjdpc.gov.cn/art/2012/6/25/art_791_77413.html (last consulted on 27 June 2013).

caused by internal administrative affairs of the court such as the time needed for court president's approval would not affect the rate of closed cases, and that was why the court could publicly proclaim that its closing case rate within the relevant time limits was up to 99.85 %. During this annual session of the people's congress the author learned about the problem of court delays from letters and telephone calls from citizens, and of fraud in calculating the closing rate of cases within the time limits, also through letters and telephone calls of judges. In later years, the annual reports submitted by the Guangdong High People's Court to the Guangdong People's Congress for deliberation no longer included the closing rate of cases within the time limits.

On the basis of the expansion of the application of the simplified procedure, we may conclude that an overly speedy process usually goes along with fewer procedural guarantees and lower quality. Although a speedy process enhances judicial efficiency, the cost is inferior quality and an unfavourable situation for enhancing public trust in Chinese civil justice. From the perspective of the effectiveness of adjudication one could say that 'haste makes waste', and the results are just the opposite of what one wishes for. Taking all this together with the high appeals rate, the many complaints and the high number of petitions by letters and visits, one cannot ignore the negative effect of a highly efficient but low-quality administration of justice, and this is the reason why scholars have advocated a civil justice reform that introduces slower but better justice.

There is another aspect concerning the high rate of closing cases within the time limits that deserves attention. Due to internal and external procedural influences, a few cases are greatly delayed, preventing a final decision. Through procedural techniques administered by the court, these cases escape the time limitation mechanism, which makes this mechanism virtually useless for these cases, and this has negative consequences. Not long ago, when talking about this problem with the director of the case management office of an intermediate court, the director quoted the '80-20 rule' and told me frankly that, comparatively speaking, through the case management mechanism his court could control about 80 % of cases with better case management techniques, but for the remaining 20 % the case management mechanism was useless due to so-called 'Chinese characteristics'.

The author of the present contribution immediately understood what he meant. The following example may serve as an illustration. The case concerns an intellectual property contract dispute in which a famous university and its affiliated middle school were the plaintiffs and a Hong Kong company the defendant. From the filing of the lawsuit to enforcement of the judgment 10 years passed. The first instance proceedings in the case lasted more than 3 years, and the appellate trial lasted nearly 1 year. After deliberation, the collegial panel of the appellate court submitted its draft judgment to the competent deputy court president for approval, but the approval process lasted half a year without an outcome. This enraged the parties, who then filed petitions to a large number of government offices. Not until the local people's congress and the mass media focused on this delayed case did the competent deputy court president present the case to the judicial committee, and the appellate court finished the case according to the judicial committee's decision. In this case, the

time limitation mechanism seemed like a mirage and exerted no institutional influence on the proceedings. The court explained later that its procedural starting point had been Article 2 of the *Rules for Strictly Abiding by the Time Limits for the Hearing of Cases and Enforcement*, set forth by the Supreme People's Court, which reads in pertinent part that 'the time limits for cases related to Hong Kong, Macau and Taiwan shall be based on the provisions for cases involving foreign aspects', and thus treated this case as not being controlled by the time limitation mechanism for Chinese cases. That is to say, no matter how long these cases lasted, no time limits would be regarded and, therefore, the time limits in these cases are 'unlimited' rather than 'limited'. Since the basis for this approach was a Supreme People's Court's judicial interpretation, court delays have their basis partly in such judicial interpretations. What is ironic is that this judicial interpretation of the Supreme People's Court was provided for in a document aimed at advocating strictly abiding by the time limits for the hearing of cases and their enforcement. The purpose of 'enhancing judicial efficiency and ensuring judicial fairness' was clearly stipulated at its very beginning.

3.3 Thoughts and Analysis

From the above discussion it may be concluded that there are some hidden problems in the current Chinese case management system.

3.3.1 The Case Quality Evaluation System and the Courts' Pursuit of Excellence

The case quality evaluation system currently under construction not only concerns the performance of the courts, but also involves opinions on the courts' work from the people's congress, the party committee, and so on, i.e. bodies outside the judicial system. Every year there are various 'first in excellence' campaigns, and the courts at various levels must submit their annual report to the relevant people's congress for deliberation. To gain a high appraisal, an advancement in ranking and the relevant benefits from inside and outside of the judicial system, some courts even try to enhance their indexes by way of fraud. A secretary of one local court's president once told the author of the present contribution that the court president had earlier been the deputy president of another local court. There he had been in charge of civil justice and thus was quite clearly aware of the situation at that court. Now, when he reviewed among other things the jury trial rate and the mediation rate of that court, he found himself faced with a dilemma because these data were far from true. However, if he revealed the truth, the appraisal of his own court would also be negatively affected. Such fraud will obviously discount the legitimacy of the court system.

The author of the present contribution once interviewed more than ten judges and found that most of them did not have confidence in the truth of the data in court reports. These judges also complained about data used in the evaluation of judicial fairness and efficiency. One judge even told the author that in order to enhance the rate of closing cases in time, his boss at the civil trial division had explicitly asked him to count cases as closed even though this was not the case. Although he had to follow the orders of his boss, he felt uncomfortable with it. At a recent academic conference, a local court's president told the audience that although the superior court had explicit requirements as regards the mediation rate, in his work he focused more on procedural principles. He was of the opinion that in cases where mediation appeared to be impossible, mandatory mediation should be forbidden and final court decisions should not be delayed. This president tried to reduce the influence of the mediation rate. He also added with humour that, 'Where there is a superior policy, there is an inferior countermeasure. He [the judge] can always take such an inferior countermeasure'.[28]

In communications with judges, the author also finds that the current case quality evaluation system increasingly produces evaluations and an organisational culture which highlight the performance of the courts and their judges. This system and the accompanying organisational culture substantially affect the judicial work of the court leaders. The front-line judges now more often than before directly feel the stress from struggling with the internal case quality evaluation system. According to these judges, most judges still have to adapt themselves to the evaluations and organisational culture which highlight their performance. Nevertheless, judges pay more attention to among other things perceptions of time limits, efficiency and mediation in their work, and they are motivated by rewards and promotions aimed to improve their performance. Several judges under the supervision of the author as postgraduate students received rewards and promotions because they performed their work well and ranked at the top in their courts with regard to the mediation rate, the rate of closed cases, etc. Working overtime everyday forced them to abandon normal family life to some extent and led to persistent work-related stress, but rewards and promotions made them feel that their hard work was affirmed and appreciated. However, what the author heard even more from judges was that they felt hopeless in that they could not handle cases independently. Their grievance was also that they usually worked overtime but got little social recognition for this. This was coupled with a lack of professional pride and a sense of not being held in public esteem. This contrasts sharply with the situation of judges abroad and in regions such as Hong Kong and Taiwan.

It should be noted then that the practice of combining the case quality evaluation system with the 'first in excellence' campaigns in the court system and of making the former a key index for the latter has resulted in data being untruthful. Therefore, in order to ensure the normal functioning of the case quality evaluation system, it is

[28] See Record of the 2010 Annual Procedural Law Conference of the Guangdong Law Science Society.

necessary to examine the truth of the relevant data, and we should pay attention to how these various data are linked to rewards. Moreover, one ought to be mindful of the fact that judges have to work overtime as a result of the current case management system. Otherwise the case quality evaluation system will gradually go farther astray in practice, stimulate fraud in the judicial system, do harm to the sustainable development of the judges and be unfavourable to the promotion of judicial fairness and efficiency in China.

3.3.2 Change of Focus from Promoting Efficiency to Enhancing Quality

From the perspective of comparative civil justice, case management movements in the main Western countries concentrate on the promotion of procedural efficiency. For China, however, another point needs special attention – the enhancement of judicial quality. The limits of the current Chinese civil procedure law hinder the improvement of the case management system to some extent. As plural dispute resolution mechanisms have not been established in the civil procedural legislation, it seems to be hard for the courts to find effective case handling schemes when facing heavy caseloads, and this leads the courts to the old approach of expanding the application of the simplified procedure and to simplifying the structure of the ordinary procedure. What cannot be ignored is that high efficiency comes at the cost of judges complaining about frequent overtime work and the parties complaining about the lack of procedural guarantees in Chinese civil justice.

During the author's interaction with local judges she heard quite a few times the complaint that they worked as trial machines that operated throughout the year at an ever higher speed even though cases could never be entirely completed and thus they could not meet the requirements of, for example, a speedy trial and high mediation and case closing rates. This situation not only made them feel fatigued mentally and physically, but also made them feel that it was difficult to enjoy the working life of a judge. Therefore, at a time when many unsophisticated young lawyers are trying their best to enter into the court system to work as judges, experienced and mature judges are beginning to choose to retire from the court system. A survey shows that in the past 5 years, China has lost 14,000 judges, which represents 7 % of the total number of judges, and this has resulted in a shortage of judges.[29] This trend is continuing. In Guangzhou, attention has been paid to the loss of judges in the local and intermediate courts. A judge in the front line in a Guangzhou local court recently told the author that of the more than 60 judges who personally handled cases in his court, every judge tried more than 300 cases per year. Under such persistent work pressure, just last year alone 13 front-line judges left the court, some went abroad,

[29] Ma Shoumin 2010b, p. 5.

some started work as lawyers and many others became civil servants elsewhere. He also admitted that he, too, was thinking about 'his next step'.[30] Following an interview with one judge, a newspaper journalist reported that 'under the stress of both caseload and case quality, all the judge thinks of are cases, even in his dreams. Once in his office, he has to engage in his duties without any breaks, and the pressure he feels is highly intense throughout the entire time at work. Sometimes he becomes wild-eyed just looking at case materials, and he may even have entertained thoughts of committing suicide.'[31]

The parties form their impressions and assessments of the court through their participation in litigation and contact with the judge handling their case. They hope that the judge will treat their case as a good doctor treats his patients, that the judge will pay genuine attention to their dispute and determine and decide their case seriously. However, it appears to be difficult for a busy judge to arrange sufficient time for the parties. The acceleration and simplification of procedure does not make the parties feel that their dispute is being handled efficiently, but rather that their litigation rights are not genuinely being treated with respect, and that the judgment is hasty and unjust, and even that there is judicial corruption.

And precisely because of that some scholars have already claimed that the Chinese civil justice system is not too slow but too quick, and that procedure is not too complicated but too simple. Although speed is necessary, the time limits required by the law, the high efficiency required by judicial policy and the case management system with a key index on whether cases are finalised within the relevant time limits lead to overwork and an overly simplified procedure. And from the perspective of 'efficiency', Chinese civil justice is highly efficient, but this high efficiency comes at the cost of the parties' complaints that the court does not provide adequate procedural guarantees, and the social perception that quick civil justice is not 'fair, authoritative and efficient', but 'fast, of poor quality and lacking credibility'. As to the results, going too far is as bad as not going far enough, the loss outweighs the gain. As for adjudication, 'justice delayed is justice denied', an overly quick administration of justice is also injustice, the promotion of procedural efficiency has a limit and should not be at the cost of the parties' right to an efficient trial and procedural guarantees. Therefore, one should rethink the high efficiency of the Chinese civil justice system which is the result of the simplification of the ordinary procedure and the expansion of the application of the simplified procedure and related costs, and one should never be deaf to the advice of scholars who hold the view of 'rather slower and better'. As to the overly quick court proceedings, one should slow down in order to bring relief to the judges' overtime work situation and to provide the parties with proper procedural guarantees.

Enhancing case quality in the Chinese case management mechanism is not purely a civil justice issue, but primarily an issue of civil procedural legislation.

[30] See the author's interview notes relating to interviews with judges in the local courts in Guangzhou. These notes can be consulted on request.

[31] Ma Shoumin 2010a, p. 5.

Chinese civil procedural law should be amended to respond to the situation in which simplifying the ordinary procedure and expanding the application of the simplified procedure are as 'drinking poison to end thirst' – caused by outdated legislation, so as to follow the principle of 'distinguishing and pluralism', the integrity principle and the principle of balanced litigation. On the premise of procedural fairness, one should try to save litigation costs for the parties and the State should make the procedure for dispute resolution dependant on the value, importance and complexity of the case.[32] It should establish a pluralistic civil judicial dispute resolution mechanism. The legislation should break through the limitations of the current first instance proceedings, establish an alternative judicial dispute resolution mechanism which is distinguishable from ordinary adjudication by the court as a judicial dispute resolution procedure prior to first instance proceedings, for the purpose of providing a suitable judicial dispute resolution mechanism for a variety of disputes, to give the parties opportunities to choose different procedures and, at the same time, to establish necessary prior filtering procedures for the ordinary first instance procedure. These measures will shift a portion of cases to the corresponding judicial dispute resolution mechanism, reduce the large number of cases and the strain they put on the limited number of judges, alleviate the caseloads of the courts of first instance, reduce litigation costs for the parties and also make the use of limited judicial resources more reasonable. On the other hand, the threshold and requirement of the normal first instance procedure should be increased accordingly so as to give up an abnormal procedural model, to formally establish the procedural structure of 'confronting and determining' along with the modern perception of the rule of procedural law, to make the procedure operate normally with humanity and specialisation, to make the trial power and the right of action interact and restrict each other, to show the necessary respect to the parties as participants in the procedure and give them the necessary guarantees, to change the situation in which judges are overworked, and to ensure the achievement of judicial fairness and efficiency.

3.3.3 The Roles of the Parties and Their Legal Representatives in Case Management

Under the modern understanding of civil procedural law, both the court and the parties have the responsibility to promote litigation.[33] However, as to the case management system currently established in China, the court's case management powers are central, and the parties are just subjects in the procedure; the parties' role in case management is extremely limited. Although the judicial branch in China's political structure has only limited influence, the trial powers of the court are predominant in the existing civil procedure framework which is strongly influenced by China's long

[32] Wang 2008, p. 72.

[33] Shen Kuan-Ling 2010, p. 302.

history of a mandarin-minded tradition. This leads to a very inquisitorial litigation model. As reflected by Chinese case management mechanisms, the attention paid to the role of the litigating parties and their legal representatives as well as their rights is limited. Even enhancing procedural efficiency comes at the cost of reducing the rights of the parties.

The cause of this situation is related to the parties' lack of litigation capacities in civil procedural practice. Although the parties may exercise relevant litigation rights and have capacities in this field according to the law, the role of the parties is normally played out through their legal representatives. In modern civil procedure, in order to guarantee the impartiality and fairness of the adjudicator, the duty of disclosure of facts and the introduction of evidence belongs to the parties. At the same time, given the parties' lack of legal professional skills and practical experience, they cannot predict the operation of the proceedings and cannot assess the impact and results of their actions. Hence, it is difficult for the parties to evaluate the legitimacy of the functioning of the judicial power and to respond accordingly. In response, the law has established the regime of legal representatives because lawyers may act on behalf of the parties and state their case objectively and persuasively through legal reasoning based on information collected in the case, and efficiently submit their allegations to the court.[34] Lawyers may also organise arguments and produce evidence which is favourable to their clients according to the details of the case, and argue in a logical, strict and integrated manner.[35] Therefore, the parties may attack and defend in civil proceedings with courage, prudence and knowledge while being assisted by lawyers. As a result, in the modern civil procedure of various countries the role of lawyers as the representatives of the litigants is a model that may provide the most adequate procedural guarantees.[36] Although the procedural models of the equality of the parties and the impartiality of the court have been introduced into Chinese legislation, the 'confronting and determining' procedural model has not yet been implemented. Legal representatives are not very prominent in civil procedural legislation. Legislation only provides that the parties may (or have the right to) hire someone as their representative for litigation, and it lacks substantial provisions enhancing the parties' litigation capacities so as to guarantee professionalism in litigation. Although lawyers can be hired as representatives according to the law, their qualification requirements are no different from those of ordinary people, and the necessary regulations on professional skills and ethics are lacking. This substantially impedes the development of procedural professionalism. At the same time, the role of the parties in case management is ignored, and without adequate legal representation it will prove to be hard to enhance their role. All of this leads to the general conclusion that China's civil justice system does not function adequately.

[34] Taniguchi 1996, p. 78.

[35] *Ibidem*, p. 79.

[36] *Ibidem*, p. 94.

References

Chen Yonghui (2007) Significant progress in the construction of the people's jury system with a Chinese character. People Court Daily, 4 September 2007 (in Chinese)
Li Hao (2010) Rather slower, but better. Macroscopical thinking about China's civil judicial reform. Peking Univ Law J (6):926 (in Chinese)
Ma Shoumin (2010a) Judges: dancers on sticks. People Court Daily, 12 July 2010, p 5 (in Chinese)
Ma Shoumin (2010b) How judges deal with stress. People Court Daily, 12 July 2010, p 5 (in Chinese)
Peng Xiaolong (2011) Recovery and practice of the people's assessor system: from 1998 to 2010. Chin J Law (1):15 (in Chinese)
Shen Kuan-Ling (2010) Timely trial and case management in civil procedure. Natl Taiwan Univ Law J 39(2):302 (in Chinese)
Shi Ying (2008) The decision on improving the people's jury system has been implemented well. People Court Daily, 2 December 2008 (in Chinese)
Survey Group of the Supreme People's Court (2003) Reports on civil procedure reform. Law Press China, Beijing (in Chinese)
Taniguchi Yasuhei (1996) Procedural justice and litigation (trans: Wang Yaxin, Liu Rongjun). China University of Political Science and Law Press, Beijing (in Chinese)
Wang Fuhua (2008) Remarks on the civil case management system. Leg Forum (2):72 (in Chinese)
Xiao Jianguo, Huang Zhongshun (2011) On implicit language in the court mediation process. Tribune Stud (10):54 (in Chinese)
Zhang Jiajun (2012) An empirical study on the rate of cases settled by mediation in civil procedure. Chin J Law (1):44 (in Chinese)

Chapter 4
From 'Trial Management' to 'Case Management'

Wang Fuhua

4.1 Introduction

In many countries the growing number of civil cases has caused the courts to be overloaded. Yet most governments do not adequately fund their Judiciary. Consequently, the backlog of cases has become a serious problem. The Chinese legal system knows similar problems, but for specific reasons. In China, after the civil justice reform, the case management system, or rather the trial management system, which gives the collegial bench and the judges a higher degree of independence, is used to improve the efficiency of litigation. Regulating the judges' activities is one of the major objectives of the civil justice reform, and trial management in China is largely based on internal court administration and control. Trial management emphasises the administrative functions of the Judiciary. Similar to the case management system in other jurisdictions, the trial management system in China aims at improving the efficiency of the justice system. The Chinese trial management system and related systems in other jurisdictions are, however, completely different in terms of background, approach, goals and assessment mechanisms.[1] There is one short-term and one long-term goal for trial management in China. The short-term goal is to improve the efficiency of the trial. The long-term goal is to make the legal system serve the society more effectively. China is in the process of political and economic reform. The success of this reform will depend greatly on the Judiciary.

[1]The case management system in the modern sense originates in late nineteenth-century Europe, although at the beginning, and for a long period of time afterwards, this terminology was not used to describe the system.

Wang Fuhua (✉)
Shanghai Jiaotong University, Shanghai, People's Republic of China
e-mail: wangfuhua@situ.edu.cn

C.H. (Remco) van Rhee and Fu Yulin (eds.), *Civil Litigation in China and Europe*, Ius Gentium: Comparative Perspectives on Law and Justice 31,
DOI 10.1007/978-94-007-7666-1_4,

4.2 Trial Management or Case Management?

4.2.1 Two Definitions

Trial management has a broad and a narrow definition.[2] The broad definition is the internal administrative management of the court, including the management of court facilities and judges. It can be said that the success of the internal administrative management of the court is the key to determining whether the Judiciary is optimally utilising the available funding. The narrow definition of trial management is case management. This refers to the micro-management of particular cases by judges and the courts. This kind of management mainly involves the categorisation of cases, pre-trial preparation and cooperation between the court and the litigants during the litigation process.

Trial management in China integrates the courts' overall administrative management and case management. The integration focuses on the appraisal of judicial work, the management of the case flow and the control of case quality. From an historical perspective, trial management in China dates from the beginning of the twenty-first century. It was the Shanghai Municipal First Intermediate People's Court that first introduced case flow management. The introduction of this type of management was influenced by the Anglo-American practice of case flow management. The concept of trial management was then widened to include the management and control of different facets of civil procedure such as trial procedure, trial quality and efficiency. Multiple assessment mechanisms have been developed to evaluate judicial work. The assessments cover the length of the trial and the annual case clearance rate.

The reason why the Chinese courts have adopted the unique term 'trial management' is to differentiate their approach from that of Western countries. It is problematic for the Chinese to adopt modern Western ideologies. The Chinese ideology and traditional culture resist foreign systems and concepts. Any usage of terms must be expressed in the vocabulary of the tradition of Chinese culture in order to gain general acceptance. Different from the term 'case management' that has been commonly adopted in Western countries, trial management is a new concept created by the Chinese courts in recent decades. As the concept emerged from the accumulation of the adjudication experience in China, it has become widely accepted in the country. Trial management redefined the value of the traditional Chinese legal system. Although China is a civil law country, the Chinese trial management system is closer to American case flow management – focusing on the control of the litigation process and not merely treating substantive rights as the core. As for trial management in China, all the courts are managed as a whole. Once the case has been accepted, the court is responsible for the management of the litigation process.

[2] Damaska 1997.

Due to a number of factors such as the mode of litigation, the types of judicial cases and the Chinese legal system, trial management in China is totally different from Western case management in various respects.

First, case management in Western countries originates in the adversarial system, whereas trial management in China is connected to the administrative functions of the Judiciary. Although case management and trial management appear to be similar to each other at first sight, they are certainly different.

As stated, Western case management originates in the adversarial system in which the parties must establish the facts and bear the burden of proof. In terms of procedure, the parties have the power to start, continue and withdraw their cases as they see fit. It can be said that originally the Western lawsuit was similar to a game of chess in which only the two players control the game. The referee (i.e. the judge) was not entitled to assist either side. This adversarial system, however, did not bring about the substantive equality of the parties. Quite to the contrary, it could lead to undue delay and a waste of resources. Case management was a significant tool introduced to eliminate such defects.

Secondly, case management focuses on the expansion of the judge's judicial power, while trial management aims to narrow the judge's judicial power. Trial management is closely connected to the role of judges in Chinese society. In modern litigation in China, judges do not only adjudicate, they also execute national policies. In some situations they educate the public, too. Thus they are more proactive. A Judiciary which is capable of proactively managing cases and resolving disputes by way of mediation is better than the traditional adversarial system.

From the perspective of judicial activism, case management extends the power of judges instead of restricting their power. Assessing the judge is never the central issue of case management. In trial management, judges are the main focus. Trial management in China inevitably tends to emphasise the administrative functions of the Judiciary. Against this background, the following situation can be observed in practice: the court president governs the presiding judge, the presiding judge governs the chief judge, the chief judge governs the judge, and so on, with the result that front-line judges only have a small amount of power. The drawback is that under this system the junior judges are not willing to make extensive use of their powers conferred by law. They would rather be conservative and pass complicated cases to their superiors who will give instructions. They do so in order to avoid a bad appraisal of their judicial work. As a result, the trial management system in practice has weakened the independence of adjudication.

4.2.2 How Trial Management Is Assessed

It can be said that trial management in China and case management in other jurisdictions share the same goal – minimising the backlog of cases. But trial management in China has its unique characteristics. In the mid-1990s, the Judiciary needed to respond to the societal needs regarding adjudication, such as shortening the

period of trial while guaranteeing judicial quality. The model of trial management has then been further developed to fit the societal needs. In this context, the Supreme People's Court issued several judicial interpretations, such as the *Guiding Opinions on Case Quality Evaluation (Test Implementation)* promulgated in 2008, together with *Several Provisions of the Supreme People's Court on the Strict Observance of the Case Trial Period (2000)*. These interpretations have further reinforced the trial management system in China.

The latter interpretation expressly confirmed the assessment mechanism for the quality of adjudication. The interpretation provided indices of judicial fairness, efficiency and effectiveness.

The assessment system measures the performance of the Judiciary. It operates in such a way that finalising a higher number of cases provides a higher grade in the assessment. However, from the perspective of justice, the assessment mechanism is problematic. First of all, trial management is pure procedural management, which does not involve substantive justice. The goal of trial management is to enhance efficiency via case categorisation, scheduling, etc. Secondly, the indices assess the administrative functions of the courts. The indices can be described as a reflection of the *status quo* of the civil trial in China.[3] The assessment is made by the superior courts. In order to achieve better grades in the assessment, the lower courts tend to accept all the orders from the superior courts. This has led to some cases which are not suitable for mediation being submitted to the mediation process because the ratio of cases sent to mediation is one of the indices in the trial management assessment model.

Trial management assessment in China does not take into consideration the opinion of the litigants. In other words, litigants have no way to express their opinions or to influence the outcome of the assessment.

4.2.3 The Absence of Assessment Based on Substantive Justice

The civil courts in China exercise their adjudicatory powers as a single whole. The independence of the Judiciary as a whole is generally highly respected. In contrast, the independence of individual judges is restricted and disregarded. The emphasis on indices has significantly impacted on how judges execute their judicial work. For example, the extreme emphasis on the number of cases submitted to mediation has forced judges to use all means to stimulate mediation, even suppressing the litigants' interests or delaying the hearing.

One obvious defect of trial management is that Chinese substantive and procedural laws are not well connected. The reason for this is that trial management stresses the management of judges and neglects the importance of managing individual cases.

[3] See the *2008 Guiding Opinions of the Supreme People's Court on Carrying Out Case Quality Evaluation*.

The extreme emphasis on trial management, especially on indices for assessment, has seriously affected the decisions of the Chinese courts. The trial system has lost its fundamental role to stimulate judgments on the merits of the case. It appears that the quantitative indices, which are used to represent a court's overall performance, determine all issues.[4] The core issue is managing the judges instead of the cases and only the judge's performance is focused on; the management of the case itself is ignored. Certainly, controlling and monitoring the activities of the judge will improve the efficiency of the trial, but at the expense of substantive justice. Case management on both the substantive level and the procedural level does barely exist.

It seems that the major problem of the administration of justice in China does not lie with the introduction of the trial management assessment system, but with the incorrect understanding of the meaning of this assessment system. In a modern society, performance evaluation exists in many different areas. It is, therefore, also reasonable to evaluate the performance of judges. The purpose of the evaluation is to promote the improvement of justice.[5] It should be carried out by a comprehensive committee comprised of judges, lawyers and non-legal professionals. The evaluation standards should target issues such as impartiality, legal knowledge and understanding of the law, communication skills, trial preparation, the accuracy of judgments and monitoring the procedure. Management should be based on full reliance on and respect for the judges. However, the trial management assessment system in China is usually controlled by non-legal professionals. In such a situation, the autonomy of the courts and the judges cannot be guaranteed.

4.3 Who and What to Manage?

4.3.1 Establishing Trial Management Offices

Judges in China are not sufficiently independent. The legal community is not well established either. Trial management embraces a model similar to the hierarchical system defined by Weber, which is a bureaucratic system based on a strict hierarchy.

Up to now, most of the courts in China have set up specific offices that are responsible for the daily routine of trial management.[6] They function as information

[4] For example, the time-frame taken into consideration when assessing the courts and the judges is 1 year. As a result, the filing of cases is stimulated at the beginning of the year and their finalisation at the end of the year. With regard to cases filed at the end of year, the court will persuade the litigants to withdraw them and start them again in the following year.

[5] Huai Xiaofeng 2006, p. 239.

[6] The Supreme People's Court of China set up a trial management office on 23 November 2010. The office is responsible for trial management, management of judicial staff and management of the judicial administration. As of December 2010, 25 high courts, and 900 intermediate and primary courts have set up a special trial management office.

hubs which on the basis of data from cases provide recommendations. Their main duties are: (i) managing trials and managing the assessment system; (ii) setting quotas for assessing trial quality and managing the indices of the trial assessment system; (iii) assessing the quality and efficiency of the judges; (iv) gathering and providing statistics; and (v) allocating cases to judges.

Trial management offices were established to ensure quality and efficiency. Yet, as indicated, under the assessment system courts in China tend to focus on trial management but ignore case management. There is insufficient evidence to conclude that the establishment of the trial management office has improved justice and fairness. On the contrary, in my view trial management produces a series of negative effects.

First of all, the hierarchical structure of the system has weakened the importance of the first instance.[7] The assessment focuses on the number of cases subject to appeal. In order to keep this number down the lower courts seek the opinion of the higher court before deciding. The consequent low rate of appeals is not healthy. In a modern legal system, appeal is needed, e.g. for clarifying the law. A low appeal rate jeopardises this and similar functions of appellate courts.

Secondly, the trial management system has weakened the power of the judges. The office of trial management is responsible for monitoring, assessing, gathering information and allocating cases to judges. Its function is like that of a supervisor in a factory who has to make sure that workers complete their tasks on time. Obviously, no matter how perfect this office is, it cannot replace the judges in charge of resolving disputes. The existence of this office causes the judges to be very careful, making them unwilling to create new rules and administer justice in civil cases.

Furthermore, the existence of the trial management office has caused some courts to manufacture the figures submitted for assessment. As a result of this, the independence and trustworthiness of judges is jeopardised. Since adjudication and politics are closely related in China, political factors dominate adjudication. Trial management is bound to serve the political structure, helping the government to achieve its political goal of social stability.

Most judges in China doubt the effectiveness of trial management. In a research project executed by the author of the present contribution, only 10 % of the 218 judges interviewed believed that the system could improve justice. One-third of the judges were of the opinion that trial management is of limited value. Twenty-five % of the judges believed that trial management had nothing to do with justice. It seems, therefore, that many judges do not hold the trial management system in high esteem. Ninety % of the judges interviewed by the author did not consider it to be a good system. Since this would be in line with a global trend, the courts in China should not only be concerned with efficiency but also with quality.

[7] Damaska 1986, p. 75.

4.3.2 Case Management by Judges

Due to specific characteristics of the courts in China, administrative management should not be used for managing the courts. Rather, the trial judges should control and be in charge of managing litigation and its pace. Equality of arms between the parties can be guaranteed in two manners. One is to provide legal aid to the weaker party by using public funds. Another manner is to request the trial judge assist the weaker party. However, both approaches have disadvantages. After all, public funding cannot be unlimited and assistance by the judge may endanger neutrality. Nevertheless, intervention by the judge is needed since it allows him to control the pace of litigation and prevent the parties from focusing on non-relevant issues.

If case management instead of trial management is used to enhance court efficiency, then judicial resources must be taken into consideration. In the last 5 years, although central and local governments have increased judicial funding, the increase in civil cases has also been significant. According to the Supreme People's Court report, there has been a 25 % increase of cases in the ordinary courts. Yet the number of judges has not increased: it remained 190,000 judges in total. According to research conducted by the author of the present contribution, China is one of the countries with the highest ratio of judges. In 2011, there was one judge per 6,842 citizens. Compared to other countries, this ratio is high: in the US there is one judge per 9,329 citizens; in Japan one judge per 46,928 citizens; in the Taiwan region one judge per 12,534 citizens; and in Hong Kong one judge per 37,937 citizens. Germany has an even higher ratio of one judge per 3,905 citizens. Thus, even though increasing the number of judges may be beneficial for increasing efficiency, this is not an option in China given the country's large number of judges. Instead, case management instead of trial management must have priority. In addition, the large number of non-judicial offices in the existing Chinese court system needs to be addressed. For example, the trial management office, which uses a large part of the limited judicial resources, is not beneficial for the execution of the judicial tasks of the courts.

4.4 Cooperation Between the Court and the Litigants

In modern civil litigation, cooperation between the judge and the parties can help resolve disputes. This implies that not only the role of the judges, but also that of the parties should be considered in trial management.

4.4.1 Participation of the Litigants

The experience with case management abroad has shown that strengthening the judges' powers and reducing the autonomy of the litigants are not central issues in a modern system of case management. Instead, encouraging the cooperation

between the litigants and the court is used to increase the efficiency of litigation and public confidence. Cooperation between the litigants and the court should be the objective of modern litigation and this implies that relevant information is sufficiently disclosed.

For litigants, it is of primary importance that their rights are properly protected. They are concerned with whether they can win their lawsuit and whether they can collect evidence which is beneficial to them. They are also concerned with the total time needed for completing the action. An annual assessment of the courts as in China which does not take these issues into consideration is meaningless to them.

There are two successful models of litigation in today's world. First, there is the model of the American federal courts which emphasises that the judge as case manager should become involved in the lawsuit at an early stage and cooperate with the litigants in terms of setting a litigation schedule. Second, there are the civil law countries which emphasise that the procedural calendar should be determined by the judge, the parties and their lawyers.

In terms of case management in China, there are at least two obstacles which prevent cooperation between the litigants and the court.

Firstly, the parties do not have sufficient powers to negotiate and determine the procedure even though the right to select the procedure and to switch between procedures is a basic right of the parties in China. This right enhances the litigants' confidence in the procedure and resolves disputes. Although the right to switch between procedures was incorporated in the latest version of the civil procedural law,[8] the problem is that in the end it is the courts that decide whether or not to switch between procedures and not the litigants. Furthermore, it is not clear in what stages of the procedure such a switch is allowed. In practice, courts usually disallow parties from switching between procedures even if these parties specifically ask for a switch. According to a survey by the author of the present contribution at the Shanghai courts, litigants highly value the right to choose a suitable procedure and to switch between procedures. Fifty-four point eight % of the parties and 54.6 % of the lawyers were of the opinion that the litigants should be given the right to select the applicable procedure. By contrast, the public authorities were not enthusiastic about this: only 35.7 % of the people's procurators were in favour of the parties' being allowed to negotiate over the applicable procedure.

Secondly, currently the litigants have no obligation or duty whatsoever to assist the court in the conduct of the procedure. In order to encourage the participation of the parties in the action and shorten the length of the procedure, legislation encouraging the participation of the parties in the action is needed. According to the author's research, nearly all key players were of the opinion that legislation should be put in place. In addition, 90.4 % of the judges, 86.7 % of the legal scholars, 95.4 % of the lawyers and 96.4 % of the parties interviewed believed that the period of time for introducing evidence should be limited by statute.

[8] Art. 122 of the Civil Procedure Law, amended recently, provides that civil disputes that are brought before the people's court and that are suitable for mediation, should first be mediated, except if the parties refuse mediation.

The research by the present author shows that 20 % of delay was actually caused intentionally. When introducing the latest amendments to the Civil Procedure Law, the legislature suggested punishing the parties that caused undue delay in submitting evidence. However, the introduction of a ban on the submission of late evidence seemed to be too harsh in practice. Even the courts have expressed doubts on this issue. Sanctions in the form of monetary fines are more suitable if parties deliberately and unduly prolong the hearing of a case.

4.4.2 Case Management in the Transition Period

Over the past few decades, strengthening the judges' power in directing the litigation process has become a global trend. Nevertheless, the civil law system and the common law system are different in terms of case management. In general, the common law employs a 'lawyer-centred' system. Lawyers are the principal players who present their cases to the court.[9] Case management is often limited to procedural issues only. In civil law countries, on the contrary, case management involves both substantive and procedural issues.

In the transition period from trial management to case management, China should be aware of several issues. The increased power of individual judges, for example, may lead to an abuse of power. Bias on the part of the judges may occur because the judges will have closer contact with the parties. As a consequence, measures must be taken to ensure the neutrality of the judges. For the purpose of ensuring neutrality, any contact of the judge with the parties must be closely monitored in order to protect the rights of the parties.

4.4.3 Assistance to the Court by Lawyers

Lawyers play an important role in preventing unreasonable submissions by their clients.[10] Therefore, lawyers should play an important role in the initial stages of litigation. Consequently, cooperation between the court and the litigants alone is not enough. Lawyers must also be involved in cooperation, although this may appear unrealistic at first sight. After all, their income will be affected if the length of the action is shortened as a result of cooperation. Yet, if the litigants' interests are their first priority, lawyers should be willing to cooperate with the court. In this regard, lawyers should better prepare their cases to avoid undue delay.

[9] Grossi and Pagni 2010, p. 3, 4.

[10] *Ibidem*.

4.5 Final Remarks

In recent years, the management and monitoring of judges has been emphasised in China. Reforms should be introduced step-by-step, taking into consideration the actual situation. Reforms should first focus on cooperation between the court and the litigants. The role of administrative bodies in the court system should be reduced and a case management style which is suitable to China should be developed.

References

Damaska MR (1986) The faces of justice and state authority: a comparative approach to the legal process. Yale University Press, New Haven

Damaska MR (1997) Evidence law adrift. Yale University Press, Boston

Grossi S, Pagni MC (2010) Commentary on the Italian code of civil procedure. Oxford University Press, Oxford

Huai Xiaofeng (2006) The court and the judge. Law Press, Beijing (in Chinese)

Part II
China: Hong Kong

Chapter 5
China: Hong Kong. Selective Adoption of the English Woolf Reforms

Peter C.H. Chan, David Chan, and Chen Lei

5.1 Introduction

5.1.1 The Traditional Role of the Judge and the Parties and the Origins of the Hong Kong Civil Justice Reform

In Hong Kong, the judge traditionally took a passive role in civil proceedings. Parties were left to manage the case with minimal intervention from the court.[1] One of the major drawbacks of this arrangement was that 'litigation is too adversarial as cases are run by the parties and not by the courts, with the rules all too often ignored by the parties and not enforced by the courts.'[2]

Undue delay was a by-product of this 'laissez-faire' approach in civil litigation. The root of the problem lies in court's overemphasis on the notion of 'justice on the merits' at the expense of procedural efficacy.[3] Zuckerman commented that this approach had resulted in:

> a weakening of the normative force of the time-limits, for litigants could rest assured that failure to comply with time-limits would have no serious consequences for their case except

[1] Wilkinson et al. 2011, p. 5.

[2] Interim Report 2001, p. 2, para. 5.

[3] The 'justice on the merits' approach is best encapsulated in *Birkett v. James* [1978] AC 297; also see Zuckerman 2009, pp. 60–62 and 71.

P.C.H. Chan (✉) • Chen Lei
City University Hong Kong, Hong Kong,
People's Republic of China
e-mail: pchchan@cityu.edu.hk; leichen@cityu.edu.hk

D. Chan
Rooms 1323A-1328, Prince's Building, Hong Kong, People's Republic of China
e-mail: evadchan@netvigator.com

C.H. (Remco) van Rhee and Fu Yulin (eds.), *Civil Litigation in China and Europe*, Ius Gentium: Comparative Perspectives on Law and Justice 31,
DOI 10.1007/978-94-007-7666-1_5,

> in the most extreme situations. Even disobedience of peremptory orders i.e. 'unless orders' on pain of specified sanctions would rarely have adverse consequences.[4]

Traditionally, settlement was not specifically promoted as a key objective of civil justice. Settlement was often left to the last minute before trial when most costs have already been incurred. Chief Justice Ma noted:

> A just settlement for the right reasons involves a timely settlement. Prior to the CJR, many settlements of course took place but the majority of these did not occur until the eve of the trial itself. There were many reasons for this, chief among them a realization only at a late stage of the real strengths and weaknesses of one's own and the other side's case.[5]

Excessive litigation cost was another serious problem in Hong Kong. In some cases, the cost far exceeded the value of the claim. The consequences of excessive cost are obvious:

> Where the cost of litigation becomes too high, whether when compared with the resources of potential court users or relative to the amount of the claim, it endangers one's rights, putting them out of reach if they become too expensive to enforce. It also increases inequality between the wealthier and the poorer litigant, the former being able to use his deeper pockets as a strategic or tactical advantage.[6]

The problems encountered in the Hong Kong civil justice system were widely seen in other common law jurisdictions, such as England,[7] a number of provinces in Canada[8] and Singapore.[9]

Following the footsteps of England's Woolf Reform, the Chief Justice Working Party on Civil Justice Reform (Working Party) was appointed by the Chief Justice in February 2000 with the following terms of reference:

> To review the civil rules and procedures of the High Court and to recommend changes thereto with a view to ensuring and improving access to justice at reasonable cost and speed.[10]

The Hong Kong Civil Justice Reform (CJR), which came into effect on 2 April 2009, did not adopt the Woolf Reform in its entirety. Instead, the CJR was carried out by amending the Rules of the High Court (RHC) 'rather than by adopting an entirely new procedural code along the lines of the CPR.'[11] The CJR cherry-picked reform measures that worked well in England (and other common law jurisdictions)[12]

---

[4] Zuckerman 2009, p. 61.

[5] Ma 2010, p. 5.

[6] Interim Report 2001, p. 17, para. 38.

[7] The Right Honourable Lord Woolf, *Access to Justice - Final Report,* available at: http://webarchive.nationalarchives.gov.uk/ and http://www.dca.gov.uk/civil/final/overview.htm (last consulted on 30 March 2013).

[8] Canadian Bar Association, *Systems of Civil Justice Task Force Report Chapter 2: The Context for Reform*, p. 11, available at: http://www.cba.org/CBA/Pubs/pdf/systemscivil_tfreport.pdf (last consulted on 10 August 2013).

[9] Malik 2007, p. 2.

[10] Final Report 2004, p. 1, para. 1.

[11] Final Report 2004, p. 19 (Recommendation 1). The amendments were set out in the Rules of the High Court (Amendment) Rules 2008 (L.N. 152 of 2008).

[12] White Book 2012, para. 1A/0/2, 37.

and avoided 'the pitfalls revealed by the CPR experience, for example, in respect of measures carrying front-loaded costs.'[13] Further, the approach adopted by the Working Party tries 'to form a realistic view of the benefits likely to be achievable under local conditions' and asks 'whether such benefits can be achieved with less effort than by introduction of an entirely new code.'[14]

5.1.2 The Philosophy of the Civil Justice Reform and Its Impact on the Role of the Judge and the Parties in Case-Management

As a result of the CJR, there has been a qualitative shift in the Hong Kong civil justice system from the predominant emphasis on 'justice on the merits' (or substantive justice) to a 'three-dimensional concept of justice, in which efficiency and expedition are as important as the correctness of the outcome.'[15] The goal of civil justice has transcended the search for pure substantive justice and embraced a multi-faceted agenda to (among others) promote efficiency and reasonable proportionality,[16] as well as to encourage settlement. In relation to the principle of proportionality, Zuckerman noted, 'The ideas of proportionality and a just distribution of procedural resources require a reassessment of the balance which every procedural system strikes between rectitude of decision, the duration of proceedings, and their cost.'[17]

To implement the agenda of the CJR, extensive case-management powers were conferred to the judge.[18] The court is now equipped with greater discretionary powers to enforce procedural deadlines, limit discovery and administer the litigation timetable. These powers have immense implications for the fact-finding process in Hong Kong, particularly in enhancing efficiency in fact-finding. The CJR not only conferred extensive procedural case-management powers to the judge but also substantive case-management powers.[19]

The CJR does not seek to transform the adversarial system into an inquisitorial one. Parties are still actively involved in a civil lawsuit. The principle of party presentation is securely entrenched and the court has no *ex officio* power to investigate. What the CJR has done is to curtail the excesses of the adversarial system and concurrently retain 'the best features of the adversarial system.'[20] In other words,

[13] Final Report 2004, p. 16, para. 26. For reasons behind the non-adoption of the pre-action protocols, see Final Report 2004, pp. 58–73, paras. 112–139.

[14] Final Report 2004, p. 16, para. 26.

[15] Zuckerman 2009, p. 49.

[16] For a discussion of the principle of proportionality by the Working Party, see Final Report 2004, p. 13, para. 20 and p. 54, para. 106; also see Zuckerman 2009, p. 69.

[17] Zuckerman 1999, p. 48.

[18] RHC O. 1B, r. 1.

[19] RHC O. 1A, r. 4(2)(c); RHC O. 1B, r. 1(2)(j).

[20] First Year Report 2010, p. 1, para. 3(a); also see Final Report 2004, p. 246, para. 478.

the CJR targeted the excesses of the adversarial system (such as undue delay and excessive litigation cost) and sought to improve the cost-effectiveness of Hong Kong's civil procedure.[21]

On the whole, the CJR was regarded as a success, at least in its first year of implementation.[22]

5.2 The Nature, History and Origins of the Hong Kong Civil Procedural Model

5.2.1 Origins of Hong Kong Civil Procedure

As a former British colony, Hong Kong's procedural model was based on English civil procedure. There was no indigenous element (as in pre-colonial procedure) in the Hong Kong procedural model. The Supreme Court Ordinance, enacted in 1844 (shortly after Hong Kong became a colony),[23] established the Supreme Court of Hong Kong[24] and was the first statute that regulated civil procedure in Hong Kong.

The Rules of the Supreme Court in Hong Kong (enacted in 1964),[25] a subsidiary legislation, regulated the practice and procedure of the Supreme Court.[26]

After the handover, the Supreme Court of Hong Kong has been renamed as the High Court of Hong Kong.[27] The Supreme Court Ordinance and the Rules of the Supreme Court have been renamed the High Court Ordinance (Cap. 4) (HCO) and the RHC (Cap. 4A) respectively. The practice and procedure of the High Court remain the same.

5.2.2 The Court Budget

The Judiciary in Hong Kong is publicly funded. The Hong Kong Government calculates the court budget for each fiscal year. The court budget for the fiscal year 2012–13 is HK$1,209,562,000.[28]

---

[21] Final Report 2004, p. 19, para. 31.

[22] First Year Report 2010, p. 2, para. 5.

[23] Supreme Court Ordinance No. 15 of 1844. Since its enactment, it was amended four times (in 1845, 1846, 1873 and 1966): see Wesley-Smith 1994, pp. 88–91.

[24] Note that final appeal rested with the Privy Council.

[25] The Hong Kong Rules of Supreme Court were modelled after the English Rules of Supreme Court (first enacted in 1883).

[26] Wesley-Smith 1994, pp. 171–172.

[27] Section 8, Hong Kong Reunification Ordinance (Cap. A2601).

[28] Hong Kong Budget 2012–2013, Summary of Expenditure Estimates, available at: http://www.budget.gov.hk/2012/eng/pdf/sum_exp_e.pdf (last consulted 30 March 2013).

The court budget in Hong Kong is output based. The Judiciary Administrator reviews the estimates and actual expenditure of previous financial years to determine the court budget of the upcoming financial year. For instance, the budget of 2012–2013 was formulated on the basis of a review of the original and revised estimates of 2011–2012 and the actual expenditure of 2010–2011.[29]

The courts are not directly financed by the court fees to be paid by the litigants. The court fees paid by the litigants will become the revenue collected by the Judiciary, which eventually forms part of the Government's General Revenue.[30]

5.2.3 Court Administration and Judicial Appointments

Hong Kong does not have a Judicial Council. The Judiciary is self-administered. Judicial independence is securely entrenched in Hong Kong. The Judiciary operates completely independent from the executive branch. Other branches of government are forbidden to interfere with the administration of justice by the courts. The Chief Justice heads the Judiciary. The Chief Justice is assisted by the Judiciary Administrator, who is also the Controlling Officer for the Judiciary's finances.[31]

With regards to judicial appointments, Article 88 of the Hong Kong Basic Law reads, 'Judges of the courts of the Hong Kong Special Administrative Region shall be appointed by the Chief Executive on the recommendation of an independent commission composed of local judges, persons from the legal profession and eminent persons from other sectors.'[32] The Judicial Officers Recommendation Commission (JORC) is the independent commission contemplated by Article 88 of the Basic Law. It was established on 1 July 1997 under the Judicial Officers Recommendation Commission Ordinance (Cap. 92). As prescribed by the ordinance, the JORC consists of the Chief Justice as the chairman, the Secretary for Justice and seven other members appointed by the Chief Executive, including two judges, one barrister, one solicitor and three other persons who are not connected with the practice of law.[33]

---

[29] Hong Kong Budget 2012–2013, Estimates, Volume I, General Revenue Account, Head 80 – Judiciary, available at: http://www.budget.gov.hk/2012/eng/pdf/head080.pdf (last consulted on 30 March 2013).

[30] Hong Kong Judiciary Annual Report 2011, Expenditure and Revenue of the Judiciary in 2010–11, available at: http://www.judiciary.gov.hk/en/publications/annu_rept_2011/eng/expenditure.html (last consulted on 30 March 2013).

[31] Hong Kong Judiciary Annual Report 2004, Chapter 7, 92, available at: http://www.judiciary.gov.hk/en/publications/pdf/2004/chapter7.pdf (last consulted on 30 March 2013).

[32] The Basic Law is the constitution of Hong Kong.

[33] Section 3(1), Judicial Officers Recommendation Commission Ordinance (Cap. 92); also see Judicial Officers Recommendation Commission Report (1997–2002), 2, available at: http://www.judiciary.gov.hk/en/crt_services/pphlt/pdf/jorcr_1997to2002.pdf (last consulted on 30 March 2013).

5.2.4 Handling Backlogs

The First Year Report 2010 stated that the courts had to deal with 'a sizeable backlog of cases.'[34] To deal with the backlogs, the court actively managed these cases with the employment of case-management tools such as Case-Management Conferences (CMCs).[35] Case-management is likely to improve further when existing backlogs are handled.[36] It was admitted that certain case-management processes could not be fully utilized (e.g. CMCs) because the backlogs have taken up a lot of the court's time.[37]

The Hong Kong Judiciary is short of judicial manpower. At times, in the District Court (DC), only four judges (employed on full-time basis) are dealing with general civil cases. The Judiciary is actively recruiting new judges for the High Court (HC) and DC. If the recruitment goes ahead smoothly, there is a better chance that backlogs can be more efficiently dealt with.

5.2.5 Different Types of Claim Subject to Civil Procedure

The Court of First Instance (CFI) has unlimited jurisdiction over all civil matters.[38] There are 14 common types of civil proceedings in the CFI[39]: admiralty, bankruptcy, breach of contract, tort, company winding-up, construction and arbitration, custody and ancillary relief in matrimonial proceedings, hire-purchase, injunction, intellectual property, judicial review, mortgage, personal injury, and probate and administration.

5.2.6 The State/Administration Acting as a Party in Civil Litigation

The State/Administration may act as a party in the civil courts (either as plaintiff or defendant). The government can be sued under various cases, e.g. personal injuries, contract, land disputes and judicial review. The government may also sue as a plaintiff in the sole capacity of a private party (e.g. as the landlord suing a tenant in

[34] First Year Report 2010, p. 2, para. 5.

[35] First Year Report 2010, p. 2, para. 5 and p. 7, para. 21.

[36] First Year Report 2010, p. 5, para. 13.

[37] First Year Report 2010, p. 19, para. 8.

[38] Section 3(2) of HCO.

[39] Hong Kong Judiciary, Court Services & Facilities (Civil Jurisdiction), available at: http://www.judiciary.gov.hk/en/crt_services/pphlt/html/hc.htm#12 (last consulted on 30 March 2013).

a land dispute; in a dispute arising from a private contract between the government and its supplier).

In addition, the government is also indirectly involved in winding-up proceedings where an official receiver is appointed.

5.2.7 Court Structure – Civil Cases

Most of the first instance proceedings relating to handling civil matters are heard in the DC and the CFI. The DC has a limited original jurisdiction, hearing civil cases of a value over HK$50,000 but not more than HK$1 million.[40] The CFI has unlimited original jurisdiction. First instance decisions of the DC and CFI may be appealed to the Court of Appeal (CA). Except for interlocutory judgments (for which leave to appeal is required),[41] an appeal shall lie as of right to the CA from every judgment or order of the CFI in any civil cause or matter.[42] And the decision of the CA may be appealed to the Court of Final Appeal (CFA).[43]

There are four specialized civil courts in Hong Kong: the Small Claims Tribunal (SCT), the Labour Tribunal (LT), the Lands Tribunal, and the Family Court. The SCT may hear cases of a value up to HK$50,000 (with appeals to the CFI). The LT handles labour disputes with no apparent monetary limit (with appeals to the CFI). Hearings at the SCT and LT are informal with no legal representation. Lands Tribunal hears cases relating to tenancy disputes and building management (with appeals to the CA). The Family Court handles divorce cases and related matters.[44]

Hong Kong does not have a separate civil court. Civil cases are called 'civil actions' and are usually heard by a specific group of judges/justices. There are in total 37 full-time (permanent) professional judges hearing civil cases in the District Court, High Court and Court of Final Appeal and 16 non-permanent judges (i.e. Non-Permanent Judges of the Court of Final Appeal) hearing civil cases.[45] Civil cases are grouped under different 'lists' for more efficient and suitable arrangement. Examples of lists in the High Court are the Commercial List, Personal Injury List, Admiralty List, Construction List, Arbitration List and Companies List. In the District Court there are the Family List and Employee Compensation List. Each list is headed by a judge.

---

[40] Hong Kong Judiciary, About Us (What is the structure of Hong Kong courts?), available at: http://www.judiciary.gov.hk/en/crt_services/pphlt/html/guide.htm#2 (last consulted on 30 March 2013).

[41] Section 14AA of HCO.

[42] Section 14(1) of HCO.

[43] Section 22(1) of the Hong Kong Court of Final Appeal Ordinance (Cap. 484).

[44] Hong Kong Judiciary, About Us (What is the structure of Hong Kong courts?), available at: http://www.judiciary.gov.hk/en/crt_services/pphlt/html/guide.htm#2 (last consulted on 30 March 2013).

[45] See Appendix 1, Item 6.

5.2.8 Sources of Civil Procedure

Civil procedure in Hong Kong is regulated primarily by statute law, subsidiary legislation, case law, practice directions, and the inherent jurisdiction of the court.[46] Statute law is at the top of the hierarchical structure of Hong Kong civil procedure. The key statutes constitute the main source of civil procedure,[47] consolidating the law relating to the constitution, jurisdiction, practice and powers of the various levels of courts and the administration of justice.[48] Subsidiary legislations set out the detailed rules of procedure.[49] These rules are enacted by the Rules Committees established by the key statutes.[50]

Under the doctrine of *stare decisis*, with the court interpreting the rules of procedure, case law plays an instrumental role in shaping civil procedure. Commentators noted that some cases even have 'legislative effect' and 'changed the operation of procedural law.'[51]

Practice directions are directions issued by the Chief Justice as to the practice and procedure of the court.[52] Strictly speaking, practice directions have no legal effect, but non-compliance may lead to criticisms and penalty in costs. Practice directions are becoming increasingly important in civil litigation covering a wide scope of procedural matters.[53]

There is no special procedure for commercial cases in Hong Kong. The RHC applies to all civil proceedings in the High Court (including commercial cases and judicial review cases). There is, however, a special set of procedure for proceedings in the Small Claims Tribunal.[54] Personal injury action has its own Practice Direction (PD) 18.1.

5.2.9 Application of Procedural Rules

Procedural rules are strictly applied by the court with minimal freedom for deviation. However, some rules leave room for the exercise of considerable judicial discretion. The court must seek to give effect to the underlying objectives of the RHC when

[46] Wilkinson et al. 2011, p. 11.

[47] Wilkinson et al. 2011, p. 11. The key statutes on civil procedure are the Hong Kong Court of Final Appeal Ordinance (Cap. 484), the High Court Ordinance (Cap. 4) and the District Court Ordinance (Cap. 336).

[48] Long title of HCO.

[49] Examples are the Rules of the High Court (Cap. 4A) and the Rules of the District Court (336H); also see Wilkinson et al. 2011, pp. 11–12.

[50] For instance, see Section 55 of the High Court Ordinance.

[51] Wilkinson et al. 2011, pp. 12–13.

[52] RHC O. 1, r. 4.

[53] Wilkinson et al. 2011, pp. 13–14.

[54] Small Claims Tribunal (General) Rules (Cap. 338A).

exercising its powers or interpreting the rules or practice directions.[55] The court is given wide discretion in case-management, for instance on limiting discovery. For the purposes of case-management and furthering the underlying objectives, the judge may make an order to limit the discovery of documents.[56] As stated in the White Book 2012:

> Such orders may be made of the court's own motion and without the necessity of an application by any party. Although the parties will be expected to agree their own discovery regime appropriate to the action … if they do not do so, or if the court considers a different regime more appropriate it may make an order accordingly. The new rule also gives the court power to order the manner of discovery and the time for inspection.[57]

5.2.10 ALI/UNIDROIT Principles of Transnational Civil Procedure

On an overall assessment, the Hong Kong civil procedural model is generally in line with the ALI/UNIDROIT Principles of Transnational Civil Procedure.

5.3 Overview of an Ordinary Civil Lawsuit in Hong Kong

It is befitting that, before dwelling on the more substantive issues later on in this chapter, readers should be provided with an overview of the ordinary civil lawsuit in Hong Kong.

5.3.1 Commencement of Action

A civil lawsuit will usually begin by a plaintiff issuing a generally indorsed writ of summons (writ),[58] together with an acknowledgement of service form (AOS),[59] guidance notes and admission form.[60] For the purpose of service, a writ is valid in the first instance for 12 months beginning with the date of its issue.[61] The writ should contain a concise statement of the plaintiff's claim against the defendant.[62]

---

[55] RHC O. 1A, r. 2(1).

[56] RHC O. 24, r. 15A.

[57] White Book 2012, para. 24/15A/1, 567.

[58] RHC O. 5, r. 1.

[59] RHC O. 10, r. 1(6).

[60] RHC O. 13A.

[61] RHC O. 6, r. 8(1).

[62] RHC O. 6, r. 2(a).

The defendant will acknowledge the claim by filing the AOS with a notice of intention to defend within 14 days after service of the writ (including the day of service) (if the defendant contests the plaintiff's claim).[63]

5.3.2 Pleadings

The stage of pleadings will follow. Within 14 days after receipt of the AOS, the plaintiff will serve a statement of claim (SOC) on the defendant,[64] setting out the material facts and particulars in support of his claims against the defendant. It must be noted that only material facts can be pleaded in pleadings. The parties are not allowed to include evidences that prove the facts pleaded therein.[65]

The defendant will then have 28 days to file a defence (or a 'defence and counterclaim' if there is a cross-claim by the defendant against the plaintiff) in response to the plaintiff's claims.[66]

It is optional for the plaintiff to file a reply to the defence[67] (or where the defendant has also counterclaimed against the plaintiff, the plaintiff must file a 'reply and defence to counterclaim')[68] within 28 days upon receipt of the same.[69]

5.3.3 Case-Management: Interlocutory Proceedings

5.3.3.1 Timetabling Questionnaire

After the close of pleadings, the parties must within 28 days complete a Timetabling Questionnaire[70] (TQ) which facilitates the court to give directions for case-management.[71] If there is no agreement on directions being reached in the TQs, the plaintiff (or the defendant if the plaintiff fails/refuses to do so) should issue a case-management summons (CMS).[72] Upon the receipt of TQs (where both parties agreed as to the time frame for the proceedings) or after the CMS hearing, the court will fix a date for a case-management conference (CMC), which is a milestone date

[63] RHC O. 12, rr. 3 and 5.
[64] RHC O. 18, r. 1.
[65] RHC O. 18, r. 7.
[66] RHC O. 18, r. 2(1).
[67] RHC O. 18, r. 3(1).
[68] RHC O. 18, r. 3(2).
[69] RHC O. 18, r. 3(4).
[70] See Appendix 1 of PD 5.2.
[71] RHC O. 25, r. 1(1).
[72] RHC O. 25, r. 1(1B).

pursuant to the CJR.[73] A milestone date is a date which the court has fixed for a CMC, a pre-trial review, the trial or the period in which a trial is to take place. The party may apply to the court if he wishes to vary a milestone date. The court will not allow a variation of a milestone date unless there are exceptional circumstances to justify the variation.[74]

5.3.3.2 Discovery

At the same time when the parties start preparing the TQs, the discovery process commences. Within 14 days after close of pleadings,[75] each party is required to compile a list of documents (LOD) setting out documentary evidence which are relevant to the issues in the case. The LOD will then be exchanged, followed by inspection and taking copies of the documents listed in the same.[76]

5.3.3.3 Witness Statement

The discovery stage is followed by the parties exchanging written statements made by their respective witnesses. These written statements are not evidence but are exchanged for the purpose of, amongst others, informing the opposing party about the case he has to meet at trial.[77]

5.3.3.4 Other Interlocutory Applications

Apart from the above, there are occasions where parties may find it necessary to make other interlocutory applications before the milestone date. For example, summary judgment (where the defence has no merits),[78] default judgment (where the defendant fails to return the AOS or file a defence),[79] interlocutory injunction (restraining certain action by the opposing party), Mareva injunction (restraining removal or dissipation of assets by a party before judgment, in England currently known as 'freezing order'),[80] security for costs (where the plaintiff is a foreigner),[81] and specific discovery.[82]

---

[73] RHC O. 25, rr. 1A(1) and 1A(4).

[74] See RHC O. 25, r. 1B.

[75] RHC O. 24, r. 2(1).

[76] RHC O. 24, r. 9.

[77] RHC O. 38, r. 2A.

[78] RHC O. 14.

[79] RHC O. 13 and O. 19.

[80] Section 21L of HCO.

[81] RHC O. 23.

[82] RHC O. 24, r. 7.

5.3.4 CMC and Pre-trial Review

During the CMC, the presiding Master may give directions to the parties up to the stage of trial, i.e. setting dates for pre-trial review (PTR).[83] The PTR is usually presided over by the trial judge, who may give further directions in relation to the upcoming trial.

5.3.5 Trial and Judgment

The lawsuit reaches its climax at the stage of trial, where witnesses will testify and be cross-examined by the opposing party in court, and arguments by way of closing submissions will be made, all in the aim of persuading the judge to rule in favour of the party. In Hong Kong, judgments for civil actions are usually written and handed down to parties within 6 weeks from the last day of trial. Where damages awarded thereunder are not voluntarily paid by the losing party, enforcement of the judgment will follow, by way of, for example, a writ of *fi fa*,[84] a garnishee order,[85] and charging orders.[86]

5.3.6 Costs and Taxation

Costs of the action will usually follow the event, i.e. the winner gets costs of the action from the loser. The amount of costs payable can be agreed amongst parties but this is a rarity. Where there are disagreements as to the appropriate costs payable, parties can have the costs taxed by a Taxing Master. The taxed costs will then be enforceable like the damages awarded to the winning party.[87]

5.4 Division of Powers Between the Judge and the Parties in Civil Litigation – The Transfer of Case-Management Powers from the Parties to the Judge

5.4.1 Overview

The judge may exercise case-management powers on application or of its own motion.[88] In *Park Young Sook v. Sharon Melloy*,[89] the plaintiff, acting in person, claimed against a family judge based on the allegation that the judge had conspired

[83] PD 5.2.
[84] RHC O. 47.
[85] RHC O. 49.
[86] RHC O. 50.
[87] RHC O. 62.
[88] RHC O. 1B, r. 2.
[89] HCA 763/2010, 30 June 2010.

with the plaintiff's ex-husband to make orders and rulings against the plaintiff in a matrimonial matter.[90] The family judge, however, 'is immune from legal action in respect of acts done in performance of her judicial function',[91] under Article 85 of the Basic Law.[92] To J therefore requested attendance of plaintiff to show cause as to why an action could be brought against the judge.[93] After hearing the plaintiff, To J found that the plaintiff's claims against the judge were based on bare assertions,[94] and the orders of the judge upon which she complained of were previously appealed by the plaintiff and refused.[95] Upon his own motion,[96] To J struck out the plaintiff's statement of claim[97] and dismissed the action.[98]

As explained above, the new judicial case-management regime encompasses both procedural powers[99] and substantive powers[100] of case-management.

Judicial activism in case-management is illustrated by the introduction of 'underlying objectives' by virtue of RHC Order 1A and the power of active case-management by virtue of RHC Order 1B. The judges are directed to fix a timetable, control the progress of the case[101] and ensure a case will be dealt with in a quick and efficient manner.[102] This technically means 'the parties will no longer dictate the time-table' and the power in controlling the 'dynamics of litigation' has shifted from the parties to the judges.[103]

5.4.2 Example of Case-Management Power Transferred

The CJR substantially expanded the court's power in case-management. The court's general powers of case-management are set out in RHC Order 1B,[104] which includes the power to exclude an issue from consideration.[105]

---

[90] HCA 763/2010, para. 24, 10.

[91] HCA 763/2010, para. 2, 2.

[92] Also see Section 71 of the District Court Ordinance, Cap. 336.

[93] HCA 763/2010, para. 2, 2.

[94] HCA 763/2010, para. 25, 10.

[95] HCA 763/2010, para. 29, 10–11.

[96] RHC O. 1B, r. 2.

[97] RHC O. 18, r. 19(1)(a).

[98] HCA 763/2010, para. 30, 12.

[99] For instance, the power to adjourn or bring forward a hearing: RHC O. 1B, r. 1(2)(b).

[100] For instance, the power to exclude an issue from consideration: RHC O. 1B, r. 1(2)(j).

[101] RHC O. 1A, r. 4(2)(g).

[102] RHC O. 1A, r. 4(2)(l).

[103] Herbert Smith, *Hong Kong Litigation Briefing December 2008: Civil Justice Reform: Underlying Objectives, Pleadings and Case-Management,* available at: http://www.herbertsmith.com/NR/rdonlyres/122A14F0-434D-43F6-B2CA-F24CB37C5385/0/e_bulletin_4.pdf (last consulted on 30 March 2013).

[104] RHC O. 1B, r. 1.

[105] RHC O. 1B, r. 1(2)(j).

The power to exclude an issue from consideration is often exercised during CMC or PTR. As stated in a practice direction, 'Proliferation of efforts on irrelevant factual or legal disputes should be avoided.'[106] Section A18 of the Listing Questionnaire (LQ) to be filed before CMC or PTR also requires solicitor or counsel to attach a one-page summary of the issues to be tried. The said summaries of key issues facilitate discussions during the hearings in aim to further narrow down the scope of arguments at trial.

5.4.3 Why Have These Powers Been Transferred?

Unlike Mainland China where the attempt to enhance efficiency was mainly effected by devolving the responsibilities of fact-finding from the judge to the parties and strengthening the adversarial principle in its civil procedure, Hong Kong's CJR relied on the judicial centralization of case-management to achieve efficiency and other objectives set out in the underlying objectives. RHC Order 1B is the main power conferring provision in relation to case-management. However, some of these case-management powers in fact were already vested in the courts prior to the CJR, i.e. trying two cases together (consolidation), separate trial,[107] requiring party or party's representatives to attend court (usually by court sending letter to or calling the party or party's representative), and deciding on the order of issues/exclusion of issues during PTR. In this connection, Ma CJ said:

> There is little doubt that there has been a noticeable increase in efficiency in the way some civil cases have been conducted. By the imposition of more stringent timetables, the use of unless orders and a more inquisitorial approach to dealing with interlocutory applications – particularly where Case-Management Conferences (CMCs) are concerned – one can say even at this stage that the High Court and District Courts in Hong Kong have seen significant improvements.[108]

5.4.4 A Changing Culture in Favour of Procedural Efficacy

Despite the adequacy of statutory rules introduced by the CJR, effective case-management is a hollow promise if the courts are unwilling to change the longstanding culture of 'justice on the merits' under which delay was perceived as a fact of life and tolerated.[109] Fortunately, the feedback to date has been positive. Courts generally understood the importance of procedural efficiency and had taken a proactive approach in case-management.[110]

---

[106] Para. 6(2), PD 5.2.

[107] RHC O. 15, r. 5.

[108] Ma 2010, p. 5.

[109] Zuckerman 2009, p. 56.

[110] First Year Report 2010, p. 4, paras. 9–10.

A good example is that there is less tolerance from the Bench in relation to application for extension of time. 'Unless orders' (i.e. peremptory orders) are now more commonly made by judges as compared to the past (when it used to be that unless order would be imposed only after multiple delays or applications for extension of time).[111] For example, with reference to a real case,[112] the Master imposed an 'unless order' on the first application to the court for extension of time for filing a defence (although there was an extension by consent previously between the parties). In breach of the 'unless order', parties are prohibited from proceeding with the matter, i.e. filing of the defence, which inevitably would result in judgment on liability against the defendant. In achieving the underlying objective to ensure that a case is dealt with as expeditiously as is reasonably practicable, the First Year Report 2010 encouraged 'a greater use of peremptory orders.'[113] In fact, it has been reported that the HC and DC have seen some improvements in ensuring expedition. This is partly due to the fact that court directions are generally properly complied with in a timely fashion.[114]

The practical success of the CJR is ultimately determined by the actual implementation of the underlying objectives by the judges. Zuckerman noted:

> But objectives and powers are merely pre-conditions for delivering satisfactory results. Something else is needed: competent managers. Namely, managers that understand their task and are willing to work towards it, and know how to go about it. The managers in the present context are judges, for they have been charged with the task of managing litigation.[115]

This point is further illustrated in *Chevalier (Construction) Co Ltd v. Tak Cheong Engineering Development Ltd*,[116] where the judge referred to an observation made in an English case that civil justice is a 'co-operative process to which solicitors, counsel and judges all make their contributions.'[117] Moreover, it is the judge's duty to direct the manner in which the case is going to be conducted in order to maintain the judicial quality of judgment in the matter.[118]

According to the First Year Report 2010, the key success of the CJR is 'a change in culture in the conduct of court proceedings and of dispute resolution on the part of judges and the legal profession.' It added that 'The change is underlined by the underlying objectives in the Rules of the High Court and of the District Court … In order to ensure that disputes are effectively resolved, in and out of court, parties and their legal representatives are expected to be less adversarial and more cooperative.'[119]

---

[111] *The Liquidator of Wing Fai Construction Company Limited (in compulsory liquidation) v. Yip Kwong Robert* (FACV 3/2011, 8 December 2011), para. 32(5)(b), 14.

[112] *Tangspac Consulting (HK) Ltd & Anor v. NCSI (HK) Limited* (DCCJ 28/2011).

[113] First Year Report 2010, p. 5, para. 12.

[114] First Year Report 2010, p. 5, para. 13.

[115] Zuckerman 2009, p. 56.

[116] HCA 153/2008, 23 February 2011.

[117] HCA 153/2008, para. 20, quoting *Re Barbour's Settlement* [1974] 1 All ER 1188 at 1193.

[118] HCA 153/2008, para. 21.

[119] First Year Report 2010, p. 4, para. 9.

All these principal themes of the CJR were reinforced by Ma CJ in a recent CFA case of *The Liquidator of Wing Fai Construction Company Limited (in compulsory liquidation) v. Yip Kwong Robert & Ors*.[120]

It is also crucial to note that the success of effective case-management powers is mainly determined by judicial discretion. RHC Order 2, rule 1 states that the court may make an order as it thinks fit if the parties have failed to comply with milestone and non-milestone dates. RHC Order 2, rule 5 also states that the court has the discretion to grant parties relief from sanctions. The discretion is however subject to RHC Order 25, rule 1B.[121] Limiting discovery under RHC Order 24, rule 15A also involves the exercise of judicial discretion.

5.4.5 *Are There Any Sanctions if the Judge Does Not Use His Case-Management Powers?*

In Hong Kong, a judge will not be sanctioned by a superior court for not exercising his case-management powers. However, a litigant, who is discontent with the exercising of such discretionary power, or the lack of it, is entitled to appeal against the decision. As noted above, the case-management powers vested in the judges are discretionary. This inevitably means that the litigant would be facing an uphill battle challenging the same by way of an appeal. In 厦門新景地集團有限公司 *v. Eton Property Limited & Ors*,[122] Cheung CJHC said:

> As Kwan JA reiterated in the recent case of *Mimi Kar Kee Wong Hung v. Severn Villa Limited*, HCMP 2192/2011, 12 January 2012, para. 31, it need hardly be emphasized that generally, an appellate court will not interfere with a judge's exercise of discretion unless the judge has misunderstood the law or the evidence or the exercise of his discretion was plainly wrong such that it was outside the generous ambit within which a reasonable disagreement is possible. In relation to case-management decisions, the intended appellant must show that the judge "has gone clearly wrong and made orders which will clearly involve an injustice or an inability for the trial court to carry out its task", or if the judge "erred in principle or the order was irrational having regard to the issues that had to be resolved". It is of great importance that this court does not descend to micro-managing cases pending before the court below.[123]

Notwithstanding the said high threshold, the appeal in that case was allowed on the basis that the judge's decision, arising out of a late application for amendment of the statement of claim on the part of the plaintiff,[124] was a perverse case-management decision.[125] One of the amendments in that case relates to quantum,[126] which is

[120] FACV 3/2011.

[121] Zuckerman 2009, pp. 64–68.

[122] HCMP 13/2012.

[123] HCMP 13/2012, para. 9, 7.

[124] HCMP 13/2012, paras. 6–7, 4–5.

[125] HCMP 13/2012, para. 26, 10.

[126] HCMP 13/2012, para. 26, 10.

self-contained.[127] Cheung CJHC agreed that late amendment surprised the defendants and left them with inadequate time for the proper preparation of their defences in relation to it, as the trial was only 3 months away at the time of such application.[128] It was also contrary to the spirit of the CJR.[129] It was suggested that there could have been a split trial on the issue of liability and quantum, instead of pressing ahead with the full trial on both issues,[130] so that the 'injustice to either side could be avoided, or at least, minimized.'[131]

5.4.6 Effects of the Shift in Case-Management Powers

On the whole, the civil justice reform was regarded as a success upon its first year implementation. As the First Year Report 2010 points out, 'the implementation of CJR had on the whole been smooth in the first year. According to the feedback received, no major problems were identified; all issues raised were minor and operational in nature.'[132] This is supported by statistics: the average time spent from commencement of proceedings to the actual trial in the CFI has reduced from more than 1,000 to 167 days.[133] However, the statistics should not be over-read given the post-CJR sample (number of hearings) was substantially less than the pre-CJR sample. In relation to the average time from commencement to trial in the CFI, three scenarios were reported: (1) where both date of commencement and date of trial were on or before 1 April 2009, the average time was 1,013 days (totalling 212 hearings); (2) where the date of commencement was on or before 1 April 2009 and the date of trial was on or after 2 April 2009, the average time was 1,132 days (totalling 251 hearings); and (3) where both date of commencement and date of trial were on or after 2 April 2009, the average time was 167 days (totalling 16 hearings).[134]

5.4.6.1 Dealing with Undue Delay

As aforementioned, the extent to which the objectives of CJR could be enforced depends largely on the discretion of the court.[135] This means the court must be bold and principle-centred in exercising its case-management discretion and enforcing

[127] HCMP 13/2012, para. 31, 12.
[128] HCMP 13/2012, paras. 6 and 29, 4 and 11.
[129] HCMP 13/2012, para. 33, 12.
[130] HCMP 13/2012, paras. 31, 32 and 25, 12–13.
[131] HCMP 13/2012, para. 32, 12.
[132] First Year Report 2010, p. 2, para. 5.
[133] First Year Report 2010, p. 10, Table 6.1.
[134] *Ibidem*.
[135] Zuckerman 2009, p. 56; Ma 2010, p. 4.

procedural deadlines.[136] If the court is not determined enough to enforce deadlines and too readily grants relief from sanctions, the old problems of delay would continue.[137] It seems that the courts in Hong Kong are generally determined in enforcing deadlines.

As compared to dismissal for want of prosecution, which is an application from the defence side, the proactive approach taken by the courts in imposing and enforcing unless orders also caters for the situations where delays were caused by the defendants. Unlike an application for default judgment which deals with the lack of action from the defendant when he fails to give notice of intention to defend after receiving the writ[138] or fails to file a defence after receiving a statement of claim,[139] the plaintiff, in the pre-CJR era, would have difficulty in pressuring the defendant to adhere to the time-limits imposed by the rules regarding actions which were not 'pleadings-related' in nature,[140] for example delays in the discovery process and exchange of witness statements. After the CJR, with the court being more 'trigger-happy' with the imposition of unless orders, a sense of urgency is instilled in the minds of the defendants and their legal representatives in the preparation of their cases. The White Book 2012 commented, 'The new system of fixing timetables with firm milestone dates at an early stage of the proceedings attempts to deal with the problem of delay more proactively.'[141] As Ma CJ said:

> Thus, post-CJR, where all parties to the proceedings have the obligation to prosecute the proceedings and assist the Court in furthering the underlying objectives, it would be highly relevant to consider any failure on the part of the parties here. As far as the defendant is concerned, I would say once again that there is no place anymore for defendants to adopt the attitude of "letting the sleeping dogs lie". No longer will it be possible (if it ever was) for a defendant to sit idly by and do nothing, in the hope that sufficient delay would be accumulated so that some sort of prejudice can then be asserted.[142]

In *Nanjing Iron & Steel Group International Trade Co Ltd and others v. STX Pan Ocean Co Ltd and others*,[143] the CFI struck out the plaintiff's claim for inordinate delay (2 years have passed after the commencement of court proceedings). In the judgment, Reyes J said:

> Under the present CJR regime, that would seem to me to be sufficient cause to strike out the claim. In the absence of some compelling reason, it is contrary to the underlying objective in Order 1A, Rule 1(b) ("to ensure that a case is dealt with as expeditiously as is reasonably

[136] Zuckerman 2009, pp. 62–69.

[137] Zuckerman 2009, p. 70.

[138] RHC O. 13, r. 1.

[139] RHC O. 19, r. 2.

[140] This is so although the old RHC O. 25 did provide mechanism for the plaintiff to make application to the court by way of summons for direction. The hesitation of the court in imposing an 'unless order' in the past rendered such procedure ineffectual.

[141] White Book 2012, para. 25/L/1A, 590.

[142] *The Liquidator of Wing Fai Construction Company Limited (in compulsory liquidation) v. Yip Kwong Robert* (FACV 3/2011, 8 December 2011), at para. 75(8), 32.

[143] HCAJ 177/2006.

> practicable") for a party to allow an action to languish for 2 years once the same has been commenced. I am unable to see any compelling reason in this case. There simply is no excuse for such a long delay.[144]

Meanwhile, a recent CA case also confirmed that what constitutes an inordinate delay is to be looked at in the light of the policy underlying the CJR (i.e. the underlying objectives).[145]

Properly understood, Reyes J in *Nanjing Iron & Steel Group International Trade Co Ltd* 'was not saying that simply because the delay was both inordinate and inexcusable, this was somehow enough to justify a striking out order being made.'[146] It must be founded on the abuse of the process of the court, namely that the delay causes a substantial risk that a fair trial is not possible.[147] It is reiterated by the CFA that with the combination of greater case-management by the courts and peremptory orders more readily made, applications to strike out for want of prosecution should now be consigned to history.[148] However, where such application is made for the 'straddle' cases,[149] striking out for want of prosecution should only be used in plain and obvious cases and must be a remedy of last resort.[150]

5.4.6.2 Fact-Finding

The CJR does not lower the cost of fact-finding, especially in view of the added feature and effect of statement of truth.[151] In the light of Rogers VP's judgment in *Tong Kin Hing v. Autron Mauritius Corp.*,[152] parties are now required to make full investigation of their cases before pleadings, which inevitably involves thorough fact-findings at the early stage (before commencement in the case of a plaintiff) of proceedings. The suggestion in the PD 5.2[153] to exchange copy documents without the need to prepare lists of documents so as to achieve economies in respect of discovery, based on practical observation, has not been widely adopted by parties and practitioners, possibly because opposing parties, based on the lists, could consider whether certain documents need to be inspected and copies of the

[144] HCAJ 177/2006, para. 13.

[145] *Yeung Kit Ling v. Ma Kwan Ho Lawrence and Another* (CACV 258/2010). This is also confirmed by the CFA in *The Liquidator of Wing Fai Construction Company Limited (in compulsory liquidation) v. Yip Kwong Robert* (FACV 3/2011, 8 December 2011).

[146] FACV 3/2011, para. 75(6), 31.

[147] FACV 3/2011, paras. 75(2) and 75(3), 29.

[148] FACV 3/2011, para. 72, 28.

[149] Cases that were commenced prior to the CJR taking effect.

[150] FACV 3/2011, para. 75(6), 31. Non-expiry of the limitation period, a factor which used to militate against an order for striking out under *Birkett v. James* [1978] AC 279, is no longer relevant consideration under the CJR.

[151] RHC O. 41A, r. 2.

[152] [2010] 1 HKLRD 77.

[153] Para. 5, PD 5.2

same obtained.[154] As such, while cost of fact-finding has been frontloaded, it has not been lowered in any significant way. However, it is noted by the Judiciary and practitioners that there has been a gradual decrease in the number of interlocutory applications, and in particular fewer applications relating to discovery being heard and argued after implementation of the CJR.[155]

A positive side of frontloading costs on fact-finding is that lay clients will be in a better position to explore settlement at an earlier stage of the proceedings.

5.4.7 Measures Not Having the Expected Results

The First Year Report 2010 noted that the 'proliferation of interlocutory applications has been regarded as one of the most serious causes of delay and additional expense in the litigation process.'[156] As such, a new provision[157] has been added to the RHC under the CJR which gives the court power to dispose of interlocutory applications without an oral hearing, notwithstanding that such application is contested.[158] Such method, i.e. paper disposal of interlocutory applications, has not been widely adopted by the parties and practitioners. In the HC, only 32 out of 1,139 interlocutory applications were disposed on paper, whilst the figure in the DC was 4 out of 272.[159] This lack of enthusiasm from litigants is unsurprising, as it is well recognized that paper disposal is not appropriate for the complicated type of interlocutory applications and where litigants are unrepresented.[160] From the list of suitable cases for paper disposal as appeared on Part D of PD 5.4, it can be noted that most of these interlocutory applications would usually involve substantial disputes and thus require extensive arguments, so much so that written skeleton arguments filed by the parties may not be sufficient to assist the court in forming its view.[161] For example, the court will have to look into the merits of the parties' cases when considering whether to grant summary judgment, setting aside a regularly-entered default judgment,[162] grant interim payment,[163] and security for costs.[164]

---

[154] For example, the opposing party already has a copy of the said documents (authenticity of the same not challenged).

[155] See Appendix 3, Part 1, 'General Questionnaire'.

[156] First Year Report 2010, p. 5, para. 14.

[157] RHC O. 32, r. 11A.

[158] Unlike, for example, paper application for entering default judgment.

[159] First Year Report 2010, p. 6, paras. 18–19.

[160] First Year Report 2010, p. 6, para. 19. See also the White Book 2012, para. 32/11A/2, 696–697.

[161] First Year Report 2010, p. 6, para. 19.

[162] For default judgment entered irregularly, Hong Kong's position is that such judgment should be set aside as of right: see *Po Kwong Marble Factory Ltd. v. Wah Yee Decoration Co. Ltd.* [1996] 4 HKC 157; *Kerry Freight (Hong Kong) Ltd. v. Del Prado Asia Ltd.* [2005] 3 HKLRD 804; White Book 2012, para. 13/9/4, 218–219.

[163] RHC O. 29, rr. 10–11.

[164] RHC O. 23 and Section 357 of Companies Ordinance (CO), Cap. 32.

With the introduction of sanctioned offers, it is now possible for plaintiffs to initiate settlement via a court-sanctioned channel, which in the past was only available to defendants through payments into court. Experience suggests that plaintiffs are less willing to resort to sanctioned offers. This is partly due to the fact that the claim is brought by the plaintiff and unless the plaintiff is clearly aware of the weaknesses of his case there is minimal incentive to initiate settlement.

5.4.8 Impartiality of the Judge

There are no significant problems regarding the impartiality of judges. Judicial independence is securely entrenched in Hong Kong.

5.4.9 Written and Oral Procedure

In Hong Kong, procedures to be followed in civil lawsuits are primarily set out in the RHC and PDs, coupled with the use of case law to interpret the effects and meanings of the rules.

Apart from the above, parties, or their legal representatives, would have the opportunity to discuss the case with the Master presiding over the CMC, for example, whether further steps must be taken and if so what direction the Master should give, whether certain issues could be narrowed down, and the estimated time required for the trial. The parties' respective cases may also be tested by the presiding Master during CMC. The Master may order parties to compile a list of agreed issues and agreed facts so as to further expedite the PTR (if any) and trial process.

At the PTR, the trial judge will fix a date for the trial (if the precise date of trial has not been set down during the CMC) and 'the court will confirm the estimated length of the trial and give any further directions required.'[165] The trial judge and parties would make use of the PTR as the opportunity to crystallize the parties' dispute and to test the reality of their respective cases. Often issues become more refined and parties' attention more focused after the PTR. Occasionally, that actually facilitated settlement, thus saving the parties from the trial.

5.4.10 Alternatives to the Ordinary Procedural Model

The exception to the adversarial system adopted in the HC and DC can be found in the SCT and LT, where a more inquisitional approach would be adopted due to the fact

[165] Wilkinson et al. 2011, p. 438.

that legal representation is not allowed.[166] In addition, formal rules of evidence do not apply in the LT and the SCT.[167] It follows that, unlike an ordinary civil lawsuit, the judge would be in charge of establishing the applicable substantive law in such civil action.

5.4.11 Initiation of Proceedings by Public Bodies

There are situations where governmental departments would initiate civil proceedings. For example, where a company is being wound-up or where a person is being bankrupted, involvements, assistances and interventions from the Official Receiver are expected. Official Receivers[168] can be appointed as a liquidator[169] in a compulsory winding-up situation. One of the rights of a liquidator (with the assistance of solicitors) is to bring or defend proceedings in the company's name.[170] Such rights tally with its obligation to realize the assets and eventually distributing dividends to interested parties.

5.4.12 Principle of Party Presentation

The parties define the subject-matter of a civil action (including establishing the factual framework of the action and framing the claim). For instance, the plaintiff will serve a SOC to the defendant, setting out the material facts and particulars in support of his claims against the defendant. The principle of party presentation is securely entrenched.

The plaintiff is bound by the case pleaded in his SOC, and the courts would not deviate from the plaintiff's pleaded case or vary the claims made thereunder.

5.4.13 New Requirements for Pleadings

The CJR has introduced a requirement that all pleadings (together with the answers to request for further and better particulars of the pleadings) must be

[166] Section 23 of Labour Tribunal Ordinance, Cap. 25, and Section 19(2) of Small Claims Tribunal Ordinance, Cap. 338.

[167] Section 27 of Labour Tribunal Ordinance, Cap. 25, and Section 23(2) of Small Claims Tribunal Ordinance, Cap. 338.

[168] It is also possible for persons other than the Official Receiver being appointed as provisional liquidator and liquidator. However, a company and an undischarged bankrupt cannot be appointed as a liquidator: Section 278 of CO.

[169] And also a provisional liquidator before a winding up order is made. See Sections 193 and 194 of CO.

[170] Section 199 of CO.

verified by a statement of truth (SOT),[171] with signatures from the pleader or his legal representatives.[172] The effect of the SOT is that the pleader believes that the facts stated in the pleadings are true.[173] The court may by order strike out a pleading that is not verified by a SOT.[174] Proceedings for contempt of court may be brought against a person if he makes a false statement in a document verified by a SOT without an honest belief in its truth.[175]

The verification requirement serves an important function. It was noted that 'if a party is required to certify his belief in the accuracy and truth of the matters put forward the statement of case is less likely to include assertions that are speculative and fanciful and designed to obfuscate.'[176] This point is confirmed in the case of *Tong Kin Hing v. Autron Mauritius Corporation*.[177] Furthermore, a new rule was added to regulate inconsistent alternatives in the same pleading. A party may only make an allegation of fact which is inconsistent with another allegation of fact in the same pleading if the party had reasonable grounds for doing so and the allegations are made in the alternative.[178]

In addition, new restrictions are implemented in relation to amending pleadings. While a party may still amend his pleadings once without leave before the close of pleadings,[179] any further amendments must obtain leave from the court.[180] The court (either of its own motion or on the application of parties) must not order a pleading to be amended unless it is of the opinion that the amendment is necessary either for disposing fairly of the cause or matter or for saving costs,[181] for example where it is for the purpose of determining the real question in controversy between the parties, or of correcting any defect or error in any proceedings, so as to set right the footing of the parties in that case. Commentators observed:

> [the] courts have, therefore, been less prepared to permit substantial amendments for which last-minute applications are made than in the past. Leave is especially likely to be refused where an adjournment would be necessitated involving the change of a milestone date or where, if the amendment were allowed, the trial would have to be adjourned to allow the other party time to prepare a revised case.[182]

---

[171] RHC O. 41A, r. 2.

[172] RHC O. 41A, r. 3.

[173] RHC O. 41A, r. 4.

[174] RHC O. 41A, r. 6(1).

[175] RHC O. 41A, r. 9(1).

[176] See Final Report 2004, p. 111, para. 221, quoting the English White Book 2003, para. 22/0/2.

[177] [2010] 1 HKLRD 77.

[178] RHC O. 19, r. 12A.

[179] RHC O. 20, r. 3(1). The opposite party may apply to the court to disallow the amendment within 14 days after being served with the amended pleadings: RHC O. 20, r. 4(1).

[180] RHC O. 20, r. 5 which must be read subject to RHC O. 20, r. 8.

[181] RHC O. 20, r. 8(1A).

[182] Wilkinson et al. 2011, pp. 322–323.

From a practical point of view, it is argued that the new requirement, coupled with the restrictions on amendments, encouraged the pleader to advance his whole case with minimal amendments and be as forthcoming and honest as possible in its pleadings. The reform has conferred the judge with greater power in managing matters of pleadings. The court is also allowed to identify the issues at an early stage of the proceedings and take proactive steps to ensure this initial step of fact-finding is carried out expediently and appropriately. The serious consequence of making false statements without honest belief promotes the truthfulness of the cases pleaded, which contributes to the search for truth and the thoroughness of the investigation in civil litigation.

5.4.14 Organization of the Evidentiary Stage of Litigation

As stated in the above, documentary evidence which are relevant to the issues in the case would be disclosed between parties.[183] Discovery usually involves two phases: automatic discovery and inspection of the documents disclosed. There may be occasions where specific discovery is warranted.[184]

5.4.14.1 Automatic Discovery in the HC

Each party must within 14 days after the close of pleadings serve on the other party a list of documents relating to any matter in question between them in the action.[185] The requirement of automatic discovery does not apply to all actions.[186] If a party fails to comply with such requirement (where automatic discovery applies), the action (by the plaintiff) may be dismissed or pleadings (of the defendant) be struck out and judgment be entered accordingly. The opponent may also apply for an order for discovery.[187] Parties must disclose documents that relate to any matter in question.[188] The landmark decision in *Compagnie Financière du Pacifique v. Peruvian Guano Co.*[189] elaborated on this rule:

> It seems to me that every document relates to the matters in question in the action, which not only would be evidence upon any issue, but also which, it is reasonable to suppose, contains information which *may* – not which *must* – either directly or indirectly enable the

[183] Wilkinson et al. 2011, p. 333.

[184] *Ibidem*.

[185] RHC O. 24, r. 2(1).

[186] RHC O. 24, rr. 2(1) and 2(2), and RHC O. 77, r. 12(1) provide a list of actions that do not require automatic discovery. These actions include any third party proceedings, actions arising out of an accident on land due to collision or apprehended collision involving a vehicle and any civil proceedings in which the government is a party. See also Wilkinson et al. 2011, p. 348.

[187] RHC O. 24, rr. 7 and 16.

[188] RHC O. 24, r. 1.

[189] (1882) 11 QBD 55 (CA).

> party requiring the affidavit [defendants had requested a further and better affidavit of documents] either to advance his own case or to damage the case of his adversary. I have put in the words "either directly or indirectly", because, as it seems to me, a document can properly be said to contain information which may enable the party requiring the affidavit either to advance his own case or to damage the case of his adversary, if it is a document which may fairly lead him to a train of inquiry, which may have either of these two consequences.[190]

5.4.14.2 Inspection of Documents

Inspection of documents would take place after exchange of the list of documents between the parties. Documents which are protected under Legal Professional Privilege or where they constitute without prejudice communication in written form could be exempted from inspection.[191]

Wilkinson, Cheung and Booth observed, 'Where a party destroys or disposes of documents which are likely to be discoverable (or have been ordered to be discovered), the court might decide to strike out the action or defence on the grounds that, if the destruction had occurred before any action had been commenced, there had been an attempt to pervert the course of justice or, if the documents were destroyed after action had commenced, on the ground that a fair trial would no longer be achievable.'[192]

5.4.14.3 Documents Disclosed and Inspected Prior to and Apart from the Discovery Stage

Apart from the above, the court may order pre-action discovery between people who will likely be parties in subsequent proceedings.[193] For example, this provision could be used by a defendant to obtain copies of medical and hospital records of the plaintiff, if they have not already been given by consent. The court may order a person who is not a party (a hospital, for example) to give discovery.[194] An independent action for discovery is also available against innocent wrongdoers who, through no fault of their own, get mixed up in the tortuous acts of others. This principle is not limited to the identity of the wrongdoer; it may also be used to obtain other information.[195]

Furthermore, documents referred to in a pleading are also subject to discovery and inspection prior to the discovery stage.[196]

---

[190] (1882) 11 QBD 55, 63.

[191] RHC O. 24, rr. 9 and 13(2).

[192] Wilkinson et al. 2011, p. 416.

[193] Section 41 of HCO.

[194] RHC O. 24, r. 7A.

[195] *Norwich Pharmacal Co. v. Customs and Excise Commissioners* [1974] AC 133.

[196] RHC O. 24, r. 10.

5.4.14.4 Exchange of Witness Statements

After discovery and inspection of documents, the parties would then prepare and subsequently exchange their witness statements. These are written statements (exchanged well before trial) by witnesses giving a preview of their evidence to be given orally at trial. They are not sworn documents like an affidavit or affirmation thus they should not be taken as evidence.

Under the CJR, witness would often, with court's leave, adopt the witness statement as part of his evidence-in-chief (so that the contents of the same would then be entered as evidence given in court and need not be repeated orally) and give evidence in relation to new matters which have arisen since the witness statement was served.[197]

Similar to pleadings, all witness statements must be verified by a SOT after CJR,[198] otherwise they are inadmissible as evidence unless court orders otherwise.[199]

5.4.15 Establishing the Applicable Substantive Law

The parties are primarily in charge of establishing the applicable substantive law.

5.4.15.1 Pleadings

Notwithstanding that parties are not allowed to plead law in their pleadings,[200] they are allowed to raise a point of law therein.[201] In fact, the rules require that certain causes of action and legal doctrines and/or issues must be pleaded.[202]

5.4.15.2 Trial

The plaintiff will start the trial by making an opening statement of his case. This is an opportunity for the plaintiff to inform the court: (1) what the claims are and on what basis that the plaintiff says he should be entitled to the same; (2) the applicable substantive law in support of his claims. During the closing submission, parties'

[197] RHC O. 38, r. 2A(7)(b).
[198] RHC O. 38, r. 2A(4).
[199] RHC O. 41A, r. 7.
[200] White Book 2012, para. 18/7/4, 380.
[201] RHC O. 18, r. 11.
[202] White Book 2012, paras. 18/8/4 to 18/8/21, 385–388.

legal representatives would engage in discussions with the trial judge on factual and legal issues. Case authorities (including foreign and local) and legislation may be referred to. At times, the judge may consider substantive law other than those cited by the legal representatives. However, before doing so, the judge should draw the legal representative's attention to and invite submissions on the same.

Before the handover in 1997, the highest level of court for Hong Kong was the Privy Council in England. Judgments made by the same would have binding effects on all courts in Hong Kong. After the handover, judgments from the Privy Council, and in fact judgments made by the highest courts in all other common law jurisdictions, are only highly persuasive.

5.4.16 Termination of a Civil Action

It is logical that a party who commences an action is also entitled to discontinue it. If the discontinuance is made before the defendant has filed his defence, no leave is required from the court.[203] Otherwise, a party may not discontinue an action without leave from the court. However, the defendant[204] is then entitled under RHC Order 62, rule 10, to tax costs of the action up to the date of receipt of the notice of discontinuance. If the taxed costs are not paid within 4 days after taxation, the defendant can get judgment for those costs. RHC Order 21, rule 5 further provides that where an action is discontinued and the plaintiff is liable to pay to the defendant costs of the action, then, if, before payment of those costs, the plaintiff subsequently brings an action for the same, or substantially the same, cause of action, the court may order the subsequent proceedings be stayed until those costs in the discontinued action are paid.

The aforesaid usual costs order is of course not absolute. The court has wide discretion to do justice between the parties and deviate from the said general rule,[205] for example, where the issues between the parties become moot because defendant, by his amendment of the defence, practically conceded to the claims of the plaintiff. In the circumstances, it would be sensible for a plaintiff to discontinue the case to prevent unnecessary escalation of costs. This is one of those rare cases in which the general rule may not apply and plaintiff should get costs of the discontinuance.[206] Nevertheless, a plaintiff who wants an unusual costs order, or any other additional order, must apply for leave to discontinue even if it can be made without leave under RHC Order 21, rule 2.

---

[203] RHC O. 21, r. 2.

[204] Including the defendant in the original claim or defendant by way of counterclaim.

[205] *Inchroy Credit Corp Ltd v. Cheung Man Cheung* [1991] 2 HKC 619; *Trend Publishing (HK) Ltd v. Vivien Chan & Co.* [1996] 3 HKC 433.

[206] *Hachette Filipacchi Presse v. Kador Ltd* [1995] 1 HKC 352.

5.4.17 Views of the Legal Profession

Legal practitioners generally welcome the CJR. For instance, with the new statement of truth requirement, it was noted that the 'court appears to be more tightly controlling the timetable of pleadings.'[207] It was also noted that under the new case-management powers, the court is in a better position to manage the use of expert evidence.[208]

5.5 The Role of Mediation in Civil Dispute Resolution

It is an underlying objective of the CJR to facilitate the settlement of disputes.[209]

5.5.1 An Overview of Mediation Practice in Hong Kong

There are various forms of mediation practice in Hong Kong. The Working Group on Mediation[210] identified the following types of mediation practices: Construction Mediation, Family Mediation, Commercial Mediation, Community Mediation, Building Management Mediation and Victim-Offender Mediation.[211]

In relation to construction disputes, a 2-year pilot mediation scheme was introduced in September 2006.[212] Following the success of the pilot scheme, PD 6.1 was introduced to encourage parties to attempt mediation in cases under the Construction and Arbitration List.[213]

Alexander observed, 'Family Mediation is well established in Hong Kong.'[214] It began to develop in May 2000, when the government launched a 3-year family mediation pilot scheme.[215] The statistics suggested that the pilot scheme was rather successful.[216] In March 2005, the government launched a 1-year pilot scheme to extend funding to legally aided matrimonial applicants who wish to attempt mediation.[217]

---

[207] Rogers 2010, p. 31.

[208] Rogers 2010, p. 32.

[209] RHC O. 1A, r. 1(e).

[210] The Working Group on Mediation was set up in early 2008 to review and consider the greater use of mediation in Hong Kong.

[211] Mediation Report 2010, pp. 14–22.

[212] Mediation Report 2010, p. 15, para. 4.5.

[213] Para. 20, PD 6.1; also see Alexander 2010, p. 241.

[214] Alexander 2010, p. 240.

[215] Mediation Report 2010, p. 16, para. 4.9.

[216] *Ibidem*.

[217] Mediation Report 2010, p. 17, para. 4.12.

In 2009, the Legal Aid Department officially made legal aid eligible to these types of applicants.[218]

Commercial mediation is becoming more popular in Hong Kong.[219] The Mediation Council has implemented the Commercial Mediation Pilot Scheme from July 2007 to September 2008, which later developed into the Commercial Mediation Scheme.[220] The scheme aims 'to satisfactorily resolve commercial disputes in a reasonable time frame with minimal costs and inconvenience.'[221] There are a number of institutions offering commercial mediation in Hong Kong, including the Hong Kong International Arbitration Centre (HKIAC) and the ICC Hong Kong Office.

Community mediation refers to 'mediation of disputes between members of the community such as neighbours, disputes within families, workplaces and other organisations and groups.'[222] It is generally conducted by Hong Kong-based NGOs such as the Hong Kong Family Welfare Society.[223]

Building-management mediation began to develop in Hong Kong when the Lands Tribunal conducted the Pilot Scheme for Building Management disputes from 1 January 2008 to 30 June 2009.[224] The scheme aims to 'facilitate the more efficient, expeditious and fair disposal of building management cases.'[225] In July 2009, the scheme was made permanent by a practice direction.[226]

Following the CJR, legal aid was made available to eligible litigants (i.e. satisfying both the means test and merits test) who wish to attempt mediation.[227] The provision of legal aid in mediation is administered by the Legal Aid Department.

5.5.2 Mediation in CJR: A Case-Management Tool

The CJR encourages ADR.[228] The successful resolution of disputes through ADR saves costs and time. In a personal injury case, the CFI observed, 'Courts in England as well as in Hong Kong have observed that skilled mediators are able to achieve results satisfactory to both parties in many cases quite beyond the power of lawyers and courts to achieve (*Dunnett v. Railtrack Plc* [2002] 1 WLR 2434 (CA); *Supply*

[218] Legal Aid Department Newsletter ('LAD News'), July 2010 (Issue No. 36).

[219] Alexander 2010, p. 242.

[220] Mediation Report 2010, p. 18, para. 4.17.

[221] *Ibidem*.

[222] Alexander 2010, p. 235.

[223] Mediation Report 2010, p. 19, para. 4.21.

[224] Mediation Report 2010, p. 20, para. 4.26.

[225] *Ibidem*.

[226] 'Lands Tribunal Pilot Scheme for Building Management Cases to be made permanent from July 1', Hong Kong Government press release made on behalf of the Judiciary, 30 June 2009.

[227] Legal Aid Department Newsletter ('LAD News'), July 2010 (Issue No. 36).

[228] RHC O. 1A, rr. 1(e), 4(2)(e) and 4(2)(f).

Chain & Logistics Technology Ltd v. NEC Hong Kong Ltd HCA 1939/2006).'[229] Mediation helps preserve the future relationship between the parties. Under PD 31, procedures are in place to encourage parties to settle their disputes through mediation. Paragraph 1 of PD 31 reads:

> An underlying objective of the Rules of the High Court and the District Court is to facilitate the settlement of disputes. The Court has the duty as part of active case-management to further that objective by encouraging the parties to use an alternative dispute resolution procedure ('ADR') if the Court considers that appropriate and facilitating its use ('the duty in question'). The Court also has the duty of helping the parties to settle their case. The parties and their legal representatives have the duty of assisting the Court to discharge the duty in question.[230]

PD 31 applies to mediation only. Settlement negotiation by itself does not amount to ADR.[231]

The court may impose an adverse costs order on the successful party that had unreasonably refused to submit to mediation. PD 31 states that 'In exercising its discretion on costs, the Court takes into account all relevant circumstances. These would include any unreasonable failure of a party to engage in mediation where this can be established by admissible materials.'[232] The court, however, will not make any adverse costs order where the party has engaged in mediation to the minimum level of participation agreed to by the parties or as directed by the court prior to the mediation, or where the party has a reasonable explanation for not engaging in mediation.[233] In exercising this discretion, the court is guided by PD 31 and case law. The leading case is *Halsey v. Milton Keynes General NHS Trust*,[234] in which the English Court of Appeal held:

> In deciding whether to deprive a successful party of some or all of his costs on the grounds that he has refused to agree to ADR, it must be borne in mind that such an order is an exception to the general rule that costs should follow the event. In our view, the burden is on the unsuccessful party to show why there should be a departure from the general rule. The fundamental principle is that such departure is not justified unless it is shown (the burden being on the unsuccessful party) that the successful party acted unreasonably in refusing to agree to ADR.[235]

In relation to the relevant factors that the court should take into account when determining whether a refusal to mediate was unreasonable, the court said:

> factors which may be relevant to the question whether a party has unreasonably refused ADR will include (but are not limited to) the following: (a) the nature of the dispute; (b) the merits of the case; (c) the extent to which other settlement methods have been attempted;

---

[229] See *Leung Catherine v. Tary Limited* (HCPI 805/2007).

[230] Para. 1 of PD 31.

[231] Para. 3 of PD 31.

[232] Para. 4 of PD 31; also see RHC O. 62, r. 5(1)(aa).

[233] Para. 5 of PD 31.

[234] [2004] 1 WLR 3002.

[235] See [2004] 1 WLR 3002, at 3009. For a succinct overview of the PD 31 mediation regime, see Wilkinson et al. 2011, pp. 1083–1092.

> (d) whether the costs of the ADR would be disproportionately high; (e) whether any delay in setting up and attending the ADR would have been prejudicial; and (f) whether the ADR had a reasonable prospect of success. We shall consider these in turn. We wish to emphasise that in many cases no single factor will be decisive, and that these factors should not be regarded as an exhaustive check-list.[236]

It is worth to mention in passing that a leading mediator commented that cases involving elements of defamation are inappropriate for mediation as the disputants are not committed to using mediation to resolve their differences.[237] It was held that 'Statements made in mediation certificates should only be considered on the question of costs.'[238] By way of background, the court will receive a mediation certificate that provides information on (a) whether or not the plaintiff or defendant was willing to attempt mediation with the view of settlement; and (b) if the plaintiff or defendant was unwilling to attempt mediation, the reasons for not willing to do so.[239]

The First Year Report 2010 noted that 'One of the initiatives under CJR is to promote the wider use of mediation to facilitate early and satisfactory settlement of disputes.'[240] Aside PD 31, the Judiciary has set up the Mediation Information Office to provide litigants with relevant guidance on mediation.[241]

Save for a few exceptions, PD 31 applies to all civil proceedings in the CFI and the DC which have been begun by writ.[242]

5.5.3 Mediation as a Delaying Tactic

Some cases may not be suitable for mediation, for example when the relationship between the parties has seriously deteriorated such that no positive dialogue can be expected. Yet, even in these cases, a vexatious party may wish to push for mediation as a delaying tactic. Under these circumstances, mediation would be a fruitless exercise that would only result in undue delay and unnecessary costs. PD 31 creates a settlement environment by encouraging mediation armed with adverse cost orders as sanction for those who are unwilling to participate without any reasonable excuse. Instead of leaving everything to the parties on matters relating to settlement (which usually means waiting until trial or a later stage of the proceedings) as in the pre-CJR era, the court actively encourages early settlement of disputes. This is

---

[236] [2004] 1 WLR 3002, at 3009.

[237] See Appendix 3, Part 2, 'Supplemental Questionnaire on Hong Kong's mediation regime (For mediators only)'.

[238] *Bhana, Angela Mary v. Ocean Apex Trading Limited* (DCPI 1732/2009), para. 23.

[239] Appendix 2 of PD 31.

[240] First Year Report 2010, p. 17, para. 43.

[241] First Year Report 2010, p. 18, para. 45.

[242] Para. 2, PD 31.

arguably an institutionalized method of front-loading ADR costs. The intention is that by frontloading the cost of mediation, the overall cost of the lawsuit can be substantially reduced. This method is only effective if the parties genuinely want settlement and are ready when the opportunity arises. The example of a vexatious party using mediation as a delaying tactic creates a dilemma for the institutionalized attempt to front-load the cost of mediation and the underlying objective to promote early settlement.

5.5.4 A de facto Mandatory Mediation Regime?

The nature of Hong Kong's mediation regime is somewhat nebulous. While it is a voluntary regime on paper, the potential 'cost sanction' exerts substantial pressure on parties to attempt mediation.[243] It is therefore arguable that PD 31 is a *de facto* (soft-version) mandatory mediation regime.[244]

5.5.5 Mediation Confidentiality

Mediation communications are confidential. Mediation confidentiality is protected by statute and rules of mediation. For instance, Article 4 of the Hong Kong Mediation Code requires the mediators to 'keep confidential all information, arising out of or in connection with the mediation, unless compelled by law or public policy grounds.'[245] Rule 12 of the HKIAC Mediation Rules provides that 'Every document, communication or information disclosed, made or produced by any party for the purpose of or related to the mediation process shall be disclosed on a privileged and without prejudice basis and no privilege or confidentiality shall be waived by such disclosure.'[246]

The Mediation Ordinance (recently enacted) gave statutory backing to mediation confidentiality. Section 8 of the Mediation Ordinance provides that 'a person must not disclose mediation communication,' unless the disclosure falls under a statutory exception (e.g. with leave of the court).[247] The Mediation Ordinance further provided that 'a mediation communication may be admitted in evidence in any proceedings (including judicial, arbitral, administrative or disciplinary proceedings) only with leave of the court or tribunal.'[248]

---

[243] Alexander 2009, p. 154; but see Yuen 2010, p. 109; *Halsey v. Milton Keyes General NHS Trust* [2004] 1 WLR 3002.

[244] Alexander 2009, pp. 154–155.

[245] Mediation Report 2010, pp. 161–162 (Annex 7).

[246] Rule 12 of the HKIAC Mediation Rules.

[247] The Mediation Ordinance (Ord. No. 15 of 2012).

[248] Section 9 of the Mediation Ordinance.

5.5.6 A Preliminary Assessment of the Effectiveness of PD 31

Stakeholders generally regard the PD 31 regime as effective. An experienced mediator is of the view that the use of mediation does not prolong delays, especially if the case is suitable for mediation. He is also of the view that the mediators are generally skilful and the parties are willing and committed to resolving their disputes by mediation.[249] A leading litigation practitioner commented that, after the CJR, the court is more successful than before in facilitating settlement. Under the new environment, parties are much more active in considering settlement (usually through mediation) at an early stage of proceedings. This increases the likelihood of settlement. [250]

5.5.7 Mediation as a Real Alternative?

Mediation is generally regarded as a real alternative to litigation. One judge noted that the Judiciary has played a facilitative role in promoting the use of mediation:

> The measures adopted by the Judiciary are carefully designed to achieve a change of the mindset of the stakeholders: a shift from the traditional litigious mode to a broadened horizon of weighing the options in resolving a dispute satisfactorily and efficiently. We try to facilitate such change by raising awareness and providing facilities to educate our litigants about mediation.[251]

When asked whether the cost sanction under PD 31 establishes a regime of quasi-mandatory mediation, another judge said:

> Spelling out the possible sanction is meant to be an effective means to ensure that the parties will spend reasonable effort to mediate with a view to saving costs in appropriate cases. The discretion as to costs is still to be exercised in the circumstances of each case. Construing that as creating a mandatory or quasi-mandatory obligation to mediate is negative thinking. Problems arise only if the parties, exactly due to such negative thinking, decide to pay lip service to readiness or attempt to mediate even in an inappropriate case.[252]

5.5.8 Sanctioned Offer and Payment

In addition to PD 31, there are other elements in the rules that promote a friendly settlement of legal cases. RHC Order 22 introduced the system of sanctioned

[249] See Appendix 3, Part 2, 'Supplemental Questionnaire on Hong Kong's mediation regime (For mediators only)'.

[250] See Appendix 3, Part 1, 'General Questionnaire'.

[251] Lam 2010, p. 96.

[252] See Appendix 3, Part 1, 'General Questionnaire'.

offer and sanctioned payment in order to 'encourage the parties to take possible settlement seriously and to avoid unproductive prolongation of the litigation.'[253] The main difference between the two is that, a sanctioned payment refers to an offer made by way of a payment into court, whilst a sanctioned offer refers to an offer made without a payment into court. In the past, the plaintiff was in a passive role in relation to court sanctioned settlement methods. Under the CJR, the plaintiff may make a sanctioned offer.[254]

5.6 Concluding Remarks

The civil procedural model of Hong Kong has undergone substantial changes in recent years since the implementation of the CJR. Whilst preserving its adversarial nature and the value of an independent and impartial Judiciary, the traditional passive and non-interventionist role adopted by the courts is now abandoned in return for a more proactive and hands-on approach, all in the aim of enhancing proportionality and efficiency in the Hong Kong civil justice system, and achieving just settlement by exposing litigants to early assessment of the merits of their own cases and settlement opportunities. The old extremity 'no-holds barred' attitude of litigants and the legal professional in presenting and managing cases stemming from the judicial overemphasis on 'justice on merits' is modulated.

It is a misconception that enhancing procedural efficiency would result in the deterioration of the quality of substantive justice. 'Justice delayed is justice denied.' This time-honoured maxim suggests that it is impossible to treat procedural efficiency and substantive justice as two separate and unconnected objectives. In fact, the two objectives are interdependent. Finding the right balance between these two objectives takes great judicial acumen as well as the co-operation of the parties and their lawyers. A Hong Kong judge is of the view that if the parties and their legal representatives (pursuant to their duty under RHC Order 1A, rule 3) assist the court to further the underlying objectives, there is no reason why a good balance cannot be struck between procedural efficacy and substantive justice.[255]

Notwithstanding that it is still in an infantile stage and the inevitable teething problem, the CJR has already made its mark. Undue delays caused by unwarranted interlocutory applications and indeterminate causes of action are gradually weeded out by frontloading of fact-finding and the shift of case-management powers from

[253] Herbert Smith, *The Civil Justice Reform: Settlement and Costs*, Client Briefing 3, March 2009, available at: http://www.herbertsmith.com/NR/rdonlyres/8928E199-D557-491B-ABBB-FAF7ED85550C/0/clientbriefing_CJR_5.pdf (last consulted on 30 March 2013).

[254] RHC O. 22, r. 4.

[255] See Appendix 3, Part 1, 'General Questionnaire'.

parties to judges. The combining effect of frontloading of fact-finding and the court-endorsed private mediation regime augment parties' willingness to consider, attempt and ultimately reach settlement of disputes in timely fashion. A leading litigation practitioner in Hong Kong observed:

> Litigation has become slightly more efficient. Parties are more self-disciplined after the CJR. They avoided trivial points or arguing for the sake of arguing. There are incentives for parties to focus on the real substance of the dispute. The greatest incentive is to avoid cost sanctions for failure to mediate. Lawyers understand the implications of cost sanctions and advise their clients accordingly.[256]

Despite its early success, the CJR has yet to reach its maximal effect. With time, it is envisaged that use of paper disposals in interlocutory applications will be more widely received. Utilization of case-management powers by judges will continue to mature with accumulation of experiences and innovation in directions, and to improve with more contributions from practitioners. Backlogs of cases hindering effective judicial management of cases will be resolved when more judges are appointed.

Appendices

Appendix 1: Facts and Figures Relevant for the Powers of the Judge and the Parties in Civil Litigation

Hong Kong

Year of Reference: 2011

General Data on the National Civil Justice System

1. Inhabitants, GDP and average gross annual salary

Number of inhabitants	7,071,600[257]
Per capita GDP (gross domestic product)	Approx. RMB 202,367[258]
Average gross annual salary	No official statistics available

[256] See Appendix 3, Part 1, 'General Questionnaire'.

[257] This is the mid-2011 figure issued by the Census and Statistics Department of the Hong Kong Government: http://www.censtatd.gov.hk/hkstat/sub/so20.jsp (last consulted on 27 July 2013).

[258] The per capita GDP at current market prices in the fourth quarter of 2011 is HK$247,938: http://www.censtatd.gov.hk/hkstat/sub/so50.jsp (last consulted on 27 July 2013). The exchange rate (100 HKD: 81.62 RMB) is the 'Middle Rate' of the Bank of China Exchange Rate as at 27 July 2012: http://www.boc.cn/sourcedb/whpj/enindex.html (last consulted on 27 July 2013). This exchange rate is employed throughout this questionnaire.

2. Total annual budget allocated to all courts Approx. RMB 928.8 Million[259]

3. Does the budget of the courts include the following items?

	Yes	Amount
Annual public budget allocated to salaries	✓	Approx. RMB 649,259,000[260]
Annual public budget allocated to computerisation	☐	N/A
Annual public budget allocated to court buildings	✓	Approx. RMB 764,800[261]
Annual public budget allocated to training and education	☐	N/A
Annual public budget allocated to legal aid	☐	N/A[262]
Other		

4. Is the budget allocated to the public prosecution included in the court budget?

☐ Yes
☒ No

(a) If yes, give the amount of the annual public budget allocated to the prosecution services

[259]Two programmes make up the budget for the Judiciary: 'Programme (1) Courts, Tribunals and Various Statutory Functions' and 'Programme (2) Support Services for Courts' Operation'. The Estimate for 2011–2012 (i.e. total annual budget allocated to all courts) is HKD1,137.9 Million. See Head 80 Judiciary, Expenditure Analysis by Head, Volume 1B: General Revenue Account, Estimates, the 2011/12 Budget: http://www.budget.gov.hk/2011/eng/pdf/head080.pdf (see p. 143) (last consulted on 27 July 2013).

[260]This figure (i.e. HKD795,466,000) only represents 'Salaries' under Personal Emoluments of the Operating Account (Recurrent). The figure excludes the following recurrent expenses: 'Allowances' (HKD18,889,000), 'Job-related allowances' (HKD1,144,000), 'Cash allowance in lieu of housing benefits' (HKD10,942,000), 'Mandatory Provident Fund contribution' (HKD1,640,000) and 'Civil Service Provident Fund contribution' (HKD3,420,000). See paragraph 4, Operating Account, Details of Expenditure by SubHead, Head 80 Judiciary, Expenditure Analysis by Head, Volume 1B: General Revenue Account, Estimates, The 2011/12 Budget: http://www.budget.gov.hk/2011/eng/pdf/head080.pdf (see p. 151) (last consulted on 27 July 2013).

[261]This figure (i.e. HKD937,000) represents the provision for 'Minor Plant, Vehicles, and Equipment' under the Capital Account, Head 80 Judiciary, Expenditure Analysis by Head, Volume 1: General Revenue Account, Estimates, the 2011/12 Budget: http://www.budget.gov.hk/2011/eng/pdf/head080.pdf (p. 151) (last consulted in July 2013). It appears that at least parts of this provision are in connection with the installation and maintenance of minor plant and equipment in court buildings.

[262]The provision of legal aid is a separate category from 'Head 80 Judiciary' under the public budget.

Legal Aid (Access to Justice)

5. Annual number of legal aid cases and annual public budget allocated to legal aid

	Number	Amount
Civil cases	8,297[263]	N/A
Other than civil cases	2,795[264]	N/A
Total of legal aid cases	11,092	Approx. RMB 588,608,000[265]

Organisation of the court system and the public prosecution

6. Judges, non-judge staff and *Rechtspfleger*

	Total number	Sitting in civil cases[266]
Professional judges (full time equivalent and permanent posts)	Total number: 71	Total Number: 37
	Components:	**Components:**
	The Court of Final Appeal: 4	The Court of Final Appeal: 4
	The Court of Appeal of the High Court: 10	The Court of Appeal of the High Court: 7
	The Court of First Instance of the High Court: 25	The Court of First Instance of the High Court: 9
	District Court: 32	District Court: 17

(continued)

[263] The figure represents the actual number of civil cases where legal aid certificates have been granted in 2011: see Paragraph 8, Head 94 Legal Aid, Expenditure Analysis by Head, Volume 1: General Revenue Account, Estimates, the 2012/13 Budget: www.budget.gov.hk/2012/eng/pdf/head094.pdf (see p. 693) (last consulted on 27 July 2013).

[264] The figure represents the actual number of criminal cases where legal aid certificates have been granted in 2011. See Paragraph 8, Head 94 Legal Aid, Expenditure Analysis by Head, Volume 1: General Revenue Account, Estimates, the 2012/13 Budget: www.budget.gov.hk/2012/eng/pdf/head094.pdf (p. 693) (last consulted on 27 July 2013).

[265] The revised estimate for 2011/12 is HKD721,156,000: www.budget.gov.hk/2012/eng/pdf/head094.pdf (p. 700) (last consulted on 27 July 2013).

[266] Judges sitting in civil cases include those who sit for matrimonial cases and land disputes cases.

(continued)

	Total number	Sitting in civil cases
Professional judges sitting in courts on an occasional basis and paid as such	The Court of Final Appeal: 14[267]	The Court of Final Appeal: 14
Non-professional judges (including lay-judges) who are not remunerated but who can possibly receive a defrayal of costs	N/A[268]	N/A
Non-judge staff working in the courts (full time equivalent and permanent posts)	Lands Tribunal, Magistrates' Courts and other Tribunals: 75[269]	N/A
Rechtspfleger (if applicable)	N/A	N/A

The performance and workload of the courts

7. **Total number of civil cases in the courts** (litigious and non-litigious):

Court of Appeal of the High Court: 291[270]
Court of First Instance of the High Court: 15,966[271]
District Court: 45,383[272]

[267] This refers to the number of non-permanent judges of the Court of Final Appeal.

[268] There are no non-professional judges in Hong Kong.

[269] The total number excludes the recorders of the Court of First Instance and deputy judges of the District Court. There are in total 9 recorders at the Court of First Instance of Hong Kong. The number of deputy judges at the District Court fluctuates over time.

[270] The figure includes civil appeals from the Court of First Instance, civil appeals from the District Court of Hong Kong and other Civil Miscellaneous appeals. Hong Kong Judiciary Annual Report 2011, Caseload and Case Disposal of the High Court: http://www.judiciary.gov.hk/en/publications/annu_rept_2011/eng/caseload02.html (last consulted on 27 July 2013).

[271] The figure includes civil appeals from Labour Tribunal, Small Claims Tribunal, Minor Employment Claims Adjudication Board, miscellaneous appeals, High Court Actions, Personal Injuries Actions, Miscellaneous Proceedings, Bankruptcy & Companies Winding-Up and other civil cases. Hong Kong Judiciary Annual Report 2011, Caseload and Case Disposal of the High Court: http://www.judiciary.gov.hk/en/publications/annu_rept_2011/eng/caseload02.html (last consulted on 27 July 2013).

[272] The figure includes all the cases categories mentioned under the 'Civil Jurisdiction' and 'Family Jurisdiction' of the District Court. Hong Kong Judiciary Annual Report 2011, Caseload and Case Disposal of the District Court: http://www.judiciary.gov.hk/en/publications/annu_rept_2011/eng/caseload03.html (last consulted on 27 July 2013).

8. Litigious civil cases and administrative law cases in the courts

		Litigious civil cases in general	Civil cases by category (e.g. small claims, family, etc.)		
Total number of first-instance cases	Pending cases on 1 January of the year of reference	N/A	N/A	N/A	N/A
	Pending cases on 31 December of the year of reference	N/A	N/A	N/A	N/A
	Incoming cases	61,270[273]	N/A	N/A	N/A
	Decisions on the merits	52,721[274]	N/A	N/A	N/A
Average length of first-instance proceedings[275]		Court of First Instance: 170.08 days[276]	N/A	N/A	N/A
		District Court: 136.23 days[277]			

Appendix 2: Data on Civil Cases in Selected Courts

The High Court of Hong Kong and the District Court of Hong Kong, 2011

[273] The figure represented the number of first instance caseload of civil cases in the Court of First Instance and the District Court in 2011. Hong Kong Judiciary Annual Report 2011, Caseload and Case Disposal of the High Court: http://www.judiciary.gov.hk/en/publications/annu_rept_2011/eng/caseload02.html (last consulted in July 2013). Caseload and Case Disposal of the District Court: http://www.judiciary.gov.hk/en/publications/annu_rept_2011/eng/caseload03.html (last consulted on 27 July 2013).

[274] The figure represents the number of first instance case disposal of civil cases in the Court of First Instance and the District Court in 2011. Case disposal refers to appeals which have been allowed, dismissed, withdrawn, discontinued or abandoned with or without court order. Hong Kong Judiciary Annual Report 2011, Caseload and Case Disposal of the High Court: http://www.judiciary.gov.hk/en/publications/annu_rept_2011/eng/caseload02.html (last consulted in July 2013). Caseload and Case Disposal of the District Court: http://www.judiciary.gov.hk/en/publications/annu_rept_2011/eng/caseload03.html (last consulted in July 2013).

[275] The average length of the proceedings refers to the average time taken from the date of commencement to the end of trial at the Court of First Instance.

[276] The data is collected from Tables 6.1 and 8.1 of the First Year Report 2010, 10 and 12. The Hong Kong Judiciary Annual Report 2011 does not provide the relevant data.

[277] The data is collected from Tables 6.2 and 8.2 of the First Year Report 2010, 10 and 12. The Hong Kong Judicial Annual Report 2011 does not provide the relevant data.

1. What types of civil cases does the court decide?

The High Court of Hong Kong

The High Court of Hong Kong has jurisdiction over all types of civil matters. The common types of civil proceedings are[278]:

Type 1: Admiralty
Type 2: Bankruptcy
Type 3: Breach of Contract
Type 4: Tort
Type 5: Company winding-up
Type 6: Construction and Arbitration
Type 7: Custody and ancillary relief in matrimonial proceedings
Type 8: Hire-Purchase
Type 9: Injunction
Type 10: Intellectual Property
Type 11: Judicial Review
Type 12: Mortgage
Type 13: Personal Injury
Type 14: Probate and Administration

The District Court of Hong Kong

The District Court of Hong Kong has jurisdiction over the following types of civil proceedings[279]:

Type 1: Contract
Type 2: Quasi-contract
Type 3: Tort (including personal injuries claims)
Type 4: Recovery of land or premises
Type 5: Claims in equity such as administration of estate of a deceased person, trust mortgage, specific performance, maintenance of infant, dissolution of partnership, relief against fraud or mistake distress
Type 6: Employees' compensation cases (there is no limit on the amount claimed)
Type 7: Sex discrimination, disability and family status discrimination cases
Type 8: Matrimonial cases including divorce, maintenance, custody and adoption of children

2. What is the volume of cases and their proportion to the caseload that the court decides on an annual basis?

The Judiciary Annual Report 2011, published by the Hong Kong Judiciary, sets out the caseload and disposal of cases in 2011. The caseload refers to the number of

[278] Hong Kong Judiciary, Court Services & Facilities (High Court: Civil Jurisdiction): http://www.judiciary.gov.hk/en/crt_services/pphlt/html/hc.htm#12 (last consulted on 27 July 2013).

[279] Hong Kong Judiciary, Court Services & Facilities (District Court: Civil Jurisdiction): http://www.judiciary.gov.hk/en/crt_services/pphlt/html/dc.htm#12 (last consulted on 27 July 2013).

cases received and considered by the court in 2011. Disposal refers to the number of cases (including cases initiated before 2011) which have been allowed, withdrawn, abandoned or dismissed by the court. See below tables setting out the figures in relation to different courts with civil jurisdiction in Hong Kong.

The Court of Final Appeal of Hong Kong

	Type of Appeals[280]	Caseload	Disposal[281]
1	Application for leave to appeal	46	49(20)[282]
2	Substantive Appeals	21	23
	TOTAL	67[283]	72[284]

The Court of Appeal of the High Court of Hong Kong

	Type of Appeals[285]	Caseload	Disposal[286]
1	Appeals from the Court of First Instance	230	166
2	Appeals from the District Court	30	29
3	Miscellaneous Appeals	31	25
	TOTAL	291[287]	220[288]

[280] The *Hong Kong Judiciary Annual Report 2011* provides the number of civil appeals as a whole. It does not provide the number for different types of civil cases.

[281] Disposal refers to applications for leave to appeal/appeals that have been allowed, dismissed, withdrawn, abandoned or dismissed.

[282] The figure in brackets is the number of applications dismissed under Rule 7 of the Court of Final Appeal Rules, Cap. 481A.

[283] *Hong Kong Judiciary Annual Report 2011*, Caseload and Case Disposal of the Court of Final Appeal of Hong Kong: http://www.judiciary.gov.hk/en/publications/annu_rept_2011/eng/caseload01.html (last consulted on 27 July 2013).

[284] *Hong Kong Judiciary Annual Report 2011*, Caseload and Case Disposal of the Court of Final Appeal of Hong Kong: http://www.judiciary.gov.hk/en/publications/annu_rept_2011/eng/caseload01.html (last consulted on 27 July 2013).

[285] There are three types of appeals set out in the *Hong Kong Judiciary Annual Report 2011*: 'Appeals from the Court of First Instance', 'Appeals from the District Court' and 'Miscellaneous'. Same with the Court of Final Appeal, the said report did not classify civil cases into separate categories.

[286] Disposal refers to appeals/reviews that have been allowed, dismissed, withdrawn, discontinued or abandoned with or without court order.

[287] Hong Kong Judiciary Annual Report 2011, Caseload and Case Disposal of the High Court: http://www.judiciary.gov.hk/en/publications/annu_rept_2011/eng/caseload02.html (last consulted on 27 July 2013).

[288] Hong Kong Judiciary Annual Report 2011, Caseload and Case Disposal of the High Court: http://www.judiciary.gov.hk/en/publications/annu_rept_2011/eng/caseload02.html (last consulted on 27 July 2013).

The Court of First Instance of the High Court of Hong Kong

	Type of case	Caseload	Disposal[289]
1	Appeals from Labour Tribunal	33	29
2	Appeals from Small Claims Tribunal	38	37
3	Appeals from Minor Employment Claims Adjudication Board	6	8
4	Miscellaneous Appeals	2	5
5	High Court Actions	2,237	1,475
6	Miscellaneous Proceedings	2,700	1,984
7	Bankruptcy & Companies Winding-up	9,464	9,421
8	Personal Injuries Actions	941	691
9	Other cases[290]	545	265
	TOTAL	15,966	13,915

The District Court of Hong Kong

	Type of case	Caseload	Disposal[291]
1	Civil	4,994	3,715
2	Tax Claim	5,169	4,773
3	Distress for Rent	4,424	4,513
4	Employee's Compensation	2,011	1,563
5	Other civil cases[292]	5,796	4,388
6	Family Cases[293]	22,989	19,933
	TOTAL	45,383	38,885

3. Are some of the types of cases regarded as complex? If yes, please indicate which cases are regarded as complex, in terms of time and efforts needed.

[289] Disposal refers to cases and appeals that have been allowed, dismissed, withdrawn, discontinued or abandoned with or without court order.

[290] Other cases include constitutional and administrative law proceedings, admiralty actions, adoptions, bill of sale registrations, book debt registrations, commercial actions, construction and arbitration cases, matrimonial causes, applications under the Mental Health Ordinance, probate actions and stop notices.

[291] Disposal refers to cases that have been allowed, dismissed, withdrawn, discontinued or abandoned with or without court order.

[292] Other cases include Miscellaneous Proceedings, Stamp Duty (Ordinance) Appeals, Equal Opportunities Actions, Personal Injuries Cases, Occupational Deafness (Compensation) Appeals, Pneumoconiosis (Compensation) Appeals and Estate Agents Appeals.

[293] These include Matrimonial Causes, Joint Applications, Miscellaneous Family Proceedings and Adoption Applications.

Medical Negligence cases (involving the participation of overseas medical experts) and Construction Proceedings.

4. Are some of the types of cases considered as urgent cases? If yes, please indicate which cases are regarded as urgent, and how this does affect the time of processing.

Defamation leading to an urgent application for interim injunction and Mareva Injunction in the context of fraud.

5. Is there information on the average or median duration of particular types of civil cases? If yes, please provide information on average/median duration of these cases.

The Judiciary Annual Report 2011 does not provide the statistics indicating the average and median duration of civil cases from commencement to completion. However, the said report provides that the average waiting time from application (to fix date) to hearing in the High Court was 231 days.[294] As for the District Court, the average waiting time from application (to fix date) to hearing was 72 days.[295]

6. Are there targets in respect of the time needed to process each type of case in the court? If yes, please define how these targets are established (e.g. minimum and maximum time; average or mean time; percentage of cases completed within a certain period of time, etc.).

To the knowledge of the respondent, there are no such targets in Hong Kong courts that handle civil cases.

7. Does one discuss the timetable and the expected duration of the proceedings with the parties and other participants in the proceedings? If yes, please give examples.

Under the Civil Justice Reform, parties are required to agree on the timetable of the proceedings, failing such agreement, to be directed by the Master presiding over the Case Management Summons hearings. Parties are thereafter required to adhere to the timetable. Parties will also agree on the length of the trial at or before the Case Management Conference or Pre-trial Review, failing such agreement, to be directed by the Master or Trial Judge presiding over the respective hearing.

8. Are cases that are considered to last excessively long monitored? If yes, please explain which cases are considered to be excessively lengthy (e.g. cases pending more than 3/4/5 years), what their proportion is in your caseload, and which measures have been introduced for speeding up these cases.

---

[294] Hong Kong Judiciary Annual Report 2011, Caseload and Case Disposal of the High Court: http://www.judiciary.gov.hk/en/publications/annu_rept_2011/eng/caseload02.html (last consulted on 27 July 2013).

[295] Hong Kong Judiciary Annual Report 2011, Caseload and Case Disposal of the District Court: http://www.judiciary.gov.hk/en/publications/annu_rept_2011/eng/caseload03.html (last consulted on 27 July 2013). This figure excludes family cases.

Courts in Hong Kong are generally determined in enforcing deadlines after the Civil Justice Reform. In *Nanjing Iron & Steel Group International Trade Co Ltd and others v. ST Pan Ocean Co Ltd and others*,[296] the Court of First Instance had struck out the plaintiff's claim for inordinate delay (2 years) on the basis that such delay was contrary to the underlying objectives.

9. Is the duration of the proceedings monitored in the following terms? If yes, please provide data. If there are different ways of monitoring, please give information on the categories used.

No, the court uses the timetable referred to in the response to question 7 to monitor the duration of the proceedings.

10. Is information on the duration of the particular stages in the proceedings monitored and analysed? If yes, give some examples regarding the duration of particular stages of the proceedings. Ideally, give information on the ideal/average/mean duration of the preparatory stage (from the commencement to the first oral hearing on the merits), the trial stage (from the first oral hearing to closure of the proceedings) and the post-hearing stage (from the closure of the proceedings to judgment). If these data cannot be given, but there are other ways of monitoring, please give information in terms of the categories used.

The Hong Kong Judiciary Annual Report 2011 has no relevant information. However, Tables 6.1 and 6.2 of the First Year Report provide that the average time spent from commencement to trial (covering preparatory stage) in the Court of First Instance was 167 days.[297] The average time spent for District Court was 134 days.[298]

Tables 8.1 and 8.2 of the First Year Report provide that the average time spent in trial in the Court of First Instance was 3.08 days.[299] The average time spent in trial in the District Court was 2.23 days.[300]

According to an internal judicial guideline, a judge should hand down the written judgement within 6 weeks from the end of trial.

Appendix 3: Research Questionnaire (Hong Kong)

Objective

There has been a significant shift of case management powers from the parties to the judge in Hong Kong with the implementation of the Civil Justice Reform (CJR)

[296] HCAJ 177/2006.

[297] First Year Report 2010, p. 10, Table 6.1.

[298] First Year Report 2010, p. 10, Table 6.2.

[299] First Year Report 2010, p. 12, Table 8.1.

[300] First Year Report 2010, p. 12, Table 8.2.

since April 2009. The existing literature focuses primarily on the principles underlying the CJR and provides a functional assessment of the new procedural rules. Apart from the First Year Report 2010, there has been limited attention to the actual application of the new regime and its practical effect on case management. This Appendix addresses this deficit by critically examining the sources relating to the CJR (e.g. reports and case law) and gathering views of judges, practitioners and experts by way of questionnaire.

Methodology

These questionnaires are not designed for empirical research. They are designed to gather the views of specialists in the field of civil litigation to supplement the general investigation. As such the questions commonly require the respondent to comment extensively on the various aspects of judicial case management in Hong Kong in the context of the Civil Justice Reform

Part 1: General Questionnaire

Respondents:

A member of the Hong Kong Judiciary (Judge)
A leading litigation lawyer based in Hong Kong (Practitioner)

I. Overview and fundamental principles of judicial case management

1. Has litigation become more efficient (i.e. less undue delay) as a result of the shift of case management powers from the parties to the judge since the Civil Justice Reform (CJR)?

   Practitioner: *Litigation has become slightly more efficient. Parties are more self-disciplined after the CJR. They avoided trivial points or arguing for the sake of arguing. There are incentives for parties to focus on the real substance of the dispute. The greatest incentive is to avoid cost sanctions for failure to mediate. Lawyers understand the implications of cost sanctions and advise their clients accordingly.*

   (a) From your observation, has there been a decrease of interlocutory applications after CJR?

   Judge: *Yes.*

   Practitioner: *Slightly less, but no material difference.*

   (b) Do you think paper disposal for interlocutory applications can enhance efficiency or lead to more complications and delay? Please provide 1 or 2 examples to support your view in this regard.

   Judge: *Yes. But there are exceptions: (i) where the legal representatives did not put their heads together in agreeing on the directions for paper disposal of interlocutory application (including even when such is expected in employees' compensation case pursuant to PD 18.2); (ii) where the legal representatives filed far from being succinct written submissions*

(e.g. written submissions for variation of nisi costs order after trial that far exceeded the length of the submissions at the trial). All these could lead to waste of time and costs.

Practitioner: *No view.*

2. From the perspective of case management, do you think a good balance has been struck between procedural efficacy and substantive justice (i.e. ensuring a just outcome)? Please provide 1 or 2 examples to support your view in this regard.

   Judge: *No reason to believe otherwise, if the underlying objectives under RHC O.1A are adhered to; and if the parties and their legal representatives assist the court as expected (see RHC O. 1A, r.3).*

   Practitioner: *Need to consider on a case-by-case basis. At a CMC, the presiding master insisted on the parties presenting their positions within 30 min. The parties were caught by surprise, as the session requires at least half a day, given the amount in dispute was huge and that expert directions were needed.*

3. In your assessment, did the CJR case management regime lead to excessive judicial discretion and thereby create greater inconsistency in judicial decisions? Are the excesses (if any) outweighed by the benefits of case management? Please provide 1 or 2 examples to support your view in this regard.

   Judge: *No.*

   Practitioner: *No. An arbitrary decision (if any) should have nothing to do with CJR. There is bound to be some disagreement with decisions on procedure, but it is not the result of CJR.*

4. Is there any noticeable change after the CJR with discovery that had a positive impact on case management? Please provide 1 or 2 examples to support your view in this regard.

   Judge: *Few applications for discovery have so far been heard or argued post-CJR. That may well reflect the change.*

   Practitioner: *Yes. The timetable for automatic discovery becomes more realistic. Before CJR, the timetable was too rigid and short (e.g. usually within 2 weeks). Now there is usually a more manageable timetable (e.g. the court is ready to agree to a 2-month discovery period). There are technical and logistical issues with discovery (e.g. impossible to dig out all emails, the need to agree on search terms with the other side, and the need for follow-up actions (for instance a further search)). Proportionality is not expressly built into CJR (unlike in CPR). The safer assumption is that proportionality is not a test of discovery in Hong Kong. Although in practice a party may try to increase flexibility by agreeing with the other side on the scope of discovery, this ultimately does not affect the right of the other side to apply for further disclosure on the basis of the Peruvian Guano (**PG**) test. The PG test*

produces quite a costly result. The PG test predates the electronic age. The exponential increase of documentation makes PG archaic. In England, there are increasing PDs to deal with electronic documents discovery. Hong Kong should consider steps to better regulate discovery of electronic documents. The PG test should be amended.

5. The CJR not only conferred extensive procedural case management powers to the judge but also substantive case management powers (e.g. RHC O.1A, r.4(2)(c): '[deciding] promptly which issues need full investigation and trial and accordingly disposing summarily of the others' and RHC O.1B, r.1(2)(j): '[exclude] an issue from consideration'). Do you think:

   (a) granting the court substantive discretion in case management is consistent with the adversarial traditions of civil procedure under the common law?
   (b) civil adjudication has become too inquisitional?
   (c) the importance of fair trial is compromised?

   Please provide 1 or 2 examples to support your above views.

   Judge: *(a) Not inconsistent; (b) No; and (c) No*

   Practitioner: *No such threat to the adversarial principle. The CJR provides a disciplined approach under which the court must search for the best solution.*

II. Overview of the court's case management powers under the new regime

6. RHC O. 1A, r. 4 provides that the court must further the underlying objectives of the RHC by actively managing cases. Please provide a (significant) real-life example from your personal experience of active case management for the furtherance of the underlying objectives.

   Judge: *The steps under RHC O.1A, r.4(2)(a); (b); (e); (g); (h); (i); (j); and (l) have been taken during hearings.*

   Practitioner: *See CMC example above. There is more active case management (but not substantially greater).*

7. A remarkable novelty of the CJR in case management is conferring power to the court to make an order of its own motion for case management (particularly, it may on its own motion and without hearing the parties give procedural directions by way of order nisi) (see RHC O.1B generally). Please comment on the practical significance and effectiveness of this power in promoting case management and provide 1 or 2 examples (if any) in this regard.

   Judge: *Chances are that the parties would have no strong views on the directions so made for the further conduct of the case, if they are so told by the court. That may well reflect the practical effectiveness of proactive case management in matters that the parties, for one reason or the other, have simply*

failed to or refrained from proposing. Directions have been given in this manner in employees' compensation case.

Practitioner: So far no examples of case management order of own motion from experience. Proceedings are still driven by parties. In reality, given the court's heavy caseload, it is difficult to do something of its own motion. To be able to exercise these powers, the court needs time to read in and form its own views. Given current limited court resources, it still needs the parties to drive proceedings. With the help of the parties, the court will be in a good position to make proper case management orders.

III. Case management timetabling and milestones (RHC O.25)

The timetabling questionnaire – benefits
Ref. (a)
The Final Report 2004 stated the following:

'The proposed changes do not involve imposing any radically new duties on the parties or conferring much wider powers on the courts.'[301]
'The questionnaire aims at a more focussed exercise of such powers and observance of such duties. The Working Party believes that a questionnaire would be beneficial and promote cost-effectiveness in the litigation.'[302]

8. With reference to the above extracts from the Final Report (Ref. (a)), do you think the timetabling and listing questionnaires have achieved the purpose of promoting procedural efficacy and cost-effectiveness? Please provide 1 or 2 examples to support your view in this regard.

Judge: *Yes, by ensuring that the parties, as they were supposed to do so even prior to the CJR, actually consider the time estimate realistically so as to avoid future adjournment. In most cases in the District Court, this stage has passed by the time when the case comes before the judge; but adjournment of a case part-heard has become less often, and indeed rare from personal experience post-CJR.*

Practitioner: *Timetabling Questionnaire (TQ): the court is quite formalistic with it (ticking boxes). The court emphasizes getting the form right 'stylistically'. This slightly defeats the purpose of TQs. The form is intended to facilitate flexibility of timetabling. Furthermore, the format of the TQ form is not very user friendly (requires the party to tick boxes to confirm statements, but such statements are subject to caveats in subsequent pages).*

Milestones and flexibility
Ref. (b)
The Final Report 2004 stated the following:

[301] Final Report 2004, p. 192, para. 377.
[302] Final Report 2004, p. 193, para. 378.

'The aim of achieving a firm timetable which allows the flexibility needed requires a number of objectives to be pursued concurrently. The reforms should (i) seek to enhance the realism and appropriateness of the timetable which is set; (ii) build into the timetable mechanisms giving the parties and the court flexibility to react to developments while maintaining essentials of the timetable; and (iii) develop supporting reforms which will help to minimise disruption to the timetable.'[303]

9. Do you think the mechanism set out in RHC O.25 (in particular the milestone dates) has achieved the above objectives (Ref. (b)) in practice? Please explain.

   Judge: *Yes. Properly set milestone dates are supposed to have taken into account potential development contemplated by the parties. With proper assistance from the parties and innovation in directions, the court should be able to set the milestone dates that could stand the test of contingencies. In terms of adhering to the dates so set, the objectives are achieved in practice.*

   Practitioner: *The RHC O.25 regime is effective in general. Apart from promoting a culture of compliance, it also keeps parties focused. Parties are not just motivated by sanctions. The regime provides more 'pointers' for parties to follow, thereby increasing efficiency. The regime helps legal advisers to convince clients the need to case-manage and focus on what to do to achieve efficiency (especially when there is an unresponsive client). In the past, both the litigants and the lawyers were 'thrown into the sea' with not much pointers.*

10. What would you consider to be 'exceptional circumstances' that justify a variation of a milestone date under RHC O.25, r.1B(2) and (3), having to strike a delicate balance between the aim of having a firm timetable and maintaining an appropriate degree of flexibility?[304] Do you have any practical experience where the milestone date was varied (under RHC O. 25, r. 1B(5) and (6)) or application for variation of milestone was rejected by the court? If so, please provide the example(s) without disclosing the identity of the parties and/or action number.

    Judge: *This is fact-sensitive. To be exceptional, the circumstances have to be beyond reasonable expectation and control when the milestone dates were set. Impact of the variation will also be of significance. An example*

[303] Final Report 2004, p. 195, para. 381.

[304] This is a relevant question notwithstanding some guidance is already provided in paragraph 42 of PD5.2: 'Milestone dates will be immovable save in the most exceptional circumstances and for that purpose, for instance, late instructions from client, change in the team of lawyers, the absence of prejudice to the other party which cannot be compensated for by costs, will not be treated as exceptional circumstances.'

is where the determination of dispute in a case could impact on a series of similar cases. Significant amendments of pleadings at the PTR stage, properly explained, were allowed so as to set right the footing of the parties in that case. The consequential directions entailed the impracticability of adhering to the trial dates; so the trial dates were vacated and re-fixed.

Practitioner: *No experience.*

11. Have you restored/successfully applied to restore a claim (or counterclaim) under RHC O.25, r.1C(4) after a claim (or counterclaim) has been struck out due to the plaintiff's failure to appear at the case management conference or the pre-trial review? If so, why were you satisfied/what are the grounds relied upon that "good reasons" have been shown? What conditions were imposed on the restoration and why were such conditions imposed (e.g. a security)?

    Judge: *No*

    Practitioner: *No experience. Heard that there was a case restored under RHC O.25, r.1C(4) at cost sanction.*

Case management conference
Ref. (c)
The Final Report 2004 stated the following:

'A court might order a case management conference where the case is heavy and procedural complications are likely to arise, for instance, where strongly contested interlocutory applications or interlocutory appeals are intended or pending (as disclosed in the questionnaire) making it difficult to fix a realistic trial date or trial period at the summons for directions stage.'[305]

12. What factors (apart from those stated above in Ref.(c)) would you take into consideration in determining whether a case management conference should be ordered?

    Judge: *Direction for CMC in the District Court is mostly made by the Master. Seldom is CMC listed before a judge.*

    Practitioner: *No view.*

13. From practice, how effective were case management conferences?

    Judge: *See 12 above.*

    Practitioner: *No view.*

14. From your experience, is a case management conference particularly useful when a party is a litigant in person?

[305] Final Report 2004, p. 197, para. 385.

Judge: *See 12 and 13 above. But almost invariably there will be PTR before the trial judge in cases of complexity and those involving litigant in person. Such PTRs are useful.*

Practitioner: *No view.*

15. Do you think pre-trial (or case management) conferences help shorten trial time and promote settlement?[306]

Judge: *The trial judge is in a good position to make use of the PTR as the opportunity to crystallize the parties' dispute and to test the reality of their respective cases. Often issues become more refined and parties' attention more focused after the PTR. Occasionally that actually facilitated settlement and thus saving the parties from the trial.*

Practitioner: *CMC and PTR have practical use. They help parties to focus on the issues and determine whether to resort to mediation. They also gave pretext for settlement without appearing weak when initiating settlement. As PD 31 promotes settlement and mediation, it is only a 'natural' procedural step to try settlement. As a result, post-CJR settlement negotiations happen much earlier.*

IV. Case management at trial and appeal

16. Please comment on the effectiveness of RHC O.35, r.3A in practice.

Judge: *Effective in ensuring that the parties, as they were expected to do so even prior to the CJR, will consider the time estimates seriously and realistically. That helps avoiding adjournment of the hearing in the future.*

Practitioner: *No experience.*

17. What is your view on the following proposed amendment to the rules governing the appeal process?

'[*when*] *the parties are given notice of the hearing date, they receive from the court a questionnaire requiring them to provide information about the appeal and its state of preparation, including time estimates from the respective advocates who are to conduct the appeal.*'[307]

Judge: *No view.*

Practitioner: *No view.*

[306] Consider Leubsdorf 1999, p. 64: 'Maurice Rosenberg found that compulsory pre-trial conferences did not promote or speed settlement or reduce trial time, although they seemed to improve the quality of trials.'

[307] Final Report 2004, p. 359, para. 671.

V. Limited tolerance of party default after CJR

Ref. (e)

Zuckerman observed: '*The consequences of this approach* [justice on the merits] *were inevitable: a weakening of the normative force of the time limits, for litigants could rest assured that failure to comply with time limits would have no serious consequences for their case except in the most extreme situations. Even disobedience of peremptory orders i.e. "unless orders" on pain of specified sanctions would rarely have adverse consequences. In addition to creating a normative deficit, this policy gave rise to a whole industry of satellite litigation on the interpretation of the Birkett v. James principles'*[308]

18. Is *Birkett v. James* [1978] A.C. 297 still good law after the CJR? Please explain in the context of the academic comment above (Ref. (e)).

Judge: *See* Re Wing Fai Construction Company Limited*, FACV 3/2011 (8/12/2011).*

Practitioner: *No experience.*

VI. Enforcement of deadlines and sanctions under the CJR

19. Do you have any practical experience in relation to RHC O.2, r.3? If so, please provide the example(s) without revealing the parties and/or action number. How effective is RHC O.2, r.3 (payment into court for non-compliance) in tackling non-compliance and promoting procedural efficiency?

Judge: *No.*

Practitioner: *No experience.*

20. When the court is considering whether to grant a relief from sanction it is required to consider 'all circumstances' (under RHC O.2, r.5). Please provide examples of the relevant factors/circumstances that the court has taken into consideration in the past? How do the underlying objectives guide the court in interpreting and applying RHC O.2, r.5?

Judge: *See 19 above.*

Practitioner: *No experience.*

VII. Fact-finding: a case management perspective

In the context of fact-finding, the CJR emphasizes on identification of the issues at an early stage of the proceedings so that the court can take proactive steps to ensure this initial step of fact-finding is carried out expediently and appropriately. In this regard:-

[308] Zuckerman 2009, p. 61.

21. Do you have any practical experience in relation RHC O. 24, r. 15A which gives the court power to limit discovery under RHC O. 24, r 1(1)? If so, please provide the example(s) without revealing the parties and/or action number.

    Judge: *No.*

    Practitioner: *No experience.*

22. Do you think that the initial step of fact-finding can be more expediently and appropriately carried out if the parties are required to set out a list of issues to be tried in the Timetabling Questionnaire? Please provide explanation(s) for your view.

    Judge: *Preparing the list helps the parties more. The court is supposed to determine the issues transpiring from the pleadings (unless any of them has been abandoned, conceded or agreed) and irrespective whether they accord with a list of issues so prepared (as that does not bind the court anyway).*

    Practitioner: *Agree.*

VIII. Encouragement of ADR

It is an underlying objective of the RHC to facilitate the settlement of disputes (RHC O.1A, r.1(e)). It is also a duty of the court to encourage parties to use ADR (RHC O.1A, r.4(2)(e)) and to help the parties settle their disputes (RHC O.1A, r.4(2) (f)).

23. Would you agree that in practice the court is more successful than before in facilitating the settlement of disputes after CJR? Please comment with reference to the procedures in Practice Direction 31 (PD 31).

    Judge: *Not in a position to conclude.*

    Practitioner: *Parties are using mediation much more frequently. This promotes earlier and active consideration of negotiating settlement. It logically follows that there will be a higher likelihood of settlement.*

24. Do you think the PD 31 regime as a whole has been successful in striking a balance between promoting the speedy resolution of dispute via ADR on the one hand and protecting party autonomy on the other?

    Judge: *It should be; but not in a position to conclude whether it has been.*

    Practitioner: *Yes*

25. Do you think that penalizing the successful party (by way of an adverse cost order) effectively establishes a regime of quasi-mandatory mediation? If so, do you foresee any problems with such a regime?

    Judge: *No. Spelling out the possible sanction is meant to be an effective means to ensure that the parties will spend reasonable effort to mediate*

with a view to saving costs in appropriate cases. The discretion as to costs is still to be exercised in the circumstances of each case. Construing that as creating a mandatory or quasi-mandatory obligation to mediate is negative thinking. Problems arise only if the parties, exactly due to such negative thinking, decide to pay lip service to readiness or attempt to mediate even in an inappropriate case.

Practitioner: *No comment on whether it is quasi-mandatory. In any event, there is no problem. The scheme is working quite well.*

26. Have you been engaged in any case(s) where the courts encountered difficulties in determining whether a refusal to mediate is reasonable or not? If so, please provide examples.

Judge: *No*

Practitioner: *No experience. General comment: Of all the CJR measures, PD 31 produces most tangible change in the litigation culture.*

Part 2: Supplemental Questionnaire on Hong Kong's mediation regime (For mediators only)

Respondent: a leading mediator in Hong Kong

1. **Do you think the use of mediation prolongs delay or resolves the problem of delay? Please provide examples to illustrate.**

   Does not prolong delays, provided the case is suitable for mediation; the mediator is skilful and the parties are willing and committed to resolving their differences by mediation.

2. **Would you agree there is a necessity to formulate a unified accreditation system for mediators in order to enhance the implementation of Practice Direction 31 (PD31)?**

   Yes, it makes it useful for users and ensures consumer confidence as they are assured of the quality of the mediators.

3. **Do you recognize any specific categories of post-CJR cases where recourse to mediation is inappropriate?**

   Defamation cases, as the disputants are not committed to using mediation to resolve their differences.

4. **In light of the enactment of the Mediation Ordinance, to what extent does a mediation legislation impact on the role of mediation in civil litigation?**

   None, as the Mediation Ordinance is limited in scope.

5. **How do parties in mediation usually determine the 'minimum level of participation'?**[309]

   Minimum participation should be 15 h and the mediator should write an independent assessment of the situation and only the judge (not the parties) should review such in confidence when required.

References

Alexander N (2009) International and comparative mediation: legal perspectives. Kluwer Law International, Alphen aan den Rijn

Alexander N (2010) Mediation: process and practice in Hong Kong, 1st edn. LexisNexis, Hong Kong

Chief Justice Ma G (2010) Efficiency at all costs – true or bluff? In: Meggitt G (ed) Civil justice reform – what has it achieved? Sweet & Maxwell/Thomson, Hong Kong

Chief Justice's Working Party on Civil Justice Reform (2001) Civil justice reform: interim report and consultative paper. 21 November 2001

Chief Justice's Working Party on Civil Justice Reform (2004) The final report of the Chief Justice's Working Party on Civil Justice Reform. 3 March 2004

Justice Chan P, Rogers M (eds) (2012) Hong Kong civil procedure 2012, vol 1. Sweet & Maxwell, Hong Kong

Lam J (2010) Mediation in the context of CJR: the role of the judiciary. In: Meggitt G (ed) Civil justice reform – what has it achieved? Sweet & Maxwell/Thomson Reuters, Hong Kong, pp 89–96

Legislative Council Panel on Administration of Justice and Legal Services (2010) The first year's implementation of the civil justice reform from 2 April 2009 to 31 March 2010. LC paper no. CB(2)591/10–11(06), December 2010

Leubsdorf J (1999) The myth of civil procedure reform. In: Zuckerman AAS (ed) Civil justice in crisis: comparative perspectives of civil procedure. Oxford University Press, Oxford, pp 53–67

Malik WH (2007) Judiciary-led reforms in Singapore: framework, strategies, and lessons. World Bank, Washington, DC

Rogers M (2010) Making the system work in practice. In: Meggitt G (ed) Civil justice reform – what has it achieved? Sweet & Maxwell/Thomson Reuters, Hong Kong, pp 25–34

Wesley-Smith P (1994) The sources of Hong Kong law. Hong Kong University Press, Hong Kong

Wilkinson M, Cheung ETM, Booth CN (2011) A guide to civil procedure in Hong Kong, 4th edn. LexisNexis, Hong Kong

Working Group on Mediation (2010) Report of the Working Group on Mediation. February 2010

Yuen R (2010) Case-management: jurisdiction and order. In: Meggitt G (ed) Civil justice reform – what has it achieved? Sweet & Maxwell/Thomson Reuters, Hong Kong, pp 105–110

Zuckerman AAS (1999) Justice in crisis: comparative dimensions of civil procedure. In: Zuckerman AAS (ed) Civil justice in crisis: comparative perspectives of civil procedure. Oxford University Press, Oxford, pp 3–52

Zuckerman AAS (2009) The challenge of civil justice reform: effective court management of litigation. City Univ Hong Kong Law Rev 1(1):49–71

[309] Para. 5 of PD 31.

Chapter 6
Impact of Civil Justice Reform on Alternative Dispute Resolution: A Hong Kong Perspective

Christopher To

6.1 Background

The advent of the Civil Justice Reform ('CJR')[1] did have a significant and coherent transformation towards the judicial system in Hong Kong. Prior to the CJR, there were critics such as the legal practitioners, media press and other correlated published reports, who voiced concerns about the high cost of litigation which was a deterrent to those wishing to use the judicial system in Hong Kong to resolve their disputes. As suggested by the *Civil Justice Reform Interim Report and Consultation Paper (2002)* ('The Report'), the high litigation costs has made 'Hong Kong as a less attractive place to do business in and has also led to a loss of work for the legal profession.'[2] In fact, the 2002 Report went on to ascertain that the litigation process was rather 'too expensive, with costs too uncertain and often disproportionately high, relative to the claim and to the resources of potential litigants' and the court was 'too slow in bringing a case to a conclusion'. This suggested that there was a need for reform.

The Report had set out a list of 'underlying objectives' for the CJR. They are now implemented and incorporated into the Rules of the High Court (Cap 4A)('RHC').[3] These underlying objectives have acted as guidelines to assist litigants in managing their disputes effectively and efficiently throughout the litigation process as well as ensuring that the court's resources are not wasted unnecessarily. This proposition is enshrined under Order 1A Rule 2 of the RHC, where it expressly states that

> the Court shall seek to give effect to [the underlying objectives] when it … exercises any of its power … or a primary direction … [T]he primary aim in exercising the powers of the

[1] Since April 2009.

[2] Civil Justice Reform Interim Report and Consultation Paper, paras. 9–10, p. 3. Also available at http://www.info.gov.hk/archive/consult/2002/FullReport.pdf (last consulted in September 2013).

[3] Order 1A, Rule 1 of the Rules of the High court and District court.

C. To (✉)
University of Hong Kong, Hong Kong, People's Republic of China
e-mail: Christo@cityu.edu.hk

C.H. (Remco) van Rhee and Fu Yulin (eds.), *Civil Litigation in China and Europe*, Ius Gentium: Comparative Perspectives on Law and Justice 31,
DOI 10.1007/978-94-007-7666-1_6,

> Court is to secure the just resolution of disputes in accordance with the substantive rights of the parties.

To ensure that the court's resources are allocated efficiently and effectively, the Report recommended that the court should encourage the parties to resolve their disputes by Alternative Dispute Resolution ('ADR'). It noted that the mechanism of ADR

> … has been seen as a potential useful process in appropriate cases as an alternative or adjunct to civil proceedings. It is often said that ADR can be simpler, cheaper and quicker and can be more flexible and custom-designed for the dispute in question. It can be less antagonistic and less stressful than a court case and less damaging to a possible on-going relationship between the parties.[4]

Such proposition is now contained within Order 1A, Rule 4(e) of the RHC. The court has an overriding duty to encourage 'the parties to use alternative dispute resolution procedure if the Court considers that appropriate, and facilitating the use of such procedure'.

Has the introduction of CJR made an impact towards Alternative Dispute Resolution in Hong Kong? The purpose of this article is to attempt to address whether it has in fact made a difference towards the dispute resolution landscape of Hong Kong.

6.2 Impact of the Civil Justice Reform Towards Arbitration

Arbitration tends to be one of the most distinct and popular ADR mechanisms in Hong Kong. The arbitration proceedings were previously governed by the Arbitration Ordinance (Cap 341) of the Laws of Hong Kong. In June 2002, the Hong Kong Institute of Arbitrators published the *Draft Report of the Committee on Hong Kong Arbitration Law* for consultation purposes. The Report had recommended that a unitary regime, namely, the UNICTRAL Model Law, be implemented for both international and domestic arbitrations. These recommendations had provided a good indication towards the need for a complete overview of the Arbitration Law. Where it said that the Arbitration Ordinance should be

> … completely redrawn in order to apply the [UNCITRAL] Model Law equally to both domestic and international arbitrations, and arbitration agreements, together with such additional provisions as are deemed, in light of experience of Hong Kong and other [UNCITRAL] Model Law jurisdictions, both necessary and desirable. In the process the legislation would keep pace with the needs of the modern community domestically and globally….

As such, one of the preambles of the reform is to simplify the complexity of the previous Arbitration Ordinance (Cap 341) which to some was confusing in format

[4] *Supra* note 2, para. 108.

as well as some provisions needed to conform to international norms and, by doing so, to enhance the public accessibility and popularity of arbitration.

In June 2011, the Arbitration Ordinance (Cap 609) was enacted and it has become a masterpiece of legal framework in Hong Kong. Some practitioners are of the view that there is a correlation between the CJR and the arbitration regime in that in Order 1A, Rule 1(2) ('Order 1A, Rule 1(2)') of the RHC, the courts do have an overriding duty to 'ensure that a case is dealt with expeditiously as is reasonably practicable'. In the case of *Lui Chen v. Chan Poon Wing & Others, unreported, HCPI 779/2006*, the court noted that '… After the CJR, the court is even more jealous to ensure that the assessment of damages will proceed as scheduled' in order to fulfil the underlying objectives as set out in the Rules of the High Court. This approach is adopted by a recent case in *Subba Alvin* (also known as *Gurung Yadap Chandra*) *v. Hong Kee (Asia) Limited and Others [2012] 4 HKLRD 640*. Bharwaney J had affirmed that the court does have an overriding duty to '… ensure cost-effectiveness and economy, expedition, proportionality, fairness between the parties, and the proper use of court's resources'.[5]

This overriding duty is also upheld and encouraged by the Arbitration Ordinance (Cap 609). Section 46(3)(c) of the Ordinance (Cap 609) sets out that an arbitral tribunal does have an underlying duty to 'use procedures that are appropriate to the use of particular case, avoiding unnecessary delay or expense, so as to provide a fair means for resolving the dispute'. If the party has failed to comply with this duty, the party is entitled to set aside the arbitral award.[6] *G v. M, unreported, HCCT 36/2009* demonstrated that both the court and the arbitral tribunal share the same duty to ensure that the parties are not prejudiced by unnecessary delay or expenses. In gist, the court noted that

> The Court's practice is consistent with the underlying objectives of the Civil Justice Reform. But it is also consistent with commercial expectation and the Court's supportive role in the arbitration process, that the Court has to ensure that its procedural role enable [Arbitral] Awards to be promptly enforced without unnecessary delay. Otherwise, the value of arbitrations as a speedy means of resolving disputes will be undermined.[7]

Likewise, as per s.73(1) of the Arbitration Ordinance (Cap 609), an arbitral award will be final and binding unless a party challenges an award successfully. To avoid unnecessary delay, and therefore undermining the court's or tribunal's overriding duty, the court has a supportive role to the arbitral tribunal. In the case of *A v. R [2010] 3 HKC,* Reyes J had made three distinct indications throughout the judgment.

The first distinct indication is that when the disputing parties should respect the award decided by the arbitral tribunal. If the tribunal has held in favour of the party, the party should expect the national court to recognize and enforce the arbitral award.[8]

---

[5] *Subba Alvin (also known as Gurung Yadap Chandra) v. Hong Kee (Asia) Limited and Others* [2012] 4 HKLRD 640, para. 10, as *per* Bharwaney J.

[6] The grounds to set aside an arbitral award are set out in Section 81(2) of the Arbitration Ordinance (Cap 609).

[7] *G v. M unreported*, HCCT 36/2009, para. 5, as *per* Reyes J.

[8] *A v. R* [2010] 3 HKC, para. 67, as *per* Reyes J.

The second distinct indication is that legal practitioners should now remind their clients about the consequences of challenging or setting aside the arbitral award. Reyes J emphasized that if the party has failed to challenge the award, the court is entitled to request the party to pay the costs on an indemnity basis. His Lordship explained that this is because a party seeking to enforce an award should not expect to encounter such types of challenges.[9]

The third distinct indication is that both the national court and the arbitral tribunal share the same underlying objectives. Reyes J reassured that the parties must assist the court in reaching a 'just, cost-effective and efficient resolution of dispute' which is crucial. As a result, if the disputant wishes to bring an unmeritorious claim, it means that the party has failed to comply with the underlying objectives as stated in Order 1A, Rule 3 of the RHC.[10]

Based on the indications as suggested by Reyes J in *A v. R*, a party who wishes to challenge an arbitral award is very unlikely, if not impossible, to succeed.

Pacific China Holdings v. Grand Pacific Holdings Ltd [2012] 4 HKLRD 1 is another case, which conveys that the threshold to set aside or challenge an arbitral award is extremely high in Hong Kong. In that case, the appellant wished the court to set aside the arbitral award. The Court of First Instance had held in favour of the Appellant.[11] Subsequently, the Court of Appeal had reversed the decision. Tang V-P at the opening of the judgment indicated that when the party is attempting to set aside an arbitral award, the court is concerned with 'the structural integrity of the arbitral proceedings' rather than the substantive merits of the dispute or the correctness or otherwise of the award.[12]

In the meantime, His Lordship in obiter referred to Professor van den Berg's publication The New York Convention of 1958: An Overview, in which the Professor noted that '… the grounds for refusal of enforcement … are to be construed narrowly … [I]t means that their existence is accepted in serious cases only.'[13] Furthermore, Tang V-P in the dictum referred to International Chamber of Commerce Arbitration, 3rd Edition, p. 302, where the learned author expressed that the national court will only intervene and set aside or resist enforcing an award 'in the most egregious cases'. A good summary of Tang V-P's judgment conveys that the court will only set aside an arbitral award if the conduct complained of is 'serious and egregious'.

Tang V-P's approach is affirmed by the later case in *Pang Wai Hak & Others v. 華允鑒 and Others* [2012] 4 HKLRD 113, where the court noted that

> … the court does not sit as an appeal court from the decision of the arbitrator and will not address itself to the substantive merits of the dispute, or to the correctness or otherwise of

[9] *Ibidem,* para. 68.

[10] *Ibidem,* para. 69.

[11] *Pacific China Holdings v. Grand Pacific Holdings Ltd* [2011] 4 HKLRD 188, as *per* Saunders J.

[12] *Pacific China Holdings v. Grand Pacific Holdings Ltd* [2012] 4 HKLRD 1, para. 7, as *per* Tang V-P.

[13] *Ibidem*, para. 91, as *per* Tang V-P.

> the award … The only basis on which the court may intervene is where the party has been denied due process in the arbitration.

These court decisions clearly indicate that Hong Kong is a pro-arbitration jurisdiction. As briefly mentioned above, the court will not hesitate to request a party who unsuccessfully challenges an arbitral award to pay costs on an indemnity basis. In *Pacific China Holdings v. Grand Pacific Holdings Ltd [2012] 4 HKLRD 569,* subsequent to the appeal above, the respondent applied to the court to have costs taxed on an indemnity basis. The Court of Appeal ordered the appellant, who had challenged the arbitral award unsuccessfully, to pay costs on an indemnity basis. Tang V-P referred to the dictum in *Gao Haiyan & Anor v. Keeneve Holdings Ltd & Anor (No.2) [2012] 1 HKC 491*. In gist, the court had referred to Reyes J's dictum in *A v. R,* where it stated that

> Experienced judges in charge of the Construction and Arbitration List have adopted that, in proceedings … in connection with the arbitral proceedings, in the absence of special circumstances, the court will normally consider it appropriate to order cost on an indemnity basis.[14]

Also, Reyes J stated that the party's application to challenge an arbitral award is often regarded as a 'special circumstance'.[15] In explaining why indemnity costs must be made, Tang V-P concurred with the second distinct indication as suggested above by Reyes J in *A v. R*. His Lordship commented that if the challenging party has failed in its application to challenge an arbitral award, he/she should logically expect to pay costs on a higher basis.

Additionally, *Lin Ming And v. Chan Shu Quan and Others [2012] HKCRI 328* was a recent authority where the court has shown its encouragement towards parties to resolve their dispute by arbitration. In that case, the claimant had applied to the court to grant a stay of litigation in favour of arbitration, whereas the respondent had requested the court to grant an anti-arbitration injunction. Ng J noted that

> … if this court accedes to stay Application in favour of HKIAC arbitration, it would be self-defeating for this court then to grant an injunction restraining … defendants from proceeding with the HKIAC Arbitration. Common sense compels this court to adopt one or the other course, but not both. Given that a stay under Art. 8 of the Model Law is mandatory, the course which this court has to adopt is quite obvious.[16]

The court further commented that it should grant the anti-arbitration injunction 'very sparingly and with caution'. The court noted that if it intervened and granted the prescribed injunction, it would '… undermine the object of Arbitration Ordinance viz. to facilitate a speedy resolution by arbitration without unnecessary delay …', an underlying objective which is strongly advocated by the CJR.

To supplement whether the decisions made by the national court in Hong Kong are in line with the international norms, we shall now turn to other pro-arbitration

---

[14] *Gao Haiyan & Anor v. Keeneve Holdings Ltd & Anor (No. 2)* [2012] 1 HKC 491, para. 12.

[15] *Ibidem*.

[16] *Lin Ming And v. Chan Shu Quan and Others* [2012] HKCRI 328.

jurisdictions for a comparison. In the United Kingdom case of *Fiona Trust v. Privolv [2007] EWCA Civ*, the validity of the arbitration agreement was being challenged. The court was asked to intervene in the proceeding. However, Longmore LJ in the Court of Appeal noted that

> … It is also important to be aware that section 30–32 of the 1996 Act relate to the jurisdiction of the arbitral tribunal. Section 30 provides that tribunal may rule on its own substantive jurisdiction including … the question whether there is a valid agreement … and section 32 provides for the court to determine a preliminary point of jurisdiction if all the parties agree in writing or the tribunal permits the court (for good reason) to do so … .[17]

This conveys that the role of the courts in the United Kingdom is in line with that of Hong Kong thus providing a supportive role as well as encouraging the parties to resolve their dispute by arbitration rather than court litigation.

However, the English court in *Excalibur ventures LLC v. Texas Keystone Inc [2011] ArbLR 27* had criticized such approach and argued that referring the parties to arbitration is equivalent to

> … force [parties] to participate in a jurisdiction dispute between the New York arbitrator … [It] would involve, in practical terms, determining the [jurisdiction of an arbitral tribunal] by the back door, and thus likely … lead to gross injustice.[18]

Nevertheless, a controversial approach was adopted in *Nomihold Securities Inc v. Mobile Telesystems Finance SA [2012] EWHC 130*. Smith J refused to grant an anti-arbitration injunction even though the judge was prepared to accept that there was a possibility that a renewed arbitration was a breach of the original arbitration agreement. Smith J in the dictum noted that

> … On its face it is a complaint of the kind that the parties agreed should be determined by LCIA arbitration. If the New Arbitrations proceed, the tribunal appointed to them will have adequate power to determine their arbitration complaints. I say no more about the complaints themselves… but the tribunal could adopt procedures to deal with the re-arbitration complaints … It is for them to decide whether to do so.[19]

Based on the decisions in *Fiona Trust* and *Nomihold Securities*, it is suggested that the practice in Hong Kong – namely, to encourage parties to resolve their dispute by ADR, in particular arbitration, is a norm that has been widely adopted in the United Kingdom. However, there are critics who argue that such encouragement may sometimes led to 'gross injustice'. There is no doubt, however, that the Civil Justice Reform had encouraged national courts to uphold arbitration awards (provided they are validly construed), so as to uphold the underlying objectives as stated in the Hong Kong's Rules of the High Court. As such, the CJR has indeed created a significant impact towards the arbitration regime of Hong Kong in recent years.

---

[17] *Fiona Trust v. Privolv* [2007] EWCA Civ, para. 33, as *per* Longmore LJ.

[18] *Excalibur ventures LLC v. Texas Keystone Inc* [2011] ArbLR 27, para. 70, as *per* Gloster J.

[19] *Nomihold Securities Inc v. Mobile Telesystems Finance SA* [2012] EWHC 130, para. 63, as *per* Smith J.

6.3 Development of Mediation Under the Civil Justice Reform

Under the CJR regime, the court does have an overriding duty to encourage the parties to 'facilitate settlement of dispute' in appropriate cases.

In Hong Kong, prior to the enactment of the Mediation Ordinance (Cap 620), a certain level of discussion about implementing compulsory mediation within the regime of Hong Kong was explored. In 1993, a committee chaired by Kaplan J suggested that 'Whilst being attracted to a compulsory mediation scheme the Committee is of the opinion that more extensive consultation would be desirable before this is introduced'.

Subsequently, the Report recommended that the litigants should be given information about 'the benefit and procedure of mediation' but that mediation should remain voluntary. The same issue was later raised by Lord Justice Jackson's Report ('Jackson') of January 2010[20] in the United Kingdom. Jackson LJ in the Jackson Report had assured that 'mediation has a significantly greater role to play in the civil justice system than is currently recognized'.[21] Nevertheless, this does not mean that the mediation process has to become a mandatory and compulsory scheme. He noted that, 'in spite of the considerable benefits which mediation brings in appropriate cases, I do not believe that parties should ever be compelled to mediate'.[22] Instead, he suggested that there must be 'a cultural change, not rule change' required to further advance mediation. Most importantly, His Lordship emphasized that mediation can be extremely useful in appropriate cases, but it is not a universal panacea for all cures. The Law Society in England stated that

> The Law Society continues to support the use of all forms of ADR in circumstances where it may assist the parties to come to terms and they are willing to do so … However, mediation is not the panacea which some consider it to be and is not appropriate in all cases. Neither should it to be mandatory … We consider that firmer guidelines are needed on what is and is not suitable for mediation.[23]

It is important that the national court should encourage the parties to engage in a non-adversarial role of resolving their disputes by mediation where appropriate and on a voluntary basis. Otherwise, it may defeat the effectiveness of mediation.

The United Kingdom Court Service website of the Lord Chancellor's Department lists the following virtues of ADR:

> The settlement of dispute by means of ADR can:
>
> (1) significantly help litigants to save costs;
> (2) save litigants the delay of litigation in reaching finality in their disputes;

[20] Lord Justice Jackson 2009–2010.

[21] *Ibidem*, p. 358 of the 2012 Report, as *per* para. 2.9.

[22] *Ibidem*, p. 387.

[23] *Ibidem*, p. 384.

(3) enable litigants to achieve settlement of their dispute while preserving their existing commercial relationship and market reputation;
(4) provide litigants with a wider range of solutions than those offered by litigation; and
(5) make a substantial contribution to the more efficient use of judicial resources.

The Lord Chancellor's Department of the United Kingdom provided a coherent explanation about the beneficial features of ADR. In particular, it highlighted that

> … procedures may be simpler, and closer to normal business activity. There may be less, or better focused, paperwork. The work done in preparing disputes for the resolution process may be less, or simpler. Parties may choose an arbitrator or mediator for special knowledge or expertise. It may be possible to find earlier or more convenient dates for ADR than court lists permit … .[24]

Furthermore,

> … Procedures and locations are usually much less formal, and less stressful for that reason alone. Mediation, in particular, often starts by giving the parties themselves the chance to tell their own stories, and identify the issues important to them, in their own way. The process might be considered more constructive, rather than looking for weakness in the other sides' case, there is a greater concentration on what would constitute a mutually satisfactory solution ….[25]

These recommendations are largely valuable and to a certain extent have now been incorporated into the essence of Hong Kong's Mediation Ordinance (Cap 620). The preamble of this Ordinance is consistent with the underlying objectives as stated in the Rules of the High Court, namely, 'to promote, encourage and facilitate the resolution of disputes by mediation.'[26] On its basis, it does convey that the CJR has an influence towards the development of mediation in Hong Kong.

Nevertheless, as suggested above, mediation is not a universal panacea. There are some cases in which mediation may not be appropriate. For instance, where the case involves issues relating to constitutional matters, or where the rights to be tested are established as principles or precedents.[27] A recent Hong Kong case – *Greenwood Terrace v. U-Teck Ltd ., unreported, LDBM 11 of 2011* was one of those cases in which the Tribunal held that mediation is not a suitable resolution method to be adopted. In that case, the court was requested to make an interpretation into the terms of the Deed of Mutual Covenant ('DMC'). The Tribunal referred to the observations made by the court in *The Incorporated Owners of Shatin New Town v. Yeung Kui, unreported, CACV 45 of 2009*, where Mr. Justice Cheung JA noted that

> while I share the desire that parties should make all possible attempts to resolve their disputes by alternative means such as mediation, this is a case which ultimately involves a decision on law concerning the correct interpretation of the terms of the Deed of Mutual Covenant … I do not consider that its refusal to take part in mediation should be visited ….[28]

---

[24] Lord Chancellor Department, Discussion Paper, para. 4.1.

[25] Lord Chancellor Department, Discussion Paper, para. 4.6.

[26] See Sect. 6.3 of the Mediation Ordinance (Cap 620).

[27] Brown & Marriot, paras. 18–112.

[28] Para. 8 of the dictum, as *per* Mr. Justice Cheung JA.

Furthermore, the Tribunal in *Greenwood* held that since the applicant in this case was trying to seek a declaration, 'a determination by the court is a must and mediation is not suitable.'[29]

Based on the decision in *Greenwood*, it is suggested that in some cases, particularly where it may affect rights or liberties (i.e. a dispute of public importance), the court may take the view that mediation may not be a suitable mechanism to resolve the dispute.

What types of disputes are suitable to be resolved by mediation? The United Kingdom Centre for Effective Dispute Resolution ('CEDR') in a paper suggested that personal injury ('PI') and clinical negligence claims are classical types of disputes that should be resolved by mediation. It stressed that claimants in PI cases will typically claim for full or partial vindication in relation to the accident, cost and damages, an opportunity to express the implication subsequent to the accident, and wish to reach a 'swift and risk free' outcome. Similarly, in clinical negligence cases, claimants are typically looking for an apology, an explanation of what had happened, and reassurance or reform to ensure that there is a reduced or eradicated chance of the same thing happening again in the future. The respondent, especially the insurer, wishes to deviate or mitigate the losses it needs to compensate. It is suggested that these types of disputes are best to be resolved by mediation.

Pacific Long Distance Telephone v. New World Telecommunications Ltd HCA 1688/2006 is a recent Hong Kong Court of First Instance case which demonstrates that the parties are encouraged to settle their disputes by mediation, even if they had failed to settle the matter previously. Houghton J referred to *iRiver Hong Kong Ltd v. Thakral Corp (HK) Ltd*, where the court noted that

> the mere fact that negotiation between the solicitors failed to result in the settlement does not meant that it would not benefit from mediation by a skilled mediator … Brook LJ in *Dunnett v. Railtrack Plc* [2002] 1 WLR 2434 at paragraph 14 [stated that] "skilled mediators are now able to achieve results satisfactory to both parties in many cases which are quite beyond the power of lawyers and courts to achieve…".[30]

Based on this decision, it gives the impression that the Judiciary in Hong Kong as well as the United Kingdom do have strong faith towards the underlying objectives under the CJR, namely, 'to facilitate settlement of dispute' by appropriate means.

To encourage the parties to resolve their dispute by mediation, the court may need to grant a stay of litigation. The considering factors of granting a stay of litigation for mediation in Hong Kong were established in *Resource Development Limited v. Swanbridge Limited, unreported, HCA 1873/2009.* In this case, the court questioned the practical effect of granting a stay of proceedings. In other words, the court was looking for the practical benefit that would be acquired if the proceedings

[29] Para. 23 of the dictum, as *per* Deputy Judge KOT, Presiding Officer, Lands Tribunal.

[30] *Pacific Long Distance Telephone v. New World Telecommunications Ltd,* unreported, HCA 1688/2006, para. 13, as *per* Houghton J.

were stayed. The case had set out two distinctive thresholds. The first distinct threshold is to examine whether the parties are ready for trial. The second distinct threshold is to examine whether the mediation will take place 'smoothly' and whether there is a glimpse of success for parties to reach an agreement. If the parties are ready for trial, and there is no chance that the parties can reach a mediated agreement, a stay of litigation is unlikely to be granted.

The case of *C Y Foundation Group Limited v. Leonora Yung & Others, unreported, HCA 933/2011*, involved 13 parties in a dispute, and the parties had yet to exchange witness statements. The court noted that if the parties were able to resolve their dispute by mediation, it would

> … at least, save the substantive costs for preparing the witness statements. There are practical benefits for the parties if a short stay is ordered and I so order. As to the length of the stay, I do not see any reason for 90 days as proposed by the defendants. Mediation will take place within a short time. The reasonable length of stay should be such period from the date of filing and serving the Mediation Minutes until conclusion or termination of mediation. If mediation fails, they should prepare for trial immediately.[31]

The dictum is a clear indication suggesting that the Judiciary may be of the view that mediation is indeed a useful tool in resolving parties' dispute. But it will only grant a stay of litigation for a reasonable period of time, so as to promote the underlying objectives as enshrined within the principles of the CJR.

Meanwhile, if the parties have unreasonably failed to attempt mediation, the court is entitled to make a costs order on an indemnity basis, subject to Practice Direction 31, paragraph 5(2) ('PD 31').

Under the CJR regime, PD 31 also requires the parties to have a 'minimum level of participation' in the mediation. In the case of *Resource Development Limited v. Swanbridge Limited, unreported, HCA 1873/2009*, the court defined the 'minimum level of participation' is to

> … ensure that parties are going to have the mediation in a sincere manner. The Court should not impose anything that is more than necessary for the parties to participate as mediation is voluntary and any party may decide to terminate it at any stage of the mediation. To make a direction so inflexible for the minimum level of participation may germinate other unnecessary disputes between the parties ….[32]

Based on the judgment held by the Court of Appeal, it suggests that the courts are encouraged to ask parties to resolve their disputes by mediation under the CJR. However, it has no intention to force the parties to enrol into mediation involuntarily.

In summing up, the current position in Hong Kong confirms that the Judiciary would encourage the parties to resolve their dispute by mediation in appropriate cases. It boils down to the fact that the underlying objectives of the CJR do have a strong connection with the development of mediation, thus creating an atmosphere

[31] *C Y Foundation Group Limited v. Leonora Yung & Others*, unreported, HCA 933/2011, para. 21.

[32] *Resource Development Limited v. Swanbridge Limited*, unreported, HCA 1873/2009, para. 10.

which encourages the parties to 'facilitate settlement of the dispute'. Under the CJR regime, the parties are encouraged to reach a just and cost-efficient settlement failing which the court is entitled to 'penalise' the unreasonable party by paying costs on an indemnity basis to the party who sincerely makes an attempt to resolve this dispute by mediation.

6.4 The Correlation Between Adjudication and Civil Justice Reform

The construction industry remains to be one of the largest users of adjudication in Hong Kong. The courts in Hong Kong tend to encourage parties to resolve their dispute by arbitration. In the case of *Cheavalier Company Limited v. Tak Cheong Engineering Development Ltd, unreported, HCA 153/2008*, the court noted that

> … apart from mediation and settlement negotiations, there are other modes of alternative dispute resolution. In the construction field, adjudication has become very popular in the United Kingdom and in Australia. I see no reason why this option should not be adopted in Hong Kong … In many construction disputes, I believe adjudication can provide a more efficient and effective mode of dispute resolution ….[33]

The decision on *Cheavalier* suggests that adjudication may also be an appropriate technique to use in resolving one's dispute.

Some practitioners believe that adjudication may not be suitable for complicated cases. This was affirmed by an English court case, *William Verry (Glazing Systems) Ltd v. Furlong Homes [2005] EWHC 133 (TCC)*, in which the judge stated that a complicated construction matter may not favour adjudication. In contrast, in *CIB Properties Ltd v. Birse Construction [2004] EWHC 2365 (TCC),* the judgment made the point that a complicated construction dispute can still be resolved by adjudication in a fair manner. In gist, if the adjudicator is of the view that it could not reach a fair judgment within the prescribed period of time, he/she shall request the parties to give the consent to extent the time period of him/her to make a fair judgment. The court also noted that the request of extension of time should not be based on the complexity of the dispute. In fact, the mere factor an adjudicator should consider is whether it can reach a fair judgment within the prescribed period of time.[34]

Nevertheless, as mentioned above, the adjudication remains to be an ADR mechanism that is largely confined within the construction dispute. A further and coherent development of adjudication under the CJR regime has yet to be seen in Hong Kong.

---

[33] *Cheavalier Company Limited v. Tak Cheong Engineering Development Ltd,* unreported, HCA 153/2008, para. 21, as *per* Lam J.

[34] *CIB Properties Ltd v. Birse Construction* [2004] EWHC 2365 (TCC), para. 25.

6.5 Conclusion

In conclusion the CJR has indeed acted as a backbone towards the development of ADR in Hong Kong. The underlying objectives of the CJR, the practice directions and the Judiciary's attitude have steered disputants energy and efforts towards using a prescribed ADR mechanism in resolving their disputes. As matters develop ADR will without doubt be part and parcel of Hong Kong's Legal landscape going forward, in that the disputants will attempt to resolve their disputes by the prescribed mechanism first, prior to bringing the dispute in front of the court.

References

Lau D (2009) Civil procedure in Hong Kong. A guide to the main principles, 1st edn. Sweet & Maxwell, Hong Kong

Lord Justice Jackson (2009–2010) Review of civil litigation cost, final report. Available at: http://www.judiciary.gov.uk/JCO%2fDocuments%2fReports%2fjackson-final-report-140110.pdf

Part III
Austria & Germany

Chapter 7
Austria & Germany: A History of Successful Reforms

Andrea Wall

7.1 General Aspects

7.1.1 Legal Basis

7.1.1.1 Austria

In Austria, the legislative competence for procedural law matters lies with the Federation (*Bund*).[1] The legal basis of adjudication in Austria in ordinary civil law matters is primarily formed by the Code of Civil Procedure (*Zivilprozessordnung*, ZPO), which contains the rules of civil procedure as such, and the Act on Jurisdiction (*Jurisdiktionsnorm*, JN), which governs the right to exercise jurisdiction by the civil courts. The Non-Contentious Proceedings Act (*Außerstreitgesetz*, AußStrG) provides for procedural rules for particular (and quite heterogeneous) kinds of disputes, such as certain family law or company law matters. The courts are organised according to the Code of Court Organisation (*Gerichtsorganisationsgesetz*, GOG), the Highest Court's Act (*Bundesgesetz über den Obersten Gerichtshof*, OGHG) and the First and Second Instance Courts' Rules of Procedure (*Geschäftsordnung für die Gerichte I. und II. Instanz*, Geo), the latter rules being enacted by ordinance of the Minister of Justice.

Additionally, there is a set of other rules, which are essential for (national) civil procedure, such as the Service of Documents Act (*Zustellgesetz*, ZustellG) and the Labour and Social Courts Act (*Arbeits- und Sozialgerichtsgesetz*,

[1] Art. 10(1) No. 6 Federal Constitutional Law (*Bundes-Verfassungsgesetz*, B-VG).

A. Wall (✉)
University of Vienna, Vienna, Austria
e-mail: andrea.wall@univie.ac.at

C.H. (Remco) van Rhee and Fu Yulin (eds.), *Civil Litigation in China and Europe*, Ius Gentium: Comparative Perspectives on Law and Justice 31,
DOI 10.1007/978-94-007-7666-1_7,

ASGG). Furthermore, the constitutional foundation of the courts is to be found in Articles 82–94 of the Austrian Federal Constitutional Law (*Bundes-Verfassungsgesetz*, B-VG).

7.1.1.2 Germany

According to Article 74(1) No. 1 of the German Constitution (*Grundgesetz*, GG), the subject matter of 'judicial proceedings' falls within the scope of the concurrent legislative competence of the federal states and the German Federation. Therefore, the federal states are competent to legislate as long as the Federation has not exercised its legislative competence. The Federation has made use of its competence by enacting the Code of Civil Procedure (*Zivilprozessordnung*, ZPO) and the Court Organisation Act (*Gerichtsverfassungsgesetz*, GVG), which can be regarded as the most important laws on German ordinary jurisdiction. The law on civil procedure is exhaustively covered by federal acts, whereas as regards the law on court organisation there is (a little) scope left for the legislators of the federal states.[2]

Other relevant laws are, e.g., the Act on Proceedings in Family and Non-Contentious Matters (*Gesetz über das Verfahren in Familiensachen und in den Angelegenheiten der freiwilligen Gerichtsbarkeit*, FamFG), the Labour Courts Act (*Arbeitsgerichtsgesetz*, ArbGG), the Social Courts Act (*Sozialgerichtsgesetz*, SGG), the Court Costs Act (*Gerichtskostengesetz*, GKG) and the German Judges Act (*Deutsches Richtergesetz*, DRiG).

7.1.2 Court Organisation

7.1.2.1 Austria

According to Articles 82, 83(1) B-VG, the Federation is competent for the establishment of courts and jurisdiction.

Ordinary jurisdiction in civil law matters is distinguished from jurisdiction *ratione materiae* (*Kausalgerichtsbarkeit*), i.e., jurisdiction in commercial law and jurisdiction in labour and social law. However, apart from in Vienna no courts on special subject matters have been established; as a consequence ordinary courts decide 'as commercial court' or 'as labour and social court'. In principle, there are three instances.[3] The court of first instance can be either a *Bezirksgericht* or a *Landesgericht*. The subject matter of litigation or the value in dispute is decisive for determining which of these two courts has the power to hear the case. Appeals from the *Bezirksgericht*

[2] See Maunz 1984, Art. 74 Grundgesetz (GG) margin No. 72 *et seq.*

[3] See Sect. 58 Antitrust Act (*Kartellgesetz*, KartG) that provides for only two instances in antitrust law matters.

are heard by the *Landesgericht* and appeals from the *Landesgericht* as court of first instance are heard by the *Oberlandesgericht*. The court of last resort is the *Oberste Gerichtshof*.

7.1.2.2 Germany

Pursuant to Articles 30 and 92 GG, the power to establish courts is granted to the federal states with the exceptions exhaustively stipulated in the GG. In civil law matters these exceptions are the High Courts[4] and the Federal Patent Court.[5] Apart from these courts, the establishment of courts and jurisdiction itself rest with the federal states.[6]

Ordinary jurisdiction in civil law matters is distinguished from jurisdiction in labour and social law. Each of these three types of jurisdiction has its own sequence of courts with generally[7] three instances. In ordinary jurisdiction there are two types of courts of first instance, namely the *Amtsgericht* and *Landgericht*.[8] The respective competences result either from the subject matter of litigation or from the value in dispute. Special commercial divisions can be established at the *Landgericht*. There are divisions for family law matters at the *Amtsgericht* (then called *Familiengericht*). Appeals from the *Amtsgericht* are heard by the *Landgericht* (with some exceptions; e.g., decisions of the *Familiengericht*; in that case the competent court of appeal is the *Oberlandesgericht*). Appeals from the *Landgericht* as court of first instance are heard by the *Oberlandesgericht*. In general the third and highest instance of ordinary jurisdiction is the *Bundesgerichtshof*.

7.1.3 Funding of the Justice System

According to data for 2008 provided for the CEPEJ Evaluation of European Judicial Systems Report of 2010, the approved annual budget allocated to all Austrian courts and the public prosecution services was €667,930,000. The annual income from court fees (or taxes) received by the state was €741,000,000.[9] According to data for

[4] Art. 95 GG.

[5] Art. 96(1) GG.

[6] *Cf.*, e.g., Hillgruber 2007, Art. 92 GG margin No. 77 *et seq.*

[7] *Cf.*, e.g., § 566 German ZPO: 'leapfrog' appeal (*Sprungrevision*).

[8] Except for certain arbitration matters, see Section 1062 German ZPO.

[9] See European Commission for the Efficiency of Justice (CEPEJ) – Evaluation report of European judicial systems – Edition 2010 (2008 data): Efficiency and quality of justice, 61, Table 3.11; available at: http://www.coe.int/t/dghl/cooperation/cepej/evaluation/default_en.asp (last consulted in July 2012).

2006 provided for the CEPEJ Report 2008 (the last time that Germany participated), the approved annual budged allocated to all German courts and the public prosecution services was €8,731,000,000. The annual income from court fees (or taxes) received by the state was €3,977,000,000.[10]

Court fees are calculated according to a lump-sum system. The sum depends on the amount in dispute and fees are incurred separately for every instance of proceedings. They have to be paid in the beginning of the proceedings, e.g., when filing the claim. The relatively high revenues derive partly from the fact that the Austrian and German courts are in charge of the land and commercial registers. However, the surplus generated by the Austrian courts is quite remarkable and exceptional in comparison to other European countries.[11] This 'cross-financing' of other public tasks by those who make use of judicial services has been met with criticism.[12]

7.1.4 Dealing with Backlogs

The handling of procedural delays and thus the prevention of backlogs have a constitutional dimension, though counteractive measures may affect the fundamental right of judicial independence or the right to a lawful judge. Any interference with the exercise of judicial power is strictly prohibited.[13]

A measure against procedural delay is judicial supervision, which can, as a matter of course, only be conducted while judicial independence is strictly observed. In Austria, the justice system provides for automated data collection that monitors the input and output of actions. A monthly report shows the performance of the courts and allows for tracking notable cases. On this basis further organisational or supervisory steps can be taken. Once a year, the number of pending overlong proceedings is recorded in a standard report. One month in advance a warning list is issued including all proceedings that will most probably be recorded. The consequence of such a record is an obligation for the head of the court to report on the responsible judge, the reasons for delay and the remedial measures taken.[14] Similarly, under

[10] See European Commission for the Efficiency of Justice (CEPEJ) – Evaluation report of European judicial systems – Edition 2008 (2006 data): Efficiency and quality of justice, 58, Table 9; available at: http://www.coe.int/t/dghl/cooperation/cepej/evaluation/archives_en.asp (last consulted in July 2012).

[11] See CEPEJ Report, above n. 9, 61 *et seq.*

[12] See, e.g., the position of the Austrian Bar Association No. 13/1 11/174 of 2011, available at: www.oerak.or.at (last consulted in July 2012).

[13] See Art. 97 GG; § 1 Gerichtsverfassungsgesetz (GVG); § 26(1) DRiG; Art. 87(1) B-VG.

[14] See the report of the Austrian Accounting Office: Rechnungshof, *Verfahrensdauer im zivilgerichtlichen Verfahren*, Bund 2009/12, 230 *et seq.* (available at: http://www.rechnungshof.gv.at/berichte/ansicht/detail/verfahrensdauer-im-zivilgerichtlichen-verfahren.html (last consulted in July 2012)).

German law the admissible measures of supervision are limited to confronting the judge on a completely objective basis with his misconduct and encouraging the taking of remedial measures.[15]

The assignment of cases to a specific judge must be previously fixed for a certain period of time[16] so that the judge responsible for trying the case is determinable in advance. This prevents any interference with selecting the responsible judge and guarantees the right to a lawful judge.[17] The assignment of cases to the docket (*Geschäftsverteilungsplan*), issued by the court's presidium or staff panel, provides for rules on the representation of the assigned judge in the event he is prevented from complying with his judicial duties. Furthermore, a rearrangement of the assignment of cases to the docket can be made under specific circumstances including overwork of a judge.[18]

7.2 Division of Powers Between Judge and Parties

7.2.1 Origins and History

Austrian and German civil procedural law have developed in opposite directions, thereby both breaking to a certain extent with their past. While the predecessor of the Austrian Code of Civil Procedure (*Zivilprozessordnung*, ZPO), the General Rules of Court (*Allgemeine Gerichtsordnung*, AGO) of 1781, was governed by the ideas of liberalism and, therefore, with party autonomy degrading the judge to a 'jumping-jack that was only allowed to move if the parties pulled its string',[19] the Prussian *Allgemeine Gerichtsordnung* of 1793 was enacted in the spirit of Enlightened Absolutism,[20] thus based on the inquisitorial system.

The Austrian ZPO was enacted in 1895 and came into force in 1898. In accordance with the ideas of its well-known guiding spirit Franz Klein, the Austrian ZPO followed a non-liberal approach. Klein perceived litigation as a negative social phenomenon[21] and the administration of justice as an indispensable welfare facility.[22]

---

[15] See Jacobs 2011, § 1 GVG margin No. 19 *et seq.*

[16] See, e.g., Section 21e GVG; Section 26(1) Gerichtsorganisationsgesetz (GOG); Art. 87(3) B-VG.

[17] Art. 101(1) GG; Art. 83(2) B-VG.

[18] See Section 21e(3) GVG; Section 27a(1) GOG.

[19] *Cf.* Sprung 1977, p. 387: '… ein Hampelmann, der sich nur bewegen durfte, wenn die Parteien ihn am Schnürchen zogen'.

[20] *Cf.* Dahlmanns 1982, p. 2648; Oberhammer and Domej 2005, p. 109.

[21] See, e.g., Klein 1927, p. 126 *et seq.*; Klein and Engel 1927, p. 280 *et seq.*; Oberhammer and Domej 2005, p. 121.

[22] See, e.g., Klein 1927, p. 126, 133 *et seq.*; Klein and Engel 1927, p. 186 *et seq.*; *cf.* Böhm 1986, p. 63 *et seq.*

Therefore, public intervention was needed and realised mainly by concentrating case-management powers in the hands of the judge. By contrast, the German Code of Civil Procedure (*Zivilprozessordnung*, ZPO) of 1877[23] was dominated by a liberal approach[24] seeing litigation as a private concern. Certainly neither the German ZPO of 1877 nor the Austrian ZPO of 1895 can be understood as a response to former codifications. Such a view would obviously simplify the course of history.[25] However, at the end of the nineteenth century the historical starting points of the German and Austrian legislative process as regards the allocation of procedural functions between the court and the parties diverged widely.

In Germany, criticism arose soon after the enactment of the German ZPO,[26] notably focused on the duration of proceedings, culminating in several amendments aimed at accelerating proceedings by strengthening the case-management powers of the judge.[27] The Local Court's Amendment Act (*Amtsgerichtsnovelle*)[28] of 1909 introduced *ex officio* proceedings (*Amtsbetrieb*) at the *Amtsgericht*, meaning that the court was mainly in charge of the formal course of proceedings rather than the parties; only in 1943 did a regulation (4th *Vereinfachungsverordnung*)[29] extend the *Amtsbetrieb* to proceedings before the *Landgericht*[30]; and the amendment of 1924 (*Novelle* 1924)[31] strengthened the judge's position not only with regard to the formal course of proceedings, but also with regard to substantive matters.[32] In our context two further amendments of the last century should be pointed out, namely the amendment of 1933[33] and the so-called 'amendment for simplification' (*Vereinfachungsnovelle*)[34] of 1976. The former stipulated, among other things, the obligation to tell the truth following the Austrian example[35] and introduced party

[23] Civilprozeßordnung, *Reichsgesetzblatt* of 30 January 1877, No. 6.

[24] *Cf.* Oberhammer and Domej 2005, p. 297.

[25] For a general overview of the development towards procedural unification in Germany and of Austrian developments, see Oberhammer and Domej 2005, p. 107 *et seq.*, 118 *et seq.*

[26] *Cf.* Dahlmanns 1982, p. 56 *et seq.*

[27] Hess 2001, p. 12; on the development of the guiding principles until 1975, see Damrau 1975.

[28] Gesetz betreffend Änderungen des Gerichtsverfassungsgesetzes, der Zivilprozeßordnung, des Gerichtskostengesetzes und der Gebührenordnung für Rechtsanwälte, *Reichsgesetzblatt* of 11 June 1909, No. 30.

[29] Verordnung zur weiteren Vereinfachung der bürgerlichen Rechtspflege, *Reichsgesetzblatt* of 13 January 1943, Part I, No. 3.

[30] Damrau 1988, p. 162 *et seq.*

[31] Verordnung über das Verfahren in bürgerlichen Rechtsstreitigkeiten, *Reichsgesetzblatt* of 22 February 1924, Part I, No. 15.

[32] Oberhammer and Domej 2005, p. 114 with further references; Brehm 2003, vor § 1 margin No. 159 *et seq.*

[33] Gesetz zur Änderung des Verfahrens in bürgerlichen Rechtsstreitigkeiten, *Reichsgesetzblatt* I of 28 October 1933, Part I, No. 120.

[34] Gesetz zur Vereinfachung und Beschleunigung gerichtlicher Verfahren (Vereinfachungsnovelle), *Bundesgesetzblatt* of 9 December 1976, Part I, No. 141.

[35] Damrau 1988, p. 166.

testimony as a means of evidence.[36] The latter tended to bring forward the proceedings by way of a thorough preparation of the hearing.[37] Both the parties as well as the court shall make efforts to accelerate and concentrate proceedings at an early stage. The power of the court to order the production of documents *ex officio* was increased by the amendment of 2001 (*ZPO-Reformgesetz* 2001).[38]

As regards the topic of this report, the Austrian system of civil procedure proved to be more persistent than the German one. The Austrian ZPO underwent two major changes, which were effected by the amendments of civil procedure of 1983 and 2002. The law of 1983[39] introduced among other things (such as significant modifications of the admissibility of legal remedies) the obligatory order for payment procedure (*Mahnverfahren*). The amendment of 2002[40] emphasised the duty of the parties to foster the efficient conduct of the lawsuit. Moreover, the so-called 'first hearing' (*Erste Tagsatzung*), which had to a large extent become no more than an unnecessary formality,[41] was replaced by a preparatory hearing (*Vorbereitende Tagsatzung*) and the directions for evidence were replaced by an agreement on the general scheduling. However, the cornerstones of the relationship between the judge and the parties remained basically unchanged. Under the Austrian ZPO the judge is and has always been in charge of the formal course of proceedings. Furthermore, ever since the Austrian ZPO was enacted, the judge has had quite considerable investigative powers. In fact, the social concept underlying the Austrian Code of Civil Procedure and the active role of the judge prescribed by it were a success and had a great impact on the legislation of many European countries.[42] Still, the Austrian legislator is never tired of emphasising that reforms are obligatory in order to speed up litigation, even though compared to international standards Austrian proceedings do not take long.[43]

The legislator's decision concerning the extent of the power of the judge was (and may well still be today)[44] not (only) driven by considerations regarding the aim, efficiency and duration of proceedings, but more indeed it was the answer to an ideological question.[45] However, the judge's having strong influence on the course

[36] Oberhammer and Domej 2005, p. 258.

[37] See, e.g., Section 272 *et seq.* German ZPO; *cf.* Oberhammer and Domej 2005, p. 114 *et seq.*

[38] Gesetz zur Reform des Zivilprozesses, *Bundesgesetzblatt* of 2 August 2001, Part I, No. 40; on the other amendments effected by the ZPO-Reformgesetz 2001, see Oberhammer and Domej 2005, p. 116 *et seq.*

[39] Zivilverfahrens-Novelle 1983, *Bundesgesetzblatt* of 4 March 1983, No. 135.

[40] Zivilverfahrens-Novelle 2002, *Bundesgesetzblatt* of 30 April 2002, Part I, No. 76.

[41] *Cf.* Oberhammer and Domej 2010, p. 266.

[42] *Cf.* Oberhammer and Domej 2010, p. 258; for further references, see Jelinek 1991, p. 41 *et seq.*; Kohler 2002, p. 121 *et seq.*

[43] *Cf.* CEPEJ Report, above n. 9, 149, Figure 9.11.

[44] See, for example, the articles on reform in the countries of Central and Eastern Europe in Oberhammer 2001a; and as for Switzerland, Oberhammer 2004b, p. 1043 *et seq.*; *cf.* also Leipold 2005, vor § 128 margin No. 148.

[45] *Cf.*, e.g., Klein 1927, p. 1 *et seq.*; recently on this issue also Haas 2011, p. 111 *et seq.* with further references.

of the proceedings and especially on the fact-finding process does not necessarily entail harming the parties' private autonomy. The underlying premises of the contrary view – namely that there can be either a powerful judge as an expression of the strong state or the adversarial system as an expression of individual freedom[46] – are plainly wrong (given an efficient constitutional basis). Instead of tenaciously burdening the discussion with ideological ballast the focus should be put on the purpose of proceedings and the best way to achieve it. In fact, today this approach is predominant in Germany and Austria.[47] Therefore, the following will centre on details instead of guiding ideas.

7.2.2 Present Situation

7.2.2.1 Commencement of Civil Proceedings

In Austria, the vast majority of civil cases are not conducted in ordinary proceedings but as an order for payment procedure (*Mahnverfahren*).[48] Although this is not a measure of reallocation of case-management powers, the obligation to commence litigation concerning pecuniary claims with a request for an order for payment (*Mahnklage*) is a very effective means of accelerating proceedings. The order for payment procedure was introduced in Austrian law as early as 1873.[49] It did not, however, become obligatory until 1983 with respect to cases before the *Bezirksgericht* and 2002 with respect to cases before the *Landesgericht*. Recently it has been extended to all actions for payment up to an amount of €75,000 (instead of €30,000).[50]

In Germany, the significance of the order for payment procedure is quite similar although it is just an option for the claimant.[51] Different from Austrian law, the application of Sections 688 *et seq.* German ZPO is not limited to a certain amount in dispute. Furthermore, the procedure differs from the Austrian equivalent: absent an objection within a certain period of time the Austrian order for payment

[46] *Cf.* Böhm 1978, p. 157.

[47] Oberhammer 2001b, p. 131 *et seq.*

[48] In 2007, 508,958 out of 621,841 civil cases before the *Bezirksgerichte* and 16,660 out of 33,738 civil cases before the *Landesgerichte* were handled as order for payment proceedings; see the report of the *Rechnungshof*, above n. 14, 212.

[49] For detailed information on the history of Austrian *Mahnverfahren*, see Oberhammer 2001c, p. 283 *et seq.*

[50] Section 244 *et seq.* Austrian ZPO.

[51] In 2010, there were 6,430,391 order for payment proceedings compared to 1,213,093 civil cases before the *Amtsgericht* and 372,150 civil cases before the *Landgericht*; in approximately 10 % of order for payment proceedings the defendant raised an objection, which led to the commencement of ordinary proceedings; see Statistisches Bundesamt, *Rechtspflege*, Fachserie 10 Reihe 2.1, 13, 30, 37, 54; available at: https://www.destatis.de/DE/Publikationen/Thematisch/Rechtspflege/GerichtePersonal/Zivilgerichte2100210107004.pdf (last consulted in July 2012).

(*Zahlungsbefehl*) becomes final and enforceable,[52] whereas under German law the claimant has to apply for an enforcement order (*Vollstreckungsbescheid*).[53]

In ordinary proceedings a civil case starts with the filing of a lawsuit. The court will examine *ex officio* whether all procedural prerequisites are fulfilled. Under German law the judge then decides on the form of (preparatory) proceedings at his discretion. He either sets an early first oral hearing (*früher erster Termin zur mündlichen Verhandlung*)[54] or he initiates preliminary written proceedings.[55] Both procedures seek to accelerate proceedings via a preparation appropriate for the respective matter in dispute. The benefit of the *früher erster Termin* is to have an oral argument at an early stage of litigation. However, as the judge has a wide scope of discretion (e.g., he can order a written defence in preparation for the early first oral hearing) the distinction between these procedures has become slightly blurred.[56] Since the amendment of 2001 (*ZPO-Reformgesetz* 2001) a conciliation hearing has to precede the (contentious) oral hearing unless it appears to be unpromising or an attempt to reach an out-of-court settlement has already failed.[57]

Austrian law distinguishes between proceedings before the *Bezirksgericht* and those before the *Landesgericht*. In proceedings before the *Landesgericht* the judge must order the defendant to submit his statement of defence within 4 weeks.[58] At the same time the claim has to be served on the defendant.[59] Upon receipt of the statement of defence, the judge has to start preparatory proceedings and summon the parties. Preparation time has to be at least 3 weeks.[60] In proceedings before the *Bezirksgericht* there is no written defence.[61] Both claim and summons will be served to the defendant at once.[62] As a matter of course, the claimant is summoned to the preparatory hearing as well.[63] Promoting a settlement is one of the explicit aims of the preparatory hearing.[64] In any case, the judge may at any other stage of the proceedings seek to reach an amicable settlement of the dispute between the parties.[65]

---

[52] Section 1 No. 1 Austrian Enforcement Act (*Exekutionsordnung*, EO).

[53] Section 699 German ZPO.

[54] Section 275 German ZPO.

[55] Section 276 German ZPO.

[56] *Cf.* Leipold 2008, § 275 margin No. 2 *et seq.*

[57] Section 278(2) German ZPO; see Haas 2011, p. 109 *et seq.*

[58] Section 230(1) Austrian ZPO.

[59] See Rechberger and Simotta 2010, margin No. 710.

[60] Section 257(1) Austrian ZPO.

[61] Section 440(2) Austrian ZPO; *cf.* Section 440(3) Austrian ZPO: the court may order the exchange of written pleadings if both parties are represented by attorneys.

[62] Section 438 Austrian ZPO.

[63] Section 437 Austrian ZPO.

[64] Section 258(1) No. 4 Austrian ZPO.

[65] Section 204 Austrian ZPO.

7.2.2.2 Formal Case Management

Case management as regards the formal aspects of the action involves all legal steps necessary for an efficient course of proceedings. Both under Austrian law and under German law the court is primarily responsible for controlling and maintaining the pace of litigation.[66] Once a claim has been filed, the court has the duty to set court sessions[67] and judicial time-limits, to effect the service of documents[68] and to issue a summons against the parties.[69] During court sessions the judge is responsible for the proper conduct of the hearing.[70] He opens, chairs and closes the session and gives and revokes the floor at oral hearings.[71] The judge decides on the cancellation or postponement of a court session.[72] Time-limits are not at the full disposal of the parties. They may not agree on the extension of the respective period of time.[73] Its shortening requires a mutual agreement.[74] The court may extend or shorten time-limits upon request but only on serious grounds.[75] Under German law the so-called peremptory time-limits (*Notfristen*; e.g., the time for filing an appeal) are not variable at all[76]; under Austrian law they can only be shortened.[77] Austrian and German law differ from each other in regard to a stay of proceedings. Pursuant to Section 168 Austrian ZPO, the parties can agree on a stay of proceedings without the judge having a say,[78] whereas under German law a stay of proceedings is not at the parties' disposal. Pursuant to Section 251 German ZPO, the court orders a stay of proceedings upon request of the parties provided that a stay is appropriate.[79] Under both laws a stay of proceedings may be a consequence of the parties' failure to appear in court. However, there is one major difference between Austrian and German law in this regard: pursuant to Section 170 Austrian ZPO, the proceedings will automatically be stayed if both parties are in default of appearance, whereas pursuant to Section 251a German ZPO, it is at the judge's discretion to order a stay of proceedings.

---

[66] See also Oberhammer and Domej 2005, p. 302 *et seq.*; regarding German law, see Haas 2011, p. 92 *et seq.*

[67] Section 216(1) German ZPO; in practice and contrary to Section 130(1) Austrian ZPO no party motion is required; see Kodek and Mayr 2011, margin No. 306.

[68] Section 166(2) German ZPO; Section 87(1) Austrian ZPO.

[69] Sections 214 and 274(1) German ZPO; Section 131 Austrian ZPO.

[70] Section 176 *et seq.* GVG; Section 197 *et seq.* Austrian ZPO.

[71] Section 136 German ZPO; Section 180 Austrian ZPO.

[72] Section 227 German ZPO; Section 134 *et seq.* Austrian ZPO.

[73] Section 224(1) German ZPO *a contrario*; Section 128(1) Austrian ZPO.

[74] Section 224(1) German ZPO; Section 129(1) Austrian ZPO: in writing.

[75] Section 224(2) German ZPO; Sections 128(2) and 129(2) Austrian ZPO.

[76] Section 224(1) and (2) German ZPO.

[77] Sections 128(1) and 129(1) Austrian ZPO.

[78] See, for example, Rechberger and Simotta 2010, margin No. 486.

[79] *Cf.* Roth 2005, § 251 margin No. 1 *et seq.*

Under Austrian law the parties may file a request that a time-limit be fixed (*Fristsetzungsantrag*)[80] if the court is in default with procedural acts, such as fixing a hearing date or obtaining an expert's report. The defaulting court may make up for its lapses within 4 weeks, otherwise the court of next higher instance has to set a time-limit for the lower court. This legal remedy was introduced in 1989[81] in order to confront a potential inactivity of the court and to fulfil the requirements of Articles 6 and 13 ECHR and Article 47(2) EU Charter of Fundamental Rights.[82] However, the filing of such a request is not very common,[83] but the mere possibility to do so might have a preventive effect.[84] One reason for the rare application of the *Fristsetzungsantrag* might be the parties' fear of displeasing the judge who, after all, has to rule on their case. Furthermore, this remedy is quite toothless. The law provides no legal consequences in the event the lower court does not comply with the time-limit set by the higher court. However, it has to be noted that data is not comprehensive on the number of such requests as proceedings before the *Bezirksgericht* are not included. It is, however, certain that, theoretically speaking, this remedy could be exercised quite frequently, since one major cause of delay is the duration of judgment writing, but it is probably just equally efficient to choose the informal way, such as addressing the *Volksanwaltschaft*[85] or the *Justiz-Ombudsstellen*.[86]

German written law did not provide a legal remedy to fight procedural delay. Absent an explicit provision, legal doctrine and the courts allowed an extraordinary appeal against inactivity (*außerordentliche Untätigkeitsbeschwerde*) pursuant to Section 567 *et seq.* German ZPO or by analogy to Section 252 German ZPO in certain cases.[87] This judge-made law did not meet the requirements of constitutional law with regard to the principle of legal certainty.[88] Subsequent to a judgment of the European Court of Human Rights[89] the German government introduced a draft law on legal protection against overlong proceedings, which has been passed recently.[90]

---

[80] Section 91 GOG.

[81] Erweiterte Wertgrenzen-Novelle 1989, *Bundesgesetzblatt* of 21 July 1989, No. 343.

[82] See in this regard, e.g., *Holzinger v. Austria*, Grand Chamber of the European Court of Human Rights, 8 June 2006, application No. 23459/94.

[83] See the report of the Austrian Rechnungshof, above n. 14, 227: in 2007, 22 requests were filed with the *Oberlandesgericht* and 116 with the *Landesgericht*.

[84] Schoibl 2005, p. 239.

[85] Art. 148a B-VG.

[86] See below Sect. 2.4.

[87] *Cf.* Leipold 2005, vor § 128 margin No. 131; Roth 2005, § 252 margin No. 6 with further references.

[88] *Cf.* German Federal Constitutional Court, 30 April 2003, No. 1 PBvU 1/02.

[89] *Sürmeli v. Germany*, Grand Chamber of the European Court of Human Rights, 8 June 2006, application No. 75529/01; *cf.* also *Rumpf v. Germany*, European Court of Human Rights, 2 September 2010, application No. 46344/06 (pilot judgment procedure).

[90] Gesetz über den Rechtsschutz bei überlangen Gerichtsverfahren und strafrechtlichen Ermittlungsverfahren, *Bundesgesetzblatt* of 2 December 2011, Part I, No. 60; see also BT-Drucks 17/3802 and BT-Drucks 17/7217.

Under the new Section 198(3) GVG, a party affected by an inappropriate procedural delay may raise an objection against the delay (*Verzögerungsrüge*) at the adjudicating court. Having raised an objection is also a prerequisite for a future claim for compensation under the new Section 198(1) GVG.[91]

In this context it should be noted that the filing of a *Fristsetzungsantrag* (or a *Verzögerungsrüge*) is necessary with a view to a future application alleging a violation of Article 6(1) ECHR at the European Court of Human Rights as Article 35(1) ECHR stipulates the rule of exhaustion of domestic remedies.[92]

7.2.2.3 Disposition of the Claim

Generally, the parties are free to dispose of their claim. They decide on whether they assert a claim in court or not,[93] the claimant by filing a claim and the defendant through his appearance in court. In the statement of claim the claimant has to specify the issue in dispute.[94] Thereby the scope of the decision-making power of the court is defined and limited. The court cannot adjudicate *ultra petita*, i.e., more than has been requested.[95] The claimant may unilaterally withdraw (without prejudice) his action (*Klagerücknahme* or *Klagszurücknahme ohne Anspruchsverzicht*) (more or less) up to the moment at which the defendant takes his first judicial step, such as the submission of a pleading or the appearance at hearings. Afterwards the claimant may withdraw his action only with the consent of the defendant.[96]

Civil litigation may also end by *cognovit*[97] (*Anerkenntnis*) or waiver[98] (*Verzicht*) of claim by a party and the request of the other party to render a judgment (with the exception of *cognovit* of a claim under German law where no request is required since the amendment of 2001).[99] The court is prevented from going into the merits of the case and may issue a simplified *cognovit* or waiver judgment.[100] According to the wording of Sections 394, 395 Austrian ZPO, a *cognovit* or waiver of claim shall

[91] For further information, see Althammer and Schäuble 2012, p. 1 *et seq.*

[92] *Cf.*, e.g., *Holzinger v. Austria*, Grand Chamber of the European Court of Human Rights, 8 June 2006, application No. 23459/94.

[93] In exceptional cases of public interest the power to commence civil proceedings is assigned to a prosecutor or an administrative body, e.g., in the case of an action for the declaration of nullity of marriage (Section 28 Austrian Civil Code (*Allgemeines Bürgerliches Gesetzbuch*, ABGB); Section 1316(1) No. 1, (3) German Civil Code (*Bürgerliches Gesetzbuch*, BGB)); see for further details Leipold 2005, vor § 128 margin No. 141 *et seq.*; Rechberger and Simotta 2010, margin No. 401.

[94] Section 253(2) No. 2 German ZPO; Section 226(1) Austrian ZPO.

[95] Sections 308(1), 528 and 557(1) German ZPO; Sections 405, 462(1) and 504(1) Austrian ZPO.

[96] Section 269 German ZPO; Section 237 *et seq.* Austrian ZPO.

[97] Section 307 German ZPO; Section 395 Austrian ZPO.

[98] Section 306 German ZPO; Section 394 Austrian ZPO.

[99] *Cf.* Leipold 2008, § 307 margin No. 43 *et seq.*

[100] See Section 313b German ZPO; Section 417(4) Austrian ZPO, Section 540(3) Austrian Geschäftsordnung für die Gerichte erster und zweiter Instanz (Geo).

be allowed only in oral hearings. Therefore, it was controversial whether a claim may even be waived or acknowledged in the course of appeal proceedings, as orality is widely restricted before higher instance courts.[101] However, in accordance with the prevailing doctrine, the Austrian *Oberster Gerichtshof* decided that a (written) *cognovit* of claim is permissible before third-instance courts as well,[102] which certainly also applies to a waiver of claim. Under German law a *cognovit* or waiver of claim can be made in writing or orally at any time of the proceedings.[103]

Unlike the withdrawal of an action, in the case of a *cognovit* or waiver of claim, proceedings may be concluded with the pronouncement of a judgment causing all the legal effects that are commonly related to a judgment, in particular the effect of *res judicata*. Therefore, and in contrast to the withdrawal of an action, the parties are deprived of re-litigating on the subject matter already judged. Both under German law and under Austrian law the judge has to examine the procedural objection of *res iudicata ex officio*.[104]

In the course of the proceedings the parties are free to settle their dispute. This is not only a procedural capacity of the parties and an expression of private autonomy in court proceedings, but rather also an explicit aim of civil procedure.[105] The judge has to encourage the parties to come to a mutual agreement on the questions at issue at any stage of the proceedings.

As stated above, the claimant determines the subject-matter of the proceedings in the statement of claim. However, under certain conditions the claimant may modify the subject matter of the pending claim.[106] At the outset, the subject matter of the case has to be defined in order to determine whether an assertion actually represents a substantive change. Therefore, the amendment of claim (*Klageänderung*) is necessarily related to the concept of *Streitgegenstand*, one of the most discussed issues in the law of civil procedure. Without going into detail, under German and Austrian law the so-called *zweigliedrige Streitgegenstand* is the prevailing concept. According to this, the subject matter of the case is determined by two elements, namely the relief sought in the claim and the factual basis. Under the prevailing Austrian case law, the factual basis consists only of the facts essential to the legal rule (*rechtserzeugender Sachverhalt*),[107] whereas German case law generally refers to all the facts

[101] See Sections 480(1), 509(1) and (2) Austrian ZPO; *cf.* Rechberger and Simotta 2010, margin No. 410.

[102] See OGH 26 January 2005, 3 Ob 255/04b with further references (available at: http://www.ris.bka.gv.at/jus (last consulted in July 2012)).

[103] *Cf.* Leipold 2008, § 306 margin No. 18 and § 307 margin No. 25 *et seq.*

[104] See Leipold 2008, § 322 margin No. 211; Rechberger 2006, § 411 margin No. 1 *et seq.*

[105] See Section 278(1) German ZPO; Section 204(1) Austrian ZPO.

[106] Pursuant to Section 263 German ZPO and Section 235(1) Austrian ZPO, the claimant may amend the claim without any restrictions up to the moment when the statement of claim is served on the defendant (so-called *Rechtshängigkeit* or *Streitanhängigkeit*).

[107] See, e.g., Rechberger and Klicka 2006, vor § 226 margin No. 15; though case law is not consistent in this regard, *cf.* for example recently OGH 15 December 2010, 7 Ob 194/10w.

of the whole state of affairs (so-called *Lebenssachverhalt*).[108] The narrower interpretation of the factual basis by Austrian courts limits the scope for unrestrained amendments of the subject matter. However, modification of the relief sought and/or the factual basis represents an amendment of claim. An amendment of claim is admissible if the defendant gives his (explicit or implicit) consent or if the court considers it to be appropriate.[109] Under Austrian law a claim may not be amended in the course of appeal proceedings.[110] In Germany, an amendment of claim is (in principle) admissible before higher instance courts but restricted in conformity with the rules on new allegations. In proceedings before a court of appeal a claim may only be amended if it is based on factual allegations that are not precluded.[111] An amendment of claim in proceedings before the German Federal Court of Justice is even more limited, if not to say almost impossible. It cannot be based on new allegations at all as Federal Court judges are not triers of fact but of law.[112]

7.2.2.4 Fact-Finding and Taking Evidence

One major achievement of the legal doctrine of the nineteenth century was to establish a sharper distinction between the principle of party disposition (*Dispositionsgrundsatz*) and the principle of party presentation (*Verhandlungsgrundsatz*).[113] According to the principle of party disposition the parties 'dominate' the subject matter of litigation; this is entirely in line with the principle of private autonomy that governs substantive law. As already mentioned above, the initiation, the content and the termination of proceedings are broadly at the disposal of the parties. This is, however, to be differentiated from the question whether or to what extent the establishment of the factual basis of the subject matter is also up to the parties. As per the principle of party presentation (*Verhandlungsgrundsatz*) – in contrast to the principle of judicial investigation (*Untersuchungsgrundsatz*) – the parties control the investigation of the facts. It is advisable to adhere to this differentiation between the principle of party presentation and the principle of party disposition and not to overstate the value of the principle of party presentation for the parties' private autonomy. An increase of the judge's power over the facts does not necessarily mean to harm the freedom of the parties in terms of substantive law. While they still remain the 'masters of proceedings' by means of the aforementioned legal instruments, a certain influence of the judge on the factual aspects of the case may increase the efficiency of proceedings and bring forward the establishment of the truth.

---

[108] See, e.g., Roth 2008, vor § 253 margin No. 11.

[109] Section 263 German ZPO; Section 235(2) and (3) Austrian ZPO.

[110] Sections 483(4) and 513 Austrian ZPO; see Klicka 2004, § 235 margin No. 12.

[111] Section 533 German ZPO.

[112] *Cf.* Section 559 German ZPO; see Wenzel 2007, § 559 margin No. 19 *et seq.*

[113] See Oberhammer and Domej 2005, pp. 295, 297.

Even though it is not explicitly stated in the Austrian ZPO, the prevailing – though highly controversial – legal doctrine considers the so-called 'extenuated principle of judicial investigation' (*abgeschwächter Untersuchungsgrundsatz*)[114] to be its guiding principle; 'extenuated' because the judge does not initially introduce the facts *sua sponte* but depends on the parties' factual allegations.[115] In Germany, the principle of party presentation is deemed to be dominant.[116] However, the actual differences are less substantial than the diverging classification would suggest. This differentiation is therefore highly doubtable and occasionally (mis)used for the purpose of arguing that Austrian and German civil procedural law would (allegedly) lack comparability. In fact, drawing a distinction between Austrian and German law in this regard no longer seems convincing.

As a matter of course, the judge relies on facts brought to him by the parties. Both under German law and under Austrian law the judge adjudicates in principle on the basis of the parties' factual submissions. He is neither entitled to initially investigate the facts of the case[117] nor can he render a judgment based on his private knowledge in respect of the facts.[118] Still, facts that are of common knowledge or known to the adjudicating court neither have to be submitted nor have to be proved.[119] In general, the judge shall not consider facts *sua sponte* that he 'accidentally' received knowledge of in the course of taking evidence.[120] He can, however, direct the course of fact-finding to a certain extent by exercising his right to ask questions and complying with his duty to advise the parties.[121] He might even be obliged to do so. For example, he has to advise the parties if a new fact incidentally appears in the course of taking evidence.[122] Moreover, German courts assume that a party wants to make use of those 'incidental' facts that are favourable to the party's legal position. Due to this presumption the party does not have to expressly refer to the new fact.[123] By comparison, Austrian courts generally seem to take a rather restrictive position. According to Austrian case law, the mere production of evidence never substitutes for the parties' factual arguments.[124] A failure to instruct the parties may

[114] Rechberger and Simotta 2010, margin No. 403; Fucik 2006, vor § 171 margin No. 3.

[115] *Cf.* Rechberger and Simotta 2010, margin No. 403.

[116] Leipold 2005, vor § 128 margin No. 146 *et seq.*; Rauscher 2008, Einleitung margin No. 291; Haas 2011, p. 89 *et seq.*, 107.

[117] *Cf.* Rosenberg et al. 2010, § 77 margin No. 7 *et seq.*; Rechberger and Simotta 2010, margin No. 403.

[118] The role of an ordinary witness would interfere with his role as an impartial and non-involved judge; see Leipold 2008, § 286 margin No. 26; Rechberger 2004, § 269 margin No. 11.

[119] Section 291 German ZPO; Section 269 Austrian ZPO.

[120] Haas 2011, p. 92; Rosenberg et al. 2010, § 77 margin No. 12; Fucik 2006, § 178 margin No. 2.

[121] For further details on this issue, see below in this section.

[122] See Schragel 2003, § 178 margin No. 6; *cf.* Stadler 2012, § 139 margin No. 8.

[123] See, e.g., BGH 8 January 1991, VI ZR 102/90, NJW 1991, 1541; 3 April 2001, VI ZR 203/00, NJW 2001, 2177; 26 July 2005, NJW 2006, 63.

[124] See, e.g., OGH RIS-Justiz RS0038037; unlike the prevailing view among legal scholars, see Rechberger 2004, vor § 266 margin No. 78 *et seq.*; Schumacher 2000, p. 30 with further references.

nevertheless constitute a gross procedural error.[125] However, the court's duty to investigate may not be overstated. Both under German law and under Austrian law, there is no burden upon the court to thoroughly comb through the parties' factual materials in search of potential facts.[126]

In principle, admitted facts need not be proved.[127] They are assumed to be true. There is no need to examine whether the parties complied with their duty to tell the truth. In general, it may be stated that under German law the scope of action of a judge faced with an admission of fact is more limited and therefore facts are to a greater extent at the parties' disposal. In Germany, an admission of fact even overrides facts to the contrary that have already been established.[128] However, according to both laws an admission is without effect if the factual submission is obviously false.[129]

Disputed facts need to be proved. It is primarily up to the parties to proffer sufficient evidence, but Austrian and German law provide a set of modifications to this rule. Therefore, the judge is entitled to take evidence *ex officio*. He can call upon an expert witness or order local inspections[130] within his duty-bound discretion.[131] Furthermore, the judge may order a party to produce documentary evidence if one of the parties has referred to this specific document.[132] In contrast to German law, according to Section 183(2) Austrian ZPO an *ex officio* document production order of the court is inadmissible if both parties object to it. Another means of evidence that can be ordered *ex officio* is party testimony (*Parteivernehmung*).[133] Under German law, however, party testimony is subject to the principle of subsidiarity and only admissible if a certain probability indicates that the fact is true.[134] Austrian law offers one further variation from the principle of party presentation: in accordance with Section 183(1) No. 4 Austrian ZPO, the judge has the power to take evidence from witnesses[135]; again, except in case of the parties' joint objection.

---

[125] Schragel 2003, §§ 182 and 182a margin No. 9.

[126] *Cf.* for Austria, e.g., OGH 1 July 2009, 7 Ob 268/08z; for Germany BGH 23 November 1967, II ZR 105/65.

[127] *Cf.* Sections 138(3) and 288 German ZPO; Section 266 *et seq.* Austrian ZPO.

[128] Leipold 2008, § 288 margin No. 33; for the different Austrian view, see Rechberger 2004, §§ 266, 267 margin No. 7.

[129] *Ibidem.*

[130] Section 144 German ZPO; Section 183(1) No. 4 Austrian ZPO.

[131] *Cf.* Leipold 2005, § 144 margin No. 7; Schragel 2003, § 183 margin No. 1.

[132] Section 142 German ZPO; Section 183(1) No. 2 Austrian ZPO; as regards the question at issue whether the opponent of the party referring to a document has to submit this document at all times or only according to Section 422 *et seq.* German ZPO, see below Sect. 2.3.

[133] Section 448 German ZPO; Section 371 Austrian ZPO; for further details on this issue, see Oberhammer and Domej 2005, p. 255 *et seq.*

[134] For a critical view, see Oberhammer 2000, p. 295, 314 *et seq.*

[135] Different from German law: see Section 373 German ZPO.

Further Duties and Powers of the Judge

As already mentioned, the judge is not without influence on the substantive aspects of litigation. The idea of a 'strong' judge has governed Austrian law since the enactment of the ZPO in 1895, whereas German law's shift towards a more active judge took place via several amendments.[136]

First, the judge has to ask questions and give instructions to the parties. This is considered to be a centrepiece of the judge's case-management powers regarding substantive aspects.[137] To some extent, it enables the judge to direct the course of proceedings, to relieve litigation of legally irrelevant factual aspects and thus to ensure procedural efficiency. By this means of communication the judge ascertains all relevant circumstances of the case and gets a general idea of the factual positions of the parties. It enables him to find out which facts are actually disputed and need to be proved. The aim is to clarify the subject matter of litigation and to urge the parties to make further statements, to provide additional facts and to proffer sufficient evidence where the parties' allegations remain unclear or incomplete. The judge may advise the parties of a procedural mistake and encourage its correction. The duty to ask questions and to give instructions does apply in all proceedings regardless of whether the parties are represented by counsel or not.[138] In exercising this duty, the judge has to maintain a proper balance between giving the parties sufficient information and preserving his impartiality. However, the limits are hard to determine; to a large extent they depend on the particularities of the individual case.[139] The determination of the appropriate and permitted amount of advice definitely is an important issue. On the one hand, it is not completely satisfying if only the lead in legal expertise decides between winning and losing but, on the other hand, neither shall it be for the judge to act as a legal adviser, as this may affect judicial impartiality. This may be demonstrated by the following highly controversial example[140]: Both under Austrian law and under German law it is disputed whether the judge can advise a party of the possibility to raise the plea of limitation (*Verjährungseinrede*). The main argument of the representatives of the opposing view is that according to substantive law the time limitation of the action depends on an explicit objection of the party and cannot be examined *ex officio*,[141] therefore advice given by the judge would run counter to the object of this rule of substantive law.[142] It cannot be denied that somehow there is a conflicting relation between these provisions. This view nevertheless ignores the actual purposes of the time limitation of the action (such as to avoid difficulties in obtaining useful evidence

[136] See Oberhammer and Domej 2005, p. 295 *et seq.*

[137] *Cf.* Oberhammer and Domej 2005, p. 300; Leipold 2005, § 139 margin No. 1.

[138] Rosenberg et al. 2010, § 77 margin No. 17; Rechberger and Simotta 2010, margin No. 606.

[139] See Oberhammer 1993, p. 58.

[140] For further explanation, see Oberhammer and Domej 2005, p. 301 *et seq.*

[141] Section 214(1) BGB; Section 1501 ABGB.

[142] *Cf.*, e.g., Leipold 2005, § 139 margin No. 53.

and to achieve legal certainty within a reasonable time; this also aims at protecting the debtor) and instead pursues another aim, namely to penalise ignorance of the law. This is, however, not the real purpose of the statute of limitations. In any case, the judge's power is limited insofar as advice or an instruction has to be based on the allegations of the parties.[143]

Second, Austrian and German law stipulate the prohibition of so-called 'surprise' decisions (*Überraschungsentscheidungen*).[144] The judge shall hold a legal conversation (*Rechtsgespräch*) with the parties, i.e., he has to discuss all legal and factual issues that he considers to be relevant to the decision of the civil case and give the parties the opportunity to be heard. The judgment must not be based on any legal opinion that was never mentioned in the course of the proceedings.[145] The parties' right to have a say in any legal and factual aspects of the matter in dispute is guaranteed by Article 6 ECHR.

Third, the judge may order the parties to attend the proceedings in person.[146] It is expected that hearing the parties instead of their representatives will conduce to a proper and faster clarification of facts. The order of personal attendance is at the discretion of the court. Pursuant to Section 141(3) German ZPO, the judge may impose a pecuniary fine on the party that has failed to comply with the order. Austrian law provides for such legal sanctions only in certain (contentious) marriage law matters.[147]

Fourth, the principle of *iura novit curia* is inherent to the Austrian and German law of civil procedure. The court has to determine the applicable law and to apply this law *ex officio*. A judge is expected to have a profound knowledge of the law and to be capable of resolving legal questions. In general, he may not call upon a legal expert.[148] Theoretically, the parties only have to bring forward the facts of the case and the judge provides them with the legal solution (*da mihi factum, dabo tibi ius*). The legal assessment of the dispute is part of the court's exclusive authority. The legal opinion of the parties must not be taken into consideration; the rules of law are not at the parties' disposal. A slightly different approach is taken if pursuant to the rules of private international law or the parties' choice of law the civil case is governed by foreign law.[149] Both under Austrian law and under German law the judge has to establish and to apply the law *ex officio*. The foreign law is not a matter of fact but of law. However, the judge is not expected to be familiar with the law of other countries. In order to assess it he may thus make use of certain auxiliary means (e.g., asking for the assistance of the parties; requesting information at the Ministry of

[143] See, for example, Wagner 2008, § 139 margin No. 38 *et seq.*; Fucik 2006, § 182 margin No. 1.

[144] Section 139(2) and (3) German ZPO; Section 182a Austrian ZPO.

[145] For further information, see Haas 2011, p. 95 *et seq.*, 101 *et seq.*

[146] Section 141 German ZPO; Section 183(1) No. 1 Austrian ZPO.

[147] See Section 460 No. 1 Austrian ZPO.

[148] *Cf.* Leipold 2008, § 293 margin No. 14 *et seq.*

[149] See Section 293 German ZPO; Section 271 Austrian ZPO; Section 4(1) Austrian Code of Private International Law (*Gesetz über das internationale Privatrecht*, IPRG).

Justice, embassies, scientific research institutions; calling upon a legal expert).[150] The same applies if the civil case is governed by special (national) laws (such as customary law or bylaws).

Further Duties of the Parties

It stands to reason that the efficiency of civil litigation relies on a proper co-operation of all persons involved. This means not only the court is in charge of the outcome of the proceedings, but the parties have to exert themselves, too. Therefore, the law stipulates various duties of the parties and points out their responsibilities several times. However, the law does not sufficiently provide for legal consequences if the parties do not comply with these duties.[151]

First, the parties shall present the facts of the case truthfully and in an exhaustive manner.[152] The parties (and their legal representatives) are bound to tell the truth during the entire course of the proceedings. In this context telling the truth means not to say anything against better knowledge[153] and not to make statements at random.[154] It goes without saying that a party's perception of the truth does not necessarily reflect what is 'objectively' true. Moreover, if the parties decide to litigate, their view of events will most likely diverge. In other words, the parties may only be obligated to present their subjective truth. The noncompliance with this duty can have various consequences. First of all, it will result in a loss of the party's credibility. The judge may consider this behaviour in the course of decision making, as he is free to evaluate the evidence in due consideration of the whole performance of the parties during the proceedings.[155] Under Austrian law, a party, one that did not conform to this duty, may be ordered to bear certain costs of litigation.[156] In the case of an intentional violation, the judge may also impose a monetary penalty on the party.[157] Likewise, German law provides for a pecuniary consequence: pursuant to Section 38 GKG, the court may charge a fee for any procedural delays due to the party's misconduct.[158] Both under German substantive law and under Austrian substantive law, the party may be found to be liable for damages suffered by the other

[150] See, e.g., Leipold 2008, § 293 margin No. 36 *et seq.*; Rechberger 2004, § 271 margin No. 3 *et seq.*

[151] See Oberhammer 2004a, p. 95; Fasching 2002, Einleitung II/1 margin No. 72.

[152] Section 138 German ZPO; Section 178 Austrian ZPO.

[153] In Germany, however, it is controversial whether a party may stick to the allegations of its opponent knowing that they are not true; see Stadler 2012, § 138 margin No. 4.

[154] See Stadler 2012, § 138 margin No. 6; Fucik 2006, § 178 margin No. 1.

[155] Section 286 German ZPO; Section 272 Austrian ZPO.

[156] Sections 44 and 48 Austrian ZPO.

[157] Sections 220 and 313 Austrian ZPO.

[158] See, e.g., Leipold 2005, § 138 margin No. 17.

party.[159] An intentional violation of the duty to tell the truth can be relevant under criminal law.[160]

Second, the parties have the duty to promote the proceedings (*Prozessförderungspflicht*). They are obligated to introduce facts, make their allegations and bring forward evidence without delay.[161] This duty was accentuated in Austrian law by the amendment of 2002 and modelled on the German example. The provenance can be easily made out in the explanatory report on the amendment of 2002[162]; however, the wording of the Austrian provision is not nearly as detailed as the German example. According to Section 282(1) German ZPO and the explanatory report on Section 178(2) Austrian ZPO, a party has to bring forward its arguments in accordance with the actual state of the proceedings. Facts, evidence, defences, etc. that appear to be relevant considering the course of the proceedings (e.g., because the statement of the opponent or the question of the judge gave reason thereto) have to be raised right away. However, the parties' duty does not go as far as having to submit everything at the slightest chance of its being relevant.

In contrast to German law, the connection between the duty to promote the proceedings and the rule on preclusion is not expressly stated in the Austrian ZPO, but it can nonetheless not be denied. Neither under Austrian law nor under German law does noncompliance with the duty to promote the proceedings inevitably lead to preclusion, but each case of preclusion certainly presents a violation of the duty to promote the proceedings.[163] Preclusion will only occur if certain prerequisites are met: the party is late in making a statement, hence the allegation could have been brought forward at an earlier stage of the proceedings[164]; the lateness is based on the gross negligence of the party; and the admission of the allegation would cause a (under Austrian law: considerable) delay in the proceedings.[165] However, it is controversial whether the court has to refuse allegations in the event the prerequisites are met or whether the refusal is at its discretion[166] and whether the parties can agree on the admission of such allegations.[167] Furthermore, the rule on preclusion correlates with the (already mentioned) duty of the judge to discuss the legal and factual situation with the parties. An allegation may only be refused if the party is aware of its relevance for the proceedings.

---

[159] Section 138 German ZPO in conjunction with Section 823(2) BGB; Section 826 BGB; Section 1305 ABGB; *cf.* Leipold 2005, § 138 margin No. 20; Schragel 2003, § 178 margin No. 4.

[160] So-called *Prozessbetrug* (fraud in obtaining a judgment); see Section 263 German Criminal Code (*Strafgesetzbuch*, StGB); Section 146 Austrian Criminal Code (*Strafgesetzbuch*, StGB).

[161] Section 282 German ZPO; Section 178(2) Austrian ZPO.

[162] See, e.g., RV 962 BlgNR XXI. GP, 22 *et seq.*

[163] *Cf.* McGuire 2010, p. 1154.

[164] Leipold 2008, § 296 margin No. 128; Schragel 2003, § 179 margin No. 5.

[165] Section 292(2) German ZPO; Section 179 Austrian ZPO.

[166] See, e.g., Leipold 2008, § 296 margin No. 148; Schragel 2003, § 179 margin No. 9; Fasching 2002, Einleitung II/1 margin No. 74.

[167] Contra: Leipold 2008, § 296 margin No. 150; pro: Schragel 2003, § 179 margin No. 9.

7.2.3 *Recent Reforms in the Allocation of Case-Management Powers and Their Effects*

Some changes regarding the powers and duties of the judge and the parties under Austrian law are a result of the amendment of 2002. The reform was (again) all about the acceleration of proceedings. Main items were the introduction of a preparatory hearing and the accentuation of the parties' duty to promote the proceedings and the judge's duty to advise the parties. The allocation of responsibilities between the judge and the parties in civil proceedings remained basically unchanged. In the light of the recent case law it can be concluded that the amendment has had only moderate effects. A stricter preclusion practice of courts dealing with late allegations has somewhat been curbed by the Austrian *Oberster Gerichtshof* according to which any new allegations brought forward during preparatory proceedings are never too late.[168] The reasons for this can be found in the fact that the amendment of 2002 (among other things) aimed at increasing orality and the judge's duty to discuss all relevant aspects with the parties, both of which cannot be achieved until oral preparatory proceedings take place. Therefore, allegations brought forward at this stage of the proceedings are in general admissible. However, this may be seen differently in the event the judge previously ordered the parties to make their allegations and proffer evidence in an exhaustive way.[169]

In Germany, certain changes concerning the relationship between the judge and the parties have originated from the *Gesetz zur Reform des Zivilprozesses*[170] of 2001. The explicit aim was to strengthen the courts of first instance in order to bring disputes to an end soon, to speed up civil proceedings and to foster transparency and acceptance of court decisions.[171] To that end an obligatory conciliation hearing was introduced,[172] and the judge's case-management powers in substantive aspects were increased. This amendment has probably led to a considerable extension of the judge's power of taking evidence where the production of documents is concerned. At the very least, the amended wording of Section 142 German ZPO along with maintaining Section 422 *et seq.* German ZPO have given (anew) rise to a legal dispute on the extent of the parties' obligation to produce documents by order of the judge.[173] According to Section 422 *et seq.* German ZPO, a party is (only) obliged to submit documents if such an obligation is stipulated in substantive law or if the party itself has referred to the document in question. This certainly applies in the case of a party's request for the production of documents. However, it is unclear whether this also applies to an *ex officio* order of the judge for production.

---

[168] See OGH 12 January 2005, 7 Ob 235/04p, ÖJZ 2006/17; contrary to OLG Linz 29 March 2004, 2 R 56/04z.

[169] *Cf.* OGH 20 April 2006, 4 Ob 50/06s, Zak 2006/443; LGZ Graz 31 March 2004, 7 R 26/04a.

[170] Above n. 38.

[171] BT-Drucks 14/4722, 1, 61.

[172] See above Sect. 2.2.1.

[173] See, e.g., Stadler 2003, p. 1625 *et seq.*, 1638 *et seq.*; *cf.* also Zekoll and Bolt 2002, p. 3129 *et seq.*

This question has become even more disputable since the amendment of 2001. Pursuant to the amended Section 142 German ZPO, the order of the judge is not only admissible if the obliged party itself has referred to the document, but is admissible regardless of which party has referred to the document. This section thus goes beyond (the unchanged) Section 423 German ZPO and challenges the relevance of Section 422 *et seq.* for Section 142 German ZPO in general. Considering, furthermore, the explicit aim of the amendment to enhance the parties' duty to produce documents, the conclusion that Section 142 German ZPO settles the production of documents by order of the judge conclusively is quite persuasive.[174] This certainly constitutes a further step away from the principle of party presentation.

A conclusive and especially scholarly analysis of the effects of the past amendments of civil procedure requires a comprehensive and detailed collection of data on the number and duration of procedures, procedural steps, etc. As a matter of fact, in the past such an evaluation of civil litigation, which is without any doubt extremely laborious, has not been given top priority.

In its 2009 report on the duration of civil proceedings the Austrian Accounting Office (*Rechnungshof*) criticised repeatedly that data provided by the Judiciary does not enable a differentiated statistical process and quality control, and recommended an evaluation of the judicial automation process (*Verfahrensautomation Justiz*) in some points.[175] However, over the past years a slight improvement may be observed, first and foremost due to an increased use of information technology (IT) in the justice system. The Accounting Office made specific recommendations, some of which have already been implemented (e.g., additional training for judges in optimised case management), other measures are still in the process of being conducted (e.g., enhanced data collection) and certain suggestions have been rejected (e.g., elaborating the standard report on overlong proceedings not once but twice a year).[176] Despite these ongoing efforts, it is hard to make assertions on several topics over a longer period of time without abandoning recognised scholarly method. For example, the exact length of proceedings has not been recorded until recently,[177] not to mention the causes for delay. In this regard the report of the Accounting Office is quite instructive. According to the report, the main reasons for long proceedings are inefficient case management by the judge, the long duration of judgment writing and the replacement of the responsible judge. Furthermore, all cases in which an expert's opinion is needed take significantly longer. The so-called overlong proceedings (more than 3 years) are not only but often caused by procedural decisions of the parties, e.g., adjournment or stay of proceedings. Apart

[174] See also Stadler 2012, § 142 margin No. 7 with further references; BGH 26 June 2007, XI ZR 277/05, BGHZ 173, 23 = NJW 2007, 2989.

[175] See the report of the Rechnungshof, above n. 14, 220 *et seq.*, 230 *et seq.*

[176] *Cf.* the report of the Rechnungshof, above n. 14; see also the report of the Rechnungshof, *Verfahrensdauer im zivilgerichtlichen Verfahren*, Bund 2010/14; parliamentary inquiry No. 8362/J and response No. 8292/AB, both in legislative period No. XXIV.

[177] *Cf.* Schneider and Roth 1998, p. 15.

from that, it should be noted that the Accounting Office had a positive opinion of the internal control mechanism, the creation of service centres at several courts, which reduce the workload of clerk's offices significantly, and the professional and efficient use of IT; all of these measures are essential for the efficiency of the justice system. Nevertheless, the report suggests that the reasons for delay can be found in individual behaviour and the judicial organisation rather than in the provisions of the Code of Civil Procedure.[178]

7.2.4 Excursus: Control of Justice Under Austrian Law

In Austria, one topic that has been raised in recent years is the control of justice; not only with regard to the administration of justice, but also with regard to the administration of the Judiciary. In this context it is interesting to note that Franz Klein's Code of Court Organisation (*Gerichtsorganisationsgesetz*) already provided for a special controlling body, the so-called *Gerichtsinspektorat*. Its task was to monitor the application of the new Code of Civil Procedure, the law in action, to countervail erroneous developments and to guarantee a uniform interpretation in the whole empire. The *Gerichtsinspektor* was not entitled to issue instructions or to intervene in pending cases nor did he evaluate the work of the judges. He simply served as a link between the administration department and the courts. Though the *Gerichtsinspektor* usually was a senior judge, the body was not incorporated into the Judiciary but located at the Ministry of Justice. For most of the year all *Gerichtsinspektoren* travelled through the empire and did 'field research' at the courts. In the winter months they got together at the Ministry and held daily conferences to share their experiences. On their subsequent travels they served as multipliers of the results of the conferences. From the very beginning the *Gerichtsinspektorat* was met with scepticism. Critics assumed that it would interfere with judicial independence.[179] In 1969, the *Gerichtsinspektorat* was finally abolished – due to the intervention of the Association of Judges (*Richtervereinigung*) – and replaced by the *Innere Revision* (internal audit) located at the presidium of each *Oberlandesgericht*.[180]

In the course of the last widespread constitutional reform a few years ago an expert group proposed the installation of an Ombudsman on Justice (*Justizanwalt*), an autonomous institution competent to deal with complaints of citizens against the justice system. Instead of accepting this proposal, the competences of the already existing 'general' Ombudsman Board (*Volksanwaltschaft*) were increased by

[178] *Cf.* Oberhammer and Domej 2010, p. 262.

[179] See on this issue Grabscheid 1914, p. 233 *et seq.*; Leonhard 1948, p. 149; Schoibl 1987, p. 57; see former Section 74(2) GOG (*Reichsgesetzblatt* 1896, No. 217) and Section 414 GO (*Reichsgesetzblatt* 1897, No. 112).

[180] Matscher 2007.

amendment to the Austrian Constitution of 2008.[181] The Board may now file a request for fixing a time-limit (*Fristsetzungsantrag*) itself or suggest supervisory measures.[182] It is even entitled to investigate *ex officio*.[183]

Parallel to this development, the Ministry of Justice laid the foundation for the creation of the so-called *Justiz-Ombudsstelle* by ordinance – knowing well that attack is the best form of defence. A new law[184] recently passed by the Austrian Parliament implements this institution in statutory law. Since 1 November 2007 at each *Oberlandesgericht* there have been *Justiz-Ombudsstellen*, which are located in the same department as the *Innere Revision*. Their staff is composed of regular judges, some of whom even continue working in their original function on a part-time basis.[185] There certainly are some good practical reasons for this organisational setting, as for example having direct access to information on proceedings. Indeed, the *Justiz-Ombudsstellen* seem to be very successful and to sort out problems in an efficient and unbureaucratic manner. Still, uniting auditor and auditee in one and the same person should give cause for concern. This means of control is, however, at least potentially more expedient than internal supervision where the personal relationship between supervisor and supervisee may interfere with objectiveness; for organisational reasons, the *Justiz-Ombudsstellen* may maintain proper boundaries more easily.

Therefore, under the current legal situation two institutions, which are more or less dedicated to the same task, exist. In practice this duplication of responsibility does not give rise to any uncertainties, which may be due to a self-limiting attitude of the Ombudsman Board. The Ombudsman Board's report on the year 2010 states that complainants are frequently referred to the *Justiz-Ombudsstelle*.[186] It is, however, not clear whether this expresses full confidence in the work of the *Justiz-Ombudsstellen* or is rather a reaction to the heavy workload of the Ombudsman Board.

7.2.5 Public Opinion Towards the Justice System

First of all, one has to bear in mind that opinion polls should be taken with a grain of salt. It might be good to reflect on the way the questions are asked. As far as can be seen, three opinion polls on the public image of justice have been commissioned

[181] Bundesverfassungsgesetz, mit dem das Bundes-Verfassungsgesetz geändert und ein Erstes Bundesverfassungsrechtsbereinigungsgesetz erlassen wird, *Bundesgesetzblatt* of 4 January 2008, Part I, No. 2; for a critical view, see Schmid and Wallnöfer 2008, p. 177 *et seq.*

[182] Art. 148c B-VG.

[183] Art. 148b B-VG.

[184] *Bundesgesetzblatt* of 28 December 2011, Part I, No. 136.

[185] See Fink-Hopf 2010, p. 29.

[186] See Volksanwaltschaft, Parlamentsbericht 2010, 117; available at: http://volksanwaltschaft.gv.at/berichte/berichte-bund (last consulted in July 2012).

in the recent past in Austria: two by the Ministry of Justice and one by the Bar Association of Lower Austria. According to the latter, 86 % of the people participating in the poll were of the opinion that proceedings lasted too long or even much too long. The results of one of the other opinion polls were slightly better: 75 % of respondents believed that the length of proceedings was inappropriate. In this poll the question was addressed to all respondents, and not only to those who had already participated in proceedings. The first poll mentioned included no specifications in this regard. In contrast, the second poll commissioned by the Ministry of Justice posed a question on the overall impression of proceedings only to respondents with court experience. The participants had to specify the reasons for their impression. Only 10 % of respondents with an overall negative impression named slow, complicated and long procedures as a reason for this; only 16 % of respondents with an overall positive impression named 'fast handling' as a reason for their impression.

According to the poll commissioned by the Bar Association, 79 % of respondents (partly) trust in the Austrian legal and justice system. Still, an alarmingly large percentage of respondents are of the opinion that specific groups of persons, predominantly politicians, but also rich people and graduates, enjoy privileges in court.

Public opinion in Germany seems to be comparable to that in Austria. Seventy-six % of respondents that have already participated in court proceedings believe that court proceedings last too long. Thirty-two % of respondents have full trust, another 39 % only partly have trust in the German courts and judges. The opinion that people are not equally treated before the courts is shared by 60 % of respondents.[187]

All in all the image of the Judiciary could be better, and it is indeed much worse than its actual condition. After all, the Austrian and German systems of civil justice work quite well, the extent of procedural delay is relatively small and corruption is negligible. The negative image may, at least from an Austrian perspective, be explained by the current press coverage of lawsuits on political malpractice and on various criminal offences in financial institutions. In recent years some criminal proceedings of public interest have not been managed efficiently and have given rise to doubts about the reliability of the justice system and the skills of the judges. This has led to a loss of trust in justice in general, as most citizens are simply not aware of the distinction between criminal and civil justice. In the eyes of the public the justice system is commonly seen as a homogeneous whole even though some structural problems, e.g., staff shortage, a lack of specialisation as regards economic crimes, etc., affect mainly criminal and not civil proceedings; in fact, criminal justice represents only a small part of all court activity.[188]

[187] See Roland Rechtsreport 2010, p. 18, 22, 24 (available at: http://www.roland-konzern.de/presse/publikationen/rolandrechtsreport/rolandrechtsreport2010.jsp (last consulted in July 2012)).

[188] Approximately 5 % of all court activity and 11 % of all court proceedings; see Mayr 2009, p. 56 *et seq.*

7.3 Conciliation and Mediation

7.3.1 Preliminary Remarks

According to Austrian and German understanding, conciliation and mediation, both being alternative means of dispute settlement, differ with regard to the method used. In mediation, a third party assists the parties' negotiation and helps them to find their own agreement. By contrast, in conciliation proceedings a (sometimes specialised) conciliator is expected to propose a solution.

Austrian and German law provide for some sort of conciliation before the courts and both countries have or had pilot projects on in-court or court-annexed mediation. A German Government Bill of 2011 aimed at implementing a legal basis for this kind of mediation. However, the Bill was significantly revised due to the intervention of the legal profession.[189] The entire debate in the course of the legislative process on (especially) in-court mediation (*gerichtsinterne Mediation* or *richterliche Mediation*) illustrates the conflicting economic interests of the persons involved. The German external (non-judicial) mediators fear that they might lose their slice of the cake if they have to compete with the judges. The new law replaces the proposed in-court mediation with an extended concept of conciliatory judges (*Güterichter*). The decision to deviate from the original plan was made despite the positive experiences with in-court mediation and in spite of the favourable opinion of leading academics[190] and practitioners.[191]

In my view, the legal profession's strong opposition was a fight for a lost cause. Even without the amendment, similar effects as in mediation could have been reached by means of judicial conciliation conducted by a requested or commissioned judge[192]: this judge may apply the techniques of mediation; representation by an attorney is not mandatory; a high degree of confidentiality is guaranteed, as such conciliatory proceedings are not bound by the principle of publicity of Section 169 GVG.[193] It might be that the legislator tried to escape further discussion on the unconstitutionality and anti-competitiveness[194] of the judicial mediator by simply avoiding the term 'judicial mediation'.

---

[189] *Cf.* the position No. 27/2010 of the German Federal Bar (*Bundesrechtsanwaltskammer*) available at: www.brak.de (last consulted in July 2012) and position No. 58/2010 of the German Bar Association (*Anwaltverein*) available at: www.anwaltverein.de (last consulted in July 2012); see the new Gesetz zur Förderung der Mediation und anderer Verfahren der außergerichtlichen Konfliktbeilegung, *Bundesgesetzblatt* of 21 July 2012, Part I, No. 35.

[190] *Cf.*, e.g., Hess 2008, F 44 *et seq.*, 139.

[191] For example, Kraus et al. 2011, p. 58 *et seq.*; Francken 2011, p. 1001 *et seq.*

[192] *Cf.* in this regard Gottwald 2001, p. 137 *et seq.*

[193] See BT-Drucks 17/8058, 21; Foerste 2012, § 278 margin No. 13.

[194] See with further references Wimmer and Wimmer 2007, p. 3245; Greger 2007, p. 3258 *et seq.*; Greger 2010, p. 211; Wagner 2010, p. 815 *et seq.*

However, Austrian and German legislation on mediation understood as a means of resolving disputes with the assistance of a mediator and without intervention of the court or any connection with court proceedings is not covered by this report.

7.3.2 The History of Conciliation in Civil Procedural Law

The general idea of litigation as a last resort is nothing new. In the original versions of the German and Austrian codes of civil procedure the judge had already been instructed to encourage the parties to reach an agreement before (and during) the proceedings.[195] There have also been attempts to introduce public institutions for extrajudicial dispute settlement at an early stage, but they were of no particular relevance.[196] Academic interest in alternative dispute resolution has increased significantly during the last decade and so has the activity of the legislator in this field of law.

As to Germany, an attempt to primarily resolve disputes in conciliatory proceedings was made in the first half of the last century. Pursuant to Section 495a German ZPO as amended by the Act of 1924,[197] conciliatory proceedings had to precede the filing of the claim. As the mandatory attempt at conciliation did not meet the expected success, it was abolished in 1950.[198] Still, the judge could promote an amicable settlement at any time during the proceedings. This approach has been continuously developed in the last few years. First, the discretionary provision to promote a settlement of the dispute was changed to a statutory obligation of the judge by the amendment of 1976.[199] Then, the amendment of 2001[200] introduced an obligatory conciliation hearing preceding the (contentious) oral hearings. Recently, a new law implemented the concept of conciliatory judges (*Güterichter*).[201] The new Section 278(5) German ZPO enables the court to refer the parties to a *Güterichter*, not only for the purpose of the preliminary conciliation hearing, but also for further attempts at conciliation.

The Austrian equivalent to Section 278 German ZPO, namely Section 204 Austrian ZPO, has not evolved significantly since its enactment and has received too little attention. Its wording is broadly based on the original version of the Austrian ZPO. It enables (but does not obligate) the judge to promote an amicable settlement at any stage of the proceedings and to refer the parties to a requested or

[195] *Cf.*, e.g., Section 278 German ZPO; Section 204 Austrian ZPO.

[196] Such as the Austrian *Gemeindevermittlungsämter* (communal conciliation committees) and the German *Schiedsmänner* (adjustors). See in detail Mayr 1995, p. 181 *et seq.*, 208 *et seq.*, 354 *et seq.*; also Oberhammer and Domej 2005, p. 216 *et seq.*

[197] Above n. 31.

[198] See, e.g., Stadler 1998, p. 2480; another attempt to introduce obligatory conciliation proceedings was made recently; see below Sect. 3.3.

[199] Above n. 34.

[200] Above n. 38.

[201] See above n. 189.

commissioned judge for this purpose, but (and unlike the German equivalent) only with their consent. In the course of the enactment of the Mediation Act (*Zivilrechts-Mediations-Gesetz*, ZivMediatG)[202] one sentence was added to Section 204(1) Austrian ZPO according to which the judge has to inform the parties of the availability of extrajudicial dispute resolution bodies if and when appropriate. Furthermore, pursuant to Section 433 Austrian ZPO, a person may request that his or her adversary be summoned before the *Bezirksgericht* in order to reach a settlement (so-called *prätorischer Vergleich*) before the matter is brought to court. However, the *prätorische Vergleich* has lost its significance over the last decades.[203]

7.3.3 Powers of the Courts in Respect of Conciliation and Mediation

As already mentioned, the Austrian as well as the German judge may or (as for Germany) must promote an amicable settlement at any stage of the ordinary proceedings. The German concept of conciliatory judges is certainly more developed in this regard.[204]

Furthermore, the judge may advise the parties of alternatives to civil proceedings (i.e., out-of-court mediation and conciliation) if and when appropriate.[205] This is, however, quite a 'soft way' to encourage the use of alternative dispute resolution methods. The same is true for another legislative proposal, part of the recent amendment of the German ZPO, according to which the claimant shall indicate in the statement of claim whether an attempt at conciliation has been made and whether there are any obstacles to extrajudicial dispute settlement.[206] Regarding non-contentious matters, the judge has slightly more powers. Pursuant to Section 135 FamFG on post-divorce disputes, the judge may order the parties to attend a no-cost information session on extrajudicial dispute settlement.[207] The attendance at information sessions cannot be enforced, but a refusal may have consequences regarding the division of the costs of litigation between the parties.[208]

As already mentioned, another way – though not a power of the judge – to support alternative methods of settling disputes is to oblige the parties to try to reach a settlement before filing a lawsuit. This approach was taken in German and Austrian legislation in selected matters. Pursuant to Section 15a of the German Act introducing the Code of Civil Procedure (*Gesetz betreffend die Einführung der Zivilprozessordnung*,

[202] *Bundesgesetzblatt* of 6 June 2003, Part I, No. 29.

[203] See Oberhammer and Domej 2005, p. 221.

[204] See above Sect. 3.2.

[205] *Cf.* Section 204(1) Austrian ZPO; Section 278a(1) draft German ZPO.

[206] See Section 253(3) No. 1 German ZPO.

[207] *Cf.* also Section 156(1) FamFG.

[208] Section 150(4) FamFG.

EGZPO), the federal states are entitled to order that the filing of civil claims in certain cases requires a prior attempt at out-of-court conciliation. Currently, nine federal states have enacted laws on this basis and implemented a mandatory attempt at conciliation. The selected matters are small pecuniary claims (up to €750), neighbour disputes, defamation claims and certain disputes under the Equal Treatment Act (*Allgemeines Gleichbehandlungsgesetz*, AGG). Mandatory conciliation in small claims was no success at all. Claimants generally avoided conciliation by filing a request for an order for payment (*Mahnklage*) as this is exempted from conciliation. Today, only two out of nine federal states still maintain the mandatory attempt at conciliation in pecuniary cases. Under Austrian law, provisions that order attempts at conciliation or mediation preceding civil proceedings can be found in various laws.[209] The respective legal matters seem to have been chosen rather at random. For example, regarding neighbour disputes only those dealing with the deprivation of light and air must be examined in preliminary conciliation proceedings.

In Germany, the enactment of Section 15a EGZPO on obligatory conciliation was met with harsh criticism. The legislator was accused of not having learned the lessons of the past.[210] In general, forcing the parties to try to settle their dispute is not considered to be an appropriate way to promote conciliation and mediation.[211] The German experiences confirmed this view to some extent.[212] Certain kinds of disputes are most probably more appropriate for (mandatory) ADR than others.[213] In legal conflicts that require expert knowledge or on which personal and social aspects have a strong impact, court proceedings reach their limits. It might be easier to get to the origins of the conflict in mediation and conciliation. Instead of enacting obligations to use mediation or conciliation, German legal scholars argue for the implementation of financial incentives. Proposals are, e.g., to expand the existing legal aid scheme and include procedural costs of mediation or conciliation in general[214] or only where the judge refers the parties to extrajudicial dispute settlement[215]; or providing pecuniary sanctions: a party that refuses to try conciliation or mediation or does not co-operate shall bear the costs of litigation, which might otherwise have been avoidable.[216]

---

[209] See Section 364(3) ABGB and Art. III *Zivilrechts-Änderungsgesetz* (ZivRÄG) 2004; Section 79 m Genetic Engineering Act (*Gentechnikgesetz*, GTG) – neighbour disputes regarding nuisance caused by genetically modified organisms; Section 135(3) Farm Labour Act (*Landarbeitsgesetz*, LAG); Section 15a(3) Apprenticeships Act (*Berufsausbildungsgesetz*, BAG) – both regarding the extraordinary dismissal of apprentices; Section 10 Federal Disability Equality Act (*Bundes-Behindertengleichstellungsgesetz*, BGStG); Section 37 *et seq.* Tenancy Act (*Mietrechtsgesetz*, MRG); Section 22(4) Housing Corporation Act (*Wohnungsgemeinnützigkeitsgesetz*, WGG); Section 52(3) Commonhold Property Act (*Wohnungseigentumsgesetz*, WEG).

[210] *Cf.*, e.g., Stadler 1998, p. 2480.

[211] See, e.g., Mayr 1999, p. 28; Wagner 1998, p. 841 *et seq.*; Althammer 2006, p. 72 with further references.

[212] See with further references Hess 2008, F 31 *et seq.*

[213] See, e.g., Greger 2005, p. 79; Schilken 2001, p. 474 *et seq.*

[214] See Wagner 2010, p. 835 *et seq.*

[215] See Hess 2008, F 115; Bercher and Engel 2010, p. 128 with further references.

[216] See Althammer 2006, p. 74 with further references.

Appendices

Appendix 1A: Facts and Figures Relevant for the Powers of the Judge and the Parties in Civil Litigation

Austria

Year of Reference: 2008

Part I: General Data on the National Civil Justice System

1. Inhabitants, GDP and average gross annual salary

Number of inhabitants	8,336,549
Per capita GDP (gross domestic product)	€33,810
Average gross annual salary	€43,200

2. Total annual budget allocated to all courts €667,930,000

3. Does the budget of the courts include the following items?

	Yes	Amount
Annual public budget allocated to salaries	☒	€332,940,000
Annual public budget allocated to computerisation	☒	€28,400,000
Annual public budget allocated to court buildings	☒	€47,800,000
Annual public budget allocated to training and education	☐	N/A
Annual public budget allocated to legal aid	☒	€18,400,000
Other	☐	N/A

4. Is the budget allocated to the public prosecution included in the court budget?

☒ Yes
☐ No

(a) If yes, give the amount of the annual public budget allocated to the prosecution services N/A

Legal Aid (Access to Justice)

5. Annual number of legal aid cases and annual public budget allocated to legal aid

	Number	Amount
Civil cases	13,831	N/A
Other than civil cases	N/A	N/A
Total of legal aid cases	N/A	€18,400,000

Organisation of the court system and the public prosecution

6. Judges, non-judge staff and *Rechtspfleger*

	Total number	Sitting in civil cases
Professional judges (full time equivalent and permanent posts)	1,658	N/A
Professional judges sitting in courts on an occasional basis and paid as such	N/A	N/A
Non-professional judges (including lay-judges) who are not remunerated but who can possibly receive a defrayal of costs	N/A	N/A
Non-judge staff working in the courts (full time equivalent and permanent posts) – including *Rechtspfleger*	4,637.87	N/A
Rechtspfleger	745.17	N/A

The performance and workload of the courts

7. Total number of civil cases in the courts (litigious and non-litigious): 937,563 incoming litigious and non-litigious civil cases (including order for payment proceedings)

8. Litigious civil cases and administrative law cases in the courts

		Litigious civil cases in general	Civil cases by category (e.g. small claims, family, etc.)		
			Litigious divorce		
Total number of first-instance cases	Pending cases on 1 January of the year of reference	39,975	3,324	N/A	N/A
	Pending cases on 31 December of the year of reference	39,227	3,275	N/A	N/A
	Incoming cases	110,497	7,325	N/A	N/A
	Decisions on the merits	111,245	7,374	N/A	N/A
Average length of first-instance proceedings		N/A	N/A	N/A	N/A

Appendix 1B: Facts and Figures Relevant for the Powers of the Judge and the Parties in Civil Litigation

Germany

Year of Reference: 2009 or 2010 (As indicated)[217]

Part I: General Data on the National Civil Justice System

1. Inhabitants, GDP and average gross annual salary

Number of inhabitants	81,752,000 (2010)
Per capita GDP (gross domestic product)	€34,120 (2010)
Average gross annual salary	€38,724 (2010; full-time employee)

2. Total annual budget allocated to all courts €7,803,000,000
(2009; source: Fachserie 14 Reihe 3.1 – 2009)

3. Does the budget of the courts include the following items?

	Yes	Amount (euro or RMB)
Annual public budget allocated to salaries	☒	€4,466,000,000
Annual public budget allocated to computerisation	☐	N/A
Annual public budget allocated to court buildings	☒	€49,000,000
Annual public budget allocated to training and education	☐	N/A
Annual public budget allocated to legal aid	☐	N/A
Other (please specify)	☐	N/A

4. Is the budget allocated to the public prosecution included in the court budget?

☒ Yes
☐ No

(a) If yes, give the amount of the annual public budget allocated to the prosecution services N/A

[217] Source: Statistisches Bundesamt (www.destatis.de), unless otherwise indicated.

Legal Aid (Access to Justice)

5. Annual number of legal aid cases and annual public budget allocated to legal aid (Source: Fachserie 10, Reihe 2.1, 2010)

	Number	Amount
Civil cases	66,323	N/A
Other than civil cases	N/A	N/A
Total of legal aid cases	N/A	N/A

Organisation of the court system and the public prosecution

6. Judges, non-judge staff and *Rechtspfleger*
(31.12.2010; source: Fachserie 10 Reihe 1 – 2011)

	Total number	Sitting in ordinary civil cases
Professional judges (full time equivalent and permanent posts)	20,411	15,039
Professional judges sitting in courts on an occasional basis and paid as such	N/A	N/A
Non-professional judges (including lay-judges) who are not remunerated but who can possibly receive a defrayal of costs	N/A	N/A
Non-judge staff working in the courts (full time equivalent and permanent posts)	N/A	N/A
Rechtspfleger (if applicable)	N/A	N/A

The performance and workload of the courts

7. Total number of civil cases in the courts (litigious and non-litigious):
1,585,243 incoming civil cases (without family law cases and order for payment proceedings) (31.12.2010; source: Fachserie 10 Reihe 2.1 – 2010)

8. Litigious civil cases and administrative law cases in the courts

		Litigious civil cases in general	**Civil cases by category (e.g. small claims, family, etc.)**		
Total number of first-instance cases	Pending cases by 1 January of the year of reference	800,112	N/A	N/A	N/A
	Pending cases by 31 December of the year of reference	798,703	N/A	N/A	N/A
	Incoming cases	1,585,243	N/A	N/A	N/A
	All cases terminated by decision on the merits [Streitiges Urteil]; by court settlement)	1,586,652 400,687 266,660	N/A	N/A	N/A

(continued)

	Litigious civil cases in general	Civil cases by category (e.g. small claims, family, etc.)		
Average length of first-instance proceedings (months)				
Amtsgericht				
all terminated cases	4.7	N/A	N/A	N/A
cases terminated by decision on the merits	7.1			
Landgericht				
all terminated cases	8.1			
cases terminated by decision on the merits	13.2			

References

Althammer C (2006) Mediation als prozessuale Last. Juristenzeitung 61:69–76

Althammer C, Schäuble D (2012) Effektiver Rechtsschutz bei überlanger Verfahrens-dauer – Das neue Gesetz aus zivilrechtlicher Perspektive. Neue Juristische Wochen-schrift 65:1–7

Bercher A, Engel M (2010) Kostenanreize für eine Streitbeilegung durch Mediation. Zeitschrift für Rechtspolitik 43:126–129

Böhm P (1986) Die österreichischen Justizgesetze von 1895/96. In: Hofmeister H (ed) Kodifikation als Mittel der Politik. Böhlau, Vienna/Graz/Cologne, pp 59–66

Böhm P (1978) Der Streit um die Verhandlungsmaxime. Ius Commune VII:136–159

Brehm W (2003) In: Stein F, Jonas M (eds) Kommentar zur Zivilprozessordnung, vol I, 22nd edn. Mohr Siebeck, Tübingen

Dahlmanns GJ (1982) Deutschland. In: Coing H (ed) Handbuch der Quellen und Literatur der neueren europäischen Privatrechtsgeschichte, vol III, Part 2. C.H. Beck, Munich, pp 2615–2697

Damrau J (1975) Die Entwicklung einzelner Prozessmaximen seit der Reichszivilprozess-ordnung von 1877. Schöningh, Paderborn

Damrau J (1988) Der Einfluss der Ideen Franz Kleins auf den Deutschen Zivilprozeß. In: Hofmeister H (ed) Forschungsband Franz Klein. Manz, Vienna, pp 157–171

Fasching HW (2002) In: Fasching HW, Konecny A (eds) Kommentar zu den Zivilprozessgesetzen, vol II/1, 2nd edn. Manz, Vienna

Fink-Hopf G (2010) Zwei Jahre Justiz-Ombudsstelle beim Oberlandesgericht Wien. Richterzeitung :28–30

Foerste U (2012) In: Musielak H-J (ed) Kommentar zur Zivilprozessordnung, 9th edn. Beck, Munich

Francken J-P (2011) Der Entwurf des Gesetzes zur Förderung der Mediation und die gerichtsinterne Mediation im arbeitsgerichtlichen Verfahren. Neue Zeitschrift für Arbeitsrecht 28:1001–1005

Fucik R (2006) In: Rechberger WH (ed) Kommentar zur ZPO, 3rd edn. Springer, Vienna

Gottwald P (2001) Mediation und gerichtlicher Vergleich: Unterschiede und Gemein-samkeiten. In: Lüke G, Mikami T, Prütting H (eds) Festschrift Ishikawa. de Gruyter, Berlin/New York, pp 137–155

Grabscheid (1914) Klein's Gerichtsinspektorat. In: Festschrift für Franz Klein. Manz, Vienna, pp 233–236

Greger R (2005) Obligatorische Schlichtung – Erfahrungen und Zukunftsperspektiven. Zeitschrift für Schiedsverfahren 3:76–80

Greger R (2007) Justiz und Mediation – Entwicklungslinien nach Abschluss der Modell-projekte. Neue Juristische Wochenschrift 60:3258–3262
Greger R (2010) Die Reglementierung der Selbstregulierung – Zum Referentenentwurf eines Mediationsgesetz. Zeitschrift für Rechtspolitik :209–213
Haas U (2011) The relationship between the judge and the parties under German law. In: Lipp V, Fredriksen HH (eds) Reforms of civil procedure in Germany and Norway. Mohr Siebeck, Tübingen, pp 87–114
Hess B (2001) Vergleichende Bemerkungen zur Rechtsstellung des Richters. In: Oberhammer P (ed) Richterbild und Rechtsreform in Mitteleuropa. Manz, Vienna, pp 1–21
Hess B (2008) Mediation und weitere Verfahren konsensualer Streitbeilegung – Regelungsbedarf im Verfahrens- und Berufsrecht, Gutachten zum 67. Deutschen Juristentag, vol I. Beck, Munich
Hillgruber C (2007) In: Maunz T, Dürig G (eds) Grundgesetz-Kommentar, 51st edn. Beck, Munich
Hopf G (2010) Gerichtsexterne Mediation. Rabels Zeitschrift für ausländisches und internationales Privatrecht 74:759–780
Jacobs M (2011) In: Stein F, Jonas M (eds) Kommentar zur Zivilprozessordnung, vol X, 22nd edn. Mohr Siebeck, Tübingen
Jelinek W (1991) Einflüsse des österreichischen Zivilprozessrechts auf andere Rechts-ordnungen. In: Habscheid WJ (ed) Das deutsche Zivilprozessrecht und seine Ausstrahlung auf andere Rechtsordnungen. Gieseking-Verlag, Bielefeld, pp 41–89
Klein F (1927) Zeit- und Geistesströmungen im Prozesse. In: Friedländer O (ed) Franz Klein, Reden, Vorträge, Aufsätze, Briefe, vol I. Manz, Vienna, pp 117–138
Klein F, Engel F (1927) Der Zivilprozess Österreichs. J. Bensheimer, Mannheim/Berlin/Leipzig
Klicka T (2004) In: Fasching HW, Konecny A (eds) Kommentar zu den Zivilprozessgesetzen, vol III, 2nd edn. Manz, Vienna
Kodek G, Mayr PG (2011) Zivilprozessrecht. Facultas, Vienna
Kohler M (2002) Die Entwicklung des schwedischen Zivilprozeßrechts. Mohr Siebeck, Tübingen
Kraus A-M, Moltmann-Willisch A-R, von Hammerstein F (2011) Richterliche Mediation an Berliner Zivilgerichten. Zeitschrift für Rechtspolitik 44:58–59
Leipold D (2005) In: Stein F, Jonas M (eds) Kommentar zur Zivilprozessordnung, vol III, 22nd edn. Mohr Siebeck, Tübingen
Leipold D (2008) In: Stein F, Jonas M (eds) Kommentar zur Zivilprozessordnung, vol IV, 22nd edn. Mohr Siebeck, Tübingen
Leonhard O (1948) Zur Geschichte der österreichischen Justizreform vom Jahre 1898. In: Festschrift zur Fünfzigjahrfeier der österreichischen Zivilprozessordnung. Manz, Vienna, pp 125–159
Matscher F (2007) Schwierige Selbstreinigung der Justiz. Rechtspanorama 23 October 2007, *Die Presse* 2007/43/04
Maunz T (1984) In: Maunz T, Dürig G (eds) Grundgesetz-Kommentar, 23rd edn. Beck, Munich
Mayr PG (1995) Rechtsschutzalternativen in der österreichischen Rechtsentwicklung. Manz, Vienna
Mayr PG (1999) Einführung in die außergerichtliche Streitschlichtung. In: Mayr PG (ed) Öffentliche Einrichtungen zur außergerichtlichen Vermittlung von Streitigkeiten. Manz, Vienna, pp 3–29
Mayr PG (2009) Neue Rechtstatsachen aus der Zivilgerichtsbarkeit. Anwaltsblatt 71:54–66
McGuire M-R (2010) Prozessförderungspflicht und Präklusion. Ecolex 21:1153–1156
Oberhammer P (1993) Richtermacht, Wahrheitspflicht und Parteienvertretung. In: Kralik W, Rechberger WH (eds) Konfliktvermeidung und Konfliktregelung. Manz, Vienna, pp 31–84
Oberhammer P (2000) Parteiaussage, Parteivernehmung und freie Beweiswürdigung. Zeitschrift für Zivilprozeß 113:295–326
Oberhammer P (ed) (2001a) Richterbild und Rechtsreform in Mitteleuropa. Manz, Vienna
Oberhammer P (2001b) Richterbild im Zivilprozess. In: Oberhammer P (ed) Richterbild und Rechtsreform in Mitteleuropa. Manz, Vienna, pp 131–143
Oberhammer P (2001c) Zu den Ursprüngen des Mahnverfahrens im österreichischen Recht. In: König B (ed) Festschrift Sprung. Manz, Vienna, pp 283–310

Oberhammer P (2004a) Die Aufgabenverteilung zwischen Gericht und Parteien – Überlegungen à propos 'Een nieuwe balans' aus Sicht des deutschen Rechtskreises. In: Ingelse P (ed) Commentaren op fundamentele herbezinning. Ars Aequi Libri, Nijmegen, pp 81–97
Oberhammer P (2004b) Zivilprozessgesetzgebung: Content follows method. In: Honsell H (ed) Festschrift für Ernst. Helbing & Lichtenhahn, A. Kramer, Basel/Geneva/Munich, pp 1025–1050
Oberhammer P, Domej T (2005) 'General Part – Germany, Switzerland, Austria', pp 103–28; 'Conciliation and Other Types of Alternative Dispute Settlement – Germany, Switzerland, Austria', pp 215–21; 'Party Interrogation as Evidence – Germany, Switzerland, Austria', pp 255–59; 'Powers of the Judge – Germany, Switzerland, Austria', pp 295–305. In: Van Rhee CH (ed) European traditions in civil procedure. Intersentia, Antwerp/Oxford
Oberhammer P, Domej T (2010) Delay in Austrian civil procedure and the Legislator's response. In: Van Rhee CH (ed) Within a reasonable time. Duncker & Humblot, Berlin, pp 255–277
Rauscher T (2008) In: Rauscher T, Wax P, Wenzel J (eds) Münchener Kommentar zur Zivilprozessordnung, vol I, 3rd edn. C.H. Beck, Munich
Rechberger WH (2004) In: Fasching HW, Konecny A (eds) Kommentar zu den Zivilprozessgesetzen, vol III, 2nd edn. Manz, Vienna
Rechberger WH (2006) In: Rechberger WH (ed) Kommentar zur ZPO, 3rd edn. Springer, Vienna
Rechberger WH, Klicka T (2006) In: Rechberger WH (ed) Kommentar zur ZPO, 3rd edn. Springer, Vienna
Rechberger WH, Simotta D-A (2010) Zivilprozessrecht, 8th edn. Manz, Vienna
Rosenberg L, Schwab KH, Gottwald P (2010) Zivilprozessrecht, 17th edn. Beck, Munich
Roth H (2005) In: Stein F, Jonas M (eds) Kommentar zur Zivilprozessordnung, vol III, 22nd edn. Mohr Siebeck, Tübingen
Roth H (2008) In: Stein F, Jonas M (eds) Kommentar zur Zivilprozessordnung, vol IV, 22nd edn. Mohr Siebeck, Tübingen
Schilken E (2001) Probleme der außergerichtlichen obligatorischen Streitschlichtung aufgrund der Öffnungsklausel nach § 15a EGZPO. In: Lüke G, Mikami T, Prütting H (eds) Festschrift Ishikawa. de Gruyter, Berlin/New York, pp 471–484
Schmid S, Wallnöfer K (2008) Volksanwaltschaft und Gerichtsbarkeit. Journal für Rechtspolitik 16:177–185
Schneider M, Roth P (1998) Eine Leistungsschau des österreichischen Zivilprozesses anhand der Zahlen des Jahres 1996. In: Bundesministerium für Justiz, Lewisch P, Rechberger WH (eds) 100 Jahre ZPO – Ökonomische Analyse des Zivilprozesses. Manz, Vienna, pp 3–22
Schoibl NA (1987) Die Entwicklung des österreichischen Zivilverfahrensrechts. Peter Lang, Frankfurt a. M./Bern/New York
Schoibl NA (2005) Der Fristsetzungsantrag im österreichischen Zivilverfahrensrecht. Zeitschrift für Zivilprozeß 118:205–240
Schragel W (2003) In: Fasching HW, Konecny A (eds) Kommentar zu den Zivilprozessgesetzen, vol II/2, 2nd edn. Manz, Vienna
Schumacher H (2000) Richterliche Anleitungspflichten. Manz, Vienna
Sprung R (1977) Die Grundlagen des österreichischen Zivilprozeßrechts. Zeitschrift für Zivilprozeß 90:381–394
Stadler A (1998) Außergerichtliche obligatorische Streitschlichtung – Chance oder Illusion? Neue Juristische Wochenschrift 51:2479–2487
Stadler A (2003) Inquisitionsmaxime und Sachverhaltsaufklärung; erweiterte Urkundenvorlagepflichten von Parteien und Dritten nach der Zivilprozessrechtsreform. In: Nakamura H, Fasching HW, Gaul HF, Georgiades A (eds) Festschrift für Kostas E. Beys, vol II. Sakkoulas/EUNOMIA, Athens, pp 1625–1647
Stadler A (2012) In: Musielak H-J (ed) Kommentar zur Zivilprozessordnung, 9th edn. Beck, Munich
Wagner G (1998) Obligatorische Streitschlichtung im Zivilprozess: Kosten, Nutzen, Alternativen. Juristenzeitung 53:836–846

Wagner G (2008) In: Rauscher T, Wax P, Wenzel J (eds) Münchener Kommentar zur Zivilprozessordnung, vol I, 3rd edn. C.H. Beck, Munich
Wagner G (2010) Grundstrukturen eines deutschen Mediationsgesetzes. Rabels Zeitschrift für ausländisches und internationales Privatrecht 74:794–840
Wenzel J (2007) In: Rauscher T, Wax P, Wenzel J (eds) Münchener Kommentar zur Zivilprozessordnung, vol II, 3rd edn. C.H. Beck, Munich
Wimmer R, Wimmer U (2007) Verfassungsrechtliche Aspekte richterlicher Mediation. Neue Juristische Wochenschrift 60:3243–3247
Zekoll J, Bolt J (2002) Die Pflicht zur Vorlage von Urkunden im Zivilprozess – Amerikanische Verhältnisse in Deutschland? Neue Juristische Wochenschrift 55:3129–3134

Chapter 8
The Austrian Model of Cooperation Between the Judges and the Parties

Irmgard Griss

8.1 Introduction

In having served as more than 30 years as a judge, my work and understanding of civil procedure have been shaped by the ideas of Franz Klein. Klein, who lived from 1854 to 1926, drafted the Austrian Code of Civil Procedure of 1895. The Code was introduced in 1898 and is still in force today.

Franz Klein was influenced by the rising ideas of the welfare state. He was convinced that civil litigation should not only be considered as a means to solve individual conflicts between private parties but should also serve society as a whole. He criticised the adversarial system as leading to excessive costs and making the civil justice system 'inaccessible to the larger part of society and too easily abused by others'.[1] The adversarial system had turned litigation into 'a war without a Red Cross'.[2]

Klein's main idea was to organise civil procedure in a way that would enable the courts to establish the true facts. In his opinion society was best served if substantive law was enforced, which required that facts were established in accordance with the truth.

The cornerstones of this procedural system are the managerial powers of the judge. The judge's strong position is counterbalanced by guarantees of the judge's independence and impartiality, and by safeguards for the parties' right to a fair trial.

In this contribution I would like to give an overview of the legal basis of the Austrian procedural system and to describe how the system works in practice, and, by sharing my experiences as a judge, to try to formulate guidelines for a judge's work.

[1] Klein 1891, p. 22.

[2] *Ibidem*, p. 39.

I. Griss (✉)
University of Graz, Graz, Austria
e-mail: ig@griss.co.at

C.H. (Remco) van Rhee and Fu Yulin (eds.), *Civil Litigation in China and Europe*, Ius Gentium: Comparative Perspectives on Law and Justice 31,
DOI 10.1007/978-94-007-7666-1_8,

8.2 Legal Basis

8.2.1 Safeguards of Independence and Impartiality

In Austria, the independence of the Judiciary is guaranteed by the Constitution. The principle of separation of powers and the principle that the Judiciary decides independently and without being bound by instructions are basic principles of the Austrian legal system.[3]

The independence of the Judiciary is guaranteed in two ways: institutionally and personally. Judges cannot be transferred to another post without their consent. They can be removed only for disciplinary reasons and in disciplinary proceedings conducted by judges and not by administrative authorities.[4]

The personal independence and impartiality of judges are safeguarded by the parties' right to recuse a judge.[5] There are two types of possible grounds for this: close family relationships[6] and other personal relationships giving rise to fear of prejudice. In both cases, judges are disqualified regardless of whether they are really biased. It is sufficient that the judge may appear to be biased. The reason behind this is that – in the words of a famous aphorism[7] – not only must justice be done, it must also be seen to be done.

Motions seeking disqualification of judges have to be filed immediately after obtaining knowledge of the constituting facts, be it at trial court level or at appellate court level.[8] In case of close family relationships, an action of nullity can be brought even after the judgment has become legally binding.[9]

8.2.2 Managerial Powers

The judge has an obligation to conduct the proceedings not only as regards time limits and the date of hearings but also with respect to substantive issues.[10] This involves an obligation to try to clarify unclear or insufficient arguments and to advise the parties. Failure to instruct the parties may constitute a gross procedural error.

---

[3] Arts. 87, 94 Federal Constitutional Law (*Bundes-Verfassungsgesetz, B-VG*).

[4] Art. 88 Federal Constitutional Law.

[5] Section 19 Law on Jurisdiction (*Jurisdiktionsordnung*).

[6] Section 20 Law on Jurisdiction.

[7] *R v. Sussex Justices, Ex parte McCarthy* [1924] 1 KB 256, [1923] All ER 233.

[8] Section 21 Law on Jurisdiction.

[9] Section 529 Code of Civil Procedure.

[10] Section 182 Code of Civil Procedure.

At a so-called preparatory hearing[11] the judge has to discuss with the parties which of the issues brought forward in the pleadings are relevant and who bears the burden of proof. The main purpose of the preparatory hearing is to come to an agreement on the general scheduling. Another explicit purpose is to seek to reach an amicable settlement of the dispute between the parties.

Since civil proceedings also aim at establishing the truth, judges are entitled to act *ex officio* in some respects[12]: they can order the parties to attend hearings in person, they can order them to produce documents or other objects, they can collect documents from notaries or from public authorities, they can inspect sites, they can summon witnesses and they can appoint an expert. As regards witnesses and documents, the judge cannot act *ex officio* if both parties object.

8.2.3 Duties of the Parties

The parties have the duty to promote the proceedings.[13] This means that they have to make their allegations without undue delay and present the facts truthfully and in an exhaustive manner. But it is not the objective truth that is required. The parties may state the facts from a subjective point of view, but they must not say anything against better knowledge.

If the parties fail to foster the efficient conduct of the lawsuit, two kinds of sanctions are possible. Delayed allegations or offers of evidence may be precluded. Also, the parties may be ordered to bear the costs of delayed actions even if they win the case.[14] Thus, a party may not recover all costs because of lack of procedural discipline.

8.2.4 Right to a Fair Trial

The cornerstone of the right to a fair trial is the right to be heard. The parties must be given the opportunity to comment on the other party's arguments and on evidence produced by the other party or *ex officio*.[15] They must be given an opportunity to ask questions and to request clarification. If the right to be heard is not respected, the judgment will be quashed on appeal.[16] In the event a judgment is rendered though a party was never informed of the proceedings, the party can bring an action of nullity even if the judgment has obtained formal legal force.[17]

[11] Section 258 Code of Civil Procedure.

[12] Sections 182a, 183 Code of Civil Procedure.

[13] Section 178 Code of Civil Procedure.

[14] Sections 44, 48, 179 Code of Civil Procedure.

[15] Section 178 Code of Civil Procedure.

[16] Sections 477 and 503 Code of Civil Procedure.

[17] Section 529 Code of Civil Procedure.

The parties must be given a fair chance to present their legal position. This implies that the judge discloses his legal opinion, thus giving the parties the opportunity for counter-arguments.[18] If he fails to do so and bases the judgment on a legal opinion that takes the losing party by surprise, the judgment will be quashed on appeal.

Procedural fairness is important also from another point of view. Empirical studies show that procedural justice strongly affects the willingness to accept and obey the judgment.

8.3 How It Works in Practice

Austria has a system of career judges. Austrian judges are usually well trained. After earning a law degree at university, future judges have to complete 4 years of training. In order to be accepted as trainee judges they have to pass an examination. The competition is rather fierce – every year a substantial number of law graduates want to become judges.

The trainee judges work as law clerks in court. If they have good luck, they are assigned to experienced judges who often become role models. Clerking is just one part of the traineeship; trainee judges have to attend seminars, both for improving legal knowledge and in particular for developing communication and moderation skills. In order to improve the form and style of judgments, writing classes are offered. Trainee judges also have to work in a law firm for several months. This is a rather recent requirement that is very important since it helps the future judges to better understand the attorney's role in the proceedings.

The intense training is good preparation for fulfilling a judge's tasks: trainee judges receive instruction in how to conduct proceedings in a fair way, how to communicate with parties and attorneys; and they have to study the law thoroughly. Thus they are in a position to direct the course of the proceedings in such a way as to ensure both fairness and procedural efficiency.

Although Austrian judges are granted extensive managerial powers, in practice judges are rather reluctant to use them. This holds true particularly for summoning witnesses and ordering the production of documents or other objects *ex officio*. A difficult question is how far judges may go and have to go in advising a party. Parties not represented by counsel have to be advised as regards what allegations they have to make and what evidence they have to offer in order to win their case. Judges must be very careful not to create the impression of being biased.

In Austria, only 3.2 % of all court actions take more than 3 years; most court actions are brought to a close within 1 year. However, efforts to accelerate the proceedings are always on the agenda. The main causes for undue delays are inefficient case management and the need for expert opinion. In case of undue delays, parties may file a request petitioning the court of second instance to set a time limit for the lower court. Such requests are rather rare. One reason may be the parties' fear of

[18] Sections 182 and 182a Code of Civil Procedure.

displeasing the judge who, after all, has to rule on their case. But when such requests are filed they are usually very effective. In most cases the delayed action is taken without waiting for an order from the higher court.

Although it naturally depends on the individuals involved – there are judges and attorneys who are not really cooperative – it can be said that the Austrian model of cooperation between judges and the parties exists not only in legal textbooks but also in practice.

8.4 Guiding Principles for Judges

In my judicial experience a judge's work should be guided by the following principles:

8.4.1 Prepare Yourself

For me the most important task was and is to prepare yourself. After the statement of claim and the statement of defence have been filed, the judge has to study the parties' pleadings with the utmost care and from a legal point of view. Before the first hearing he has to have made up his mind on what it is all about: what legal rules are to be applied, what is relevant, which points need to be clarified, what evidence is to be taken. The judge has to identify the key issues in the case – particularly the issues which are not in dispute. Adequate pre-hearing reading by the judge is not only a necessary prerequisite for effective case management but is also a basis for fruitful discussions about a settlement of the case. The judge can propose a fair settlement only if he is familiar with the case. In many cases a fair settlement suits the parties better than a judgment.

8.4.2 Try to Understand, and Make Yourself Understood

Jurists often use a language ordinary people are not familiar with. Judges have to be aware of this problem and they have to try to use language that at the same time is concise and commonly understood. Otherwise they may get answers to questions they did not ask and no answers to questions they did ask. This may lead to incorrect findings, and a judgment based on incorrect findings can never be correct.

Clear and understandable language is also indispensable for the judgment. How can a judgment shape future behaviour if the party concerned is not able to comprehend it? Sometimes it is claimed that legal arguments require the use of a highly specialised language. My experience is quite to the contrary. What has been really understood and thought through thoroughly can be expressed clearly and simply.

Clear language is of utmost importance also for the acceptability of the judgment. Judges always have to keep in mind that they have to explain their decision on

a case to a critical public And most importantly, for justice to be seen to be done, the judge must explain why the losing party lost, which involves stating and answering that party's main points.

8.4.3 Acquire Knowledge of the World

Sometimes judicial reasoning explicitly appeals to knowledge of the world. Judges have to decide, for example, how a reasonable man – a man of the world – would have acted. Judges therefore must be wise to the ways of the world. However, judges sometimes tend to appear unworldly. In the English-speaking world, this is called 'judgitis', in Austria we call it 'furor talaricus'. The best way to avoid this is – as the English judge Sir Robin Jacob stressed in a speech – to try to put yourself in the place of the other man or woman, whether they be litigant or witness or anyone else. This attribute is precious, both inside the courts and beyond; it can be the greatest protection against cruelty, and one of the greatest forces for peace.

8.4.4 Be Open-Minded and Always Willing to Learn

A legal system is a work in progress; judges contribute to its development. In order to be able to fulfil this important function they must be open-minded and willing to learn. At the same time they have to be conservative in the sense that established values are respected and preserved.

8.5 Concluding Remarks

Being a judge is not a job, but a vocation. It is demanding in many respects: with respect to language, with respect to legal knowledge and with respect to the best qualities of a human being. Good judges respect their fellow citizens, they are law-abiding but not blind to the realities of life, they see law not as an end in itself but as a means to achieving and securing a just and peaceful society.

The Austrian model of cooperation between judges and the parties enables the judge to develop these qualities. But, as we are all well aware, it always depends on the individual whether and to what extent this is really achieved.

Reference

Klein F (1891) Pro Futuro, Betrachtungen über Probleme der Civilprocessreform in Österreich. Franz Deuticke, Leipzig/Wien

Chapter 9
'Mediation Judges' in Germany: Mutual Interference of EU Standards and National Developments

Burkhard Hess

9.1 Procedural Developments in Europe 2000–2012

In recent years, the development of procedural law in Europe has comprised mainly three trends: firstly, there has been growing competition between the national procedural systems, which are more and more perceived as 'judicial markets'; secondly, there has been the increasingly multi-layered character of procedural law, which is still based on national cultures, but more and more influenced by European and even global parameters and related actors (such as the European Court of Justice (ECJ), the European Court of Human Rights (ECHR), the International Monetary Fund (IMF) and the World Bank). The third development relates to the scope of dispute resolution: here, an expansion of different methods of dispute resolution has been taking place that is no longer limited to the traditional litigation between two parties in civil courts, but includes ADR between consumers and in businesses, collective litigation, arbitration, online dispute resolution, etc.

Prior to addressing the main topic of my contribution, I would like to explore a little more closely these general trends in Europe, which, of course, are closely interrelated. The first development, the competition between the national systems, has been reinforced by the economic crisis. Interestingly, the crisis triggered procedural reforms in many EU Member States: national procedures were reformed in order to improve the efficiency of the Judiciary[1] – especially the managerial role of the judges was enhanced. In addition, information technologies have increasingly

[1] In Italy, the reform of the (underperforming) court system was a priority of the government, http://www.economist.com/node/21560587?frsc=dg%7Ca (last consulted in May 2013).

B. Hess (✉)
Max Planck Institute Luxembourg for International, European and Regulatory Procedural Law, Luxembourg, Luxembourg
e-mail: burkhard.hess@mpl.lu

C.H. (Remco) van Rhee and Fu Yulin (eds.), *Civil Litigation in China and Europe*, Ius Gentium: Comparative Perspectives on Law and Justice 31,
DOI 10.1007/978-94-007-7666-1_9,

been used in order to improve procedures.[2] On the other hand, forum shopping has become a wide-spread phenomenon in the European Judicial Area, not only in commercial litigation, but also in the fields of insolvency and corporate restructuring, collective litigation, cartel damages and – especially – arbitration. In order to attract high value litigation, Member States have adapted their national systems to preserve their 'judicial markets'. In this respect, it remains to be seen whether market competition is the appropriate regulatory approach for procedural law, which is based on values such as the principles of fair trial, equality of the parties and the right to be heard by an impartial tribunal.[3]

The second development relates to the different regulatory levels of procedural law: in the European Judicial Area, national procedures of EU Member States are coordinated by EU instruments covering all areas of dispute resolution. However, the European legislator regards the coordination of the national procedures as a first step towards the integration of the procedural systems of the Member States. Since the start of the new millennium, national procedures have been harmonised in specific areas (e.g. intellectual property litigation and mediation).[4] The underlying strategy which has not gone unchallenged by the Member States aims at a continuous broadening of the scope of EU legislation. The EU Commission, however, equally uses this strategy for the implementation of modern concepts of dispute resolution like collective litigation, mediation, online dispute resolution and private enforcement.[5] These concepts challenge and change the customary face of civil litigation which was traditionally aimed at the solution of private disputes of individuals. In times of economic crisis, considerable influence is exercised by international organisations such as the IMF and the World Bank requiring structural reforms of struggling judicial systems where litigation is blocked for years.[6] Accordingly, complex judicial procedures, cumbersome execution of court decisions, lack of transparency, and disconnections between court performance and budgeting are considered to negatively affect economic growth. States in necessity are required to reform their court systems and their procedures, and to implement the best international practices. Additional influence is exercised by international courts, especially the ECJ and the ECHR, imposing far-reaching obligations on national courts based on the guarantees of fair trial (Article 6, European Convention on Human Rights and Article 47, Charter of Fundamental Rights of the European Union). The constitutionalisation of

[2] The availability of information technology in the courts directly influences forum shopping: in cartel damage litigation, parties must present thousands of pieces of evidence. If a court does not dispose of facilities for the sampling and screening of these documents, the proceedings are delayed and parties are deterred from selecting these courts for litigation.

[3] Jauernig and Hess 2011, § 1.

[4] Hess 2010, § 11.

[5] Hess 2012, p. 159, 164 *et seq*.

[6] Examples: Letter of Intent of 1 September 2011, agreed between the IMF and the Portuguese government, paras. 29–31: 'Judicial Reform', http://www.imf.org/external/np/loi/2011/prt/090111.pdf (last consulted in May 2013). Similar commitments are found in the letter of intent of the Greek government to the IMF and the European Union of 9 March 2012, para. 32, http://www.imf.org/external/np/loi/2012/grc/030912.pdf (last consulted in May 2013).

procedural law has become a matter of European and international constitutional law and human rights' protection.[7]

The third development relates to the growing privatisation and diversification of dispute resolution: since the 1990s, ADR has become a powerful concept to supplement court-oriented dispute resolution – the idea of a 'multi-door courthouse' providing for well-suited dispute resolution mechanisms for different disputes expanded from the US to Europe.[8] On the other hand, the concept of private enforcement is widely discussed in Europe, especially regarding cartel damages and consumer protection.[9] At present, the introduction of collective redress at the European level may prevent unlimited competition between the national legislators that may finally result in a race to the bottom in order to attract high value litigation or to deter unwelcome liability of local businesses.[10] Another innovative area is ADR, where consumer dispute resolution, online dispute resolution, mediation and sophisticated negotiation between businesses have come to form an innovative field (and a market).[11] In this context the question arises as to whether privatisation of dispute resolution could be a (cheaper and even better) alternative to litigation in civil courts. Although the concept of privatisation has lost much of its former appeal, in the area of dispute resolution the issue is still unresolved. However, in all these innovative fields of dispute resolution, there is still a compelling need to preserve the basic guarantees of procedural fairness, of an equitable and balanced and – if a settlement is not reached – fair resolution of disputes by an independent and impartial third party according to the rule of law.

These reflections serve to demonstrate the present situation in Europe, where the national systems are competing; additional actors (lawmakers and decision makers) are involved and new concepts of dispute resolution are being explored. However, the current situation should not be perceived as a situation of unwelcome change, but rather as a situation where improvement is imminent and possible. The subject of this paper – the phenomenon of the German mediation judge – shall demonstrate that the present situation can trigger positive developments which had not been predicted by the Lawmaker, but are mainly based on the individual initiative of local stakeholders confronted with new challenges of a global society. In Germany, judges on their own motion have used a new provision of the Code of Civil Procedure for the implementation of ADR techniques (especially mediation) in civil proceedings. However, the professional associations of lawyers have been very critical of these developments and have tried to preserve mediation as a new market for the Bar. In the legislative process on the implementation of the EU Directive on Mediation, judges have successfully warded off this attempt, referring to EU Directive 2008/52/EC, which backed the new developments in the courts by an open definition of mediation.

[7] Hess 2005, p. 540 *et seq*.

[8] Birner 2003, Steffek 2010, p. 841 *et seq*.

[9] Basedow et al. 2012.

[10] Wagner 2012, p. 93 *et seq*.

[11] Hodges et al. 2012.

9.2 The German Procedural Reforms in 2002

In 2002, Germany adopted a far-reaching reform of the Code of Civil Procedure[12] which mainly aimed at a reassessment of appellate proceedings. The old paradigm that appeal should provide for a full second instance was given up and replaced by a new system where the appellate court should review and correct the judgment of the court of first instance.[13] The legislative concept equally required a strengthening of the first instance and an improvement of the managerial powers of the judges. In addition, the legislator also intended to improve settlements by the judges. In this respect, the new Code introduced a provision (Section 278(2) ZPO) on a 'mandatory conciliation hearing', where the courts had to attempt a settlement between the parties before the beginning of the hearing.[14] This provision was borrowed from the Code of Procedure for Labour Disputes. Furthermore, Section 278(5) ZPO permitted the court to stay the proceedings and to suggest a settlement through mediation or another ADR procedure out of court.[15] In practice, this provision was seldom applied: judges were reluctant to promote dispute resolution out of court (also for constitutional reasons), and the parties expected and preferred an attempt by the judge himself to settle the case. Finally, the additional costs of mediation conducted out of court were regarded as an impediment.[16]

9.3 The Pilot Project for Mediation at the District Court Göttingen

Although legal literature criticised the new mandatory conciliation hearing under Section 278(2) ZPO as unsuited for civil litigation, being too formal and unnecessary, judges at the District Court Göttingen (Lower Saxony) developed a new approach to settlement.[17] Influenced by the ADR movement which had reached Germany in the

[12] Gesetz zur Reform des Zivilprozesses as of 27 July 2001, *Bundesgesetzblatt* 2001, Part I, p. 1887.

[13] Gottwald 2012, p. 29 *et seq*.; Hau 2011, p. 61 *et seq*.

[14] Section 278(2) ZPO reads as follows: 'For the purposes of arriving at an amicable resolution of the legal dispute, the hearing shall be preceded by a conciliation hearing unless efforts to come to an agreement have already been made before an out-of-court dispute-resolution entity, or unless the conciliation hearing obviously does not hold out any prospects of success. In the conciliation hearing, the court is to discuss with the parties the circumstances and facts as well as the status of the dispute thus far, assessing all circumstances without any restrictions and asking questions wherever required. The parties appearing are to be heard in person on these aspects.'

[15] Section 278(5) ZPO reads as follows: 'Where appropriate, the court may suggest to the parties that they pursue dispute resolution proceedings out of court. Should the parties to the dispute decide to do so, section 251 shall apply mutatis mutandis.'

[16] Tochtermann 2013.

[17] In some federal states, in Lower Saxony and especially in Bavaria, the state Ministry of Justice supported the pilot project (at least in the initial stage).

mid-1990s, the judges studied and applied the techniques and tools of mediation at the conciliation hearing in their courts.[18] For the implementation of mediation in the German civil trial, they adapted the new statutory provisions to their needs.[19] The most important step was the introduction of a 'mediation judge' who was not the competent judge for the decision of the case, but another judge of the district court.[20] This judge was trained in mediation and was the designated judge for the settlement of the case via mediation. According to the court's internal distribution list of cases, it was excluded that the mediation judge could decide the case on the merits if the mediation turned out unsuccessfully.

The judges in Göttingen developed the following practice for the implementation of mediation in the civil trial. At the beginning of the proceedings, the judge competent for the decision on the merits reviewed the case as to whether mediation would be feasible. If the judge deemed mediation appropriate, he asked the parties (and their lawyers) whether they agreed to an attempt at mediation. When they consented, the case was transferred to the mediation judge who immediately held a hearing where he used mediation techniques (mainly evaluating the case). When the parties reached a settlement, the mediation judge sent them to the judge competent for the decision on the merits of the case, as only the latter was authorised to register the settlement in the protocol. If mediation turned out unsuccessfully, the case was quickly decided on the merits by the competent judge.

The new procedure proved to be very successful: about 18 % of all cases were sent to the mediation judges, the rate of amicable settlements in these cases was about 88.5 %. Accordingly, the number of amicable settlements at the district court rose from 33 to 50 % of all cases.[21]

In Bavaria, the Ministry of Justice initiated a similar project in 2003 at the District Courts Augsburg and Nuremberg. However, in order to avoid any conflict with the Bar, the judges were not named 'mediation judges', but 'Güterichter' (judges for amicability/for amicable settlements).[22] This model was not as successful as the model in Göttingen, but the settlement rates were equally improved. However, the judges involved disapproved of the appellation 'Güterichter',[23] but still called themselves (on the websites of their courts) 'mediation judges'.[24]

---

[18] Due to a lack of public resources and sufficient support of their ministries many judges paid for professional mediation training themselves; Tochtermann 2013, p. 533.

[19] Accordingly, the legality of the pilot project was disputed by the legal literature; see (for a critical assessment) Prütting 2011, pp. 163–172; contrary view Hess 2011, pp. 137–162.

[20] It should be noted that the local Bar fully supported the project; see Spindler 2007, pp. 79–83.

[21] Matthies 2007, p. 130, 131 *et seq*.; Görres-Ohde 2007, p. 142, 143, with a statistical overview on p. 144; von Olenhusen 2004, p. 104 *et seq*.

[22] This denomination was a reaction to severe criticism from the Bar which considered mediation as a genuine part of private dispute resolution, outside of the court system. According to this opinion, mediation was considered a task for lawyers and other experts operating in the private sector.

[23] The designation was a new – but inelegant – expression of the German language obviously created by the Bavarian Ministry of Justice for political reasons in order to avoid any similarity with mediation.

[24] Hess and Pelzer forthcoming, III.B.viii. with examples in footnote 115.

9.4 The Expansion of Judicial Mediation

The indisputable success of the Göttingen pilot project quickly entailed its expansion in the northern parts of Germany. Many courts adopted similar proceedings – the expansion often took place without the involvement of the competent ministries of justice, but mainly at the initiative of the judges. A genuine 'mediation movement' expanded in the Judiciary: judges trained other judges in mediation techniques – courts used the facilities of the Internet to promote local mediation proceedings. As a result, 'local rules on mediation' were developed at a local and regional level, sometimes promoted by the ministries of justice, sometimes regarded with much suspicion.[25] However, the new development also entailed concern about the role of the mediation judges in the resolution of disputes, as demonstrated by the following example: according to the website of the court of appeal for labour disputes in Hamburg, judicial mediation was not subject to procedural or substantive provisions, but simply aimed at the amicable settlement of disputes.[26] This self-understanding of mediation by judges was certainly faulty: as parties go to the court because they strive for dispute resolution according to the applicable law, they do not expect an amicable settlement without any respect for the rule of law. In Germany, judges are accorded great prestige and consideration by the public. However, they are expected to apply the law, even in a conciliation process. Thus, the 'information' provided by the website of the labour appellate court was misleading – but equally showed a need for a reform aimed at streamlining and fixing the autonomous developments and inserting them into the text of the Code of Civil Procedure.

From 2003 to 2010, the mediation movement within the German Judiciary gained considerable ground. The pilot projects were regarded as successful and several federal states (Hamburg, Schleswig-Holstein, Berlin, Mecklenburg-Vorpommern and Rheinland-Pfalz) adopted specific judicial mediation programmes. In 2008, almost 140 mediation judges at more than 30 district courts and courts of appeal in 8 of the 16 federal states (25 % of all district courts) were counted.[27]

However, there was still strong resistance in some federal states[28] and in the federal government.[29] This political resistance was fuelled by the Bar, where the mediation movement had equally gained ground. However, although many lawyers attended courses on mediation and became certified mediators, out-of-court mediation had not become popular. For 2010, only 2,500 private mediations were estimated (compared with 1.6 million civil lawsuits filed in German courts) along with

[25] After a change of the government, the pilot project in Lower Saxony faced considerable problems as the new government regarded mediation as a matter for lawyers and not for judges.

[26] Hess 2008, p. F 52.

[27] Hess 2011, p. 137, 142 *et seq*.

[28] Especially in Baden-Württemberg, where the Ministry of Justice and the Bar had unsuccessfully attempted to establish a court-annexed mediation scheme from 2000 to 2001; see Tochtermann 2013, p. 532, at footnote 60.

[29] The current minister of justice belongs to the Liberal Party, which traditionally represents the interests of the liberal professions (here, the Bar).

several thousand mediation proceedings in the courts. As a result, it must be stated that a genuine market for private mediation in Germany has not been established yet. However, many private mediators, most of them lawyers and the professional organisations of lawyers and mediators, argued that this failure was due to an unfair intrusion of judicial mediation in an area of private dispute resolution because judicial mediation – as part of the court proceedings – was free of additional costs.

9.5 The Constitutional Debate on Judicial Mediation

Against this background a constitutional debate was launched as to whether judicial mediation could be qualified as a judicial activity under the German Constitution. This controversy was important for the following reasons. First, qualifying mediation as part of the judicial activity entails its general admissibility in procedural law. In this respect, the Constitutional Court had held that the resolution of a dispute by amicable settlement forms part of the judicial activity. Thus, the proponents of judicial mediation heavily relied on this judgment although the opponents tried to demonstrate that this judgment did not address judicial mediation.[30] Secondly, if judicial mediation was not qualified as a task for the judge, it could be considered as an intrusion into the market for dispute resolution. In Germany, any dispute resolution out of court qualifies as a legal service requiring by law the involvement of a lawyer.[31] From that perspective, mediation by judges qualified as an unlawful activity.

Finally, the constitutional question remained unanswered – the Constitutional Court did not get an opportunity to decide the issue. However, the discussion was not confined to the German Constitution: the definition of mediation in Article 3(1) of the Mediation Directive 2008/52/EC expressly includes 'mediation conducted by a judge who is not responsible for any judicial proceedings concerning the dispute in question.' As European Union law permits mediation by judges, it was hard to argue that German constitutional law bans it although the Constitution does not include any express interdiction.

9.6 The Implementation of the EU Mediation Directive by the Mediation Act (2012)

According to its Article 12, the Directive 2008/52/EC on Certain Aspects of Mediation had to be implemented by 31 May 2011. Although the Directive only addresses cross-border situations, there was a consensus that the German legislator

[30] The German Association of Procedural Law organised an open discussion in spring 2010 where H. Prütting and I openly discussed the different approaches; Prütting 2011, pp. 163–172; Hess 2011, pp. 137–162.

[31] See Section 2 of the Act on Legal Services of 2008.

should take the opportunity to broadly implement the Directive and to adopt a comprehensive set of rules to foster mediation in Germany. Beginning in 2007, a broad political debate was launched: the Federal Ministry of Justice commissioned a comparative study[32] and the Deutsche Juristentag – the most important political forum on law reform – put the subject on its agenda in autumn 2008.[33]

In 2011, the Federal Ministry of Justice – headed by a minister from the Liberal Party which is traditionally very close to the Bar – published a pre-draft of a new Act on Mediation.[34] At that moment, judicial mediation (and the question of the professional regulation of certified mediators) turned out to be the most controversial issue of the political debate on the new Act[35]: federal states with programmes on judicial mediation proposed including judicial mediation in the Code of Civil Procedure (ZPO) while lawyers associations, the Bar and some federal states (e.g. Baden-Württemberg) recommended that the new Act should strictly promote private mediation. The first draft proposal of the Federal Ministry of Justice tried to circumvent this conflict by a provision authorising the federal states to provide for judicial mediation in their respective jurisdictions. When the Bar vigorously contested this – timid – proposal, the Ministry took one step back and presented a formal legislative proposal abolishing judicial mediation in the form it was practised by the Bavarian 'Güterichter'. According to the legislative draft, mediation was exclusively reserved to out-of-court proceedings. Dispute resolution by 'amicable settlement judges' was considered a distinct procedure – although the *Güterichter* used mediation as a tool for the promotion of settlements. The legislative proposal of the government regarding judicial mediation was unanimously supported by the Committee for Legal Affairs of the Parliament – a committee almost completely dominated by lawyers. In December 2011, the Bundestag (the German first chamber of the Parliament) adopted the proposal in a second reading.[36]

In the meantime, judges associations and those federal states where judicial mediation was promoted openly contested the draft. In January 2012, the second chamber of the German Parliament (the *Bundesrat*) stopped the draft, and a conciliation procedure between the Bundestag and the *Bundesrat* concerning the Act on Mediation was initiated. When the bill was finally passed on 21 July 2012[37] things turned out much more positively: according to the compromise, judicial mediation will be expressly included in the German Code of Civil Procedure although the judges are not permitted to call themselves 'judge mediators', but 'amicable settlement judges'. Nevertheless, according to the new provision of Section 278(5) ZPO, the dispute may be referred to an amicable settlement judge who may promote a

[32] Hopt and Steffek 2008.

[33] Verhandlungen des 67. Deutschen Juristentages Erfurt (2008), Abteilung F.

[34] Bundestags-Drucksache 17/5335.

[35] Tochtermann 2013, pp. 532–533.

[36] Bundestags-Drucksache 17/8058.

[37] *Bundesgesetzblatt* 2012, Part I, p. 1577.

settlement by using mediation as a technique.[38] As mediation forms part of the ZPO, amicable settlement judges must respect mandatory procedural guarantees. On the other hand, all federal states are obliged to provide for settlement judges in their courts – a comprehensive and uniform regime was set up in the area of judicial mediation. And, finally, it remains to be seen whether the judges will use the legal expression 'Güterichter'. Even in Bavaria, where the Ministry of Justice initiated pilot projects, judges expressly called themselves (on the websites of the courts) 'mediation judges'.[39] Against this background, it seems predictable that amicable settlement judges will continue to call themselves 'mediator judges' because they practise mediation.

What lessons can be learned from the phenomenon of the mediation judge? The example demonstrates how a global development ('mediation') is transferred to a local level. The German judicial mediation movement was – in its beginnings – a kind of grassroots movement of judges who were convinced that mediation was the right technique to promote settlement within their courts. When legislation stepped in, the different interests of judges and lawyers – the latter keen to preserve a promising, although non-existing, market – resulted in an open conflict. However, the open structure of the EU Directive on Mediation permitted a positive outcome of the legal-political debate: as the Directive expressly permits judicial mediation, it was difficult to argue that it should be forbidden at the national level. Finally, the German legislator opted for an open model of dispute resolution which corresponds to the interests of the parties – this outcome does not seem to be a bad result.[40] All in all, the story of the German mediation judges shows that European and national law-making in procedural law can benefit from each other to finally get a balanced result.

References

Ahrens M (2012) Mediation und Güterichter – Neue Regelungen der gerichtlichen und außergerichtlichen Mediation. NJW, pp 2465–2471

Basedow J, Francq S, Idot L (eds) (2012) International antitrust litigation. Hart Publishing, Oxford/Portland

Birner M (2003) Das multi-door courthouse. Centrale für Mediation, Cologne

Görres-Ohde K (2007) Ein Jahr Gerichtliche Mediation in Schleswig-Holstein – zu Stand und Perspektiven eines neuen Projekts. Schleswig-Holsteinische Anzeigen, pp 142–144

Gottwald P (2012) Reformwellen im Zivilprozessrecht des vereinten Deutschlands. In: Sutter-Somm T, Hargàsi V (eds) Die Entwicklung des Zivilprozessrechts in Mitteleuropa um die Jahrtausendwende. Schulthess, Zurich, pp 29–45

[38] The new provision reads as follows: 'The court may refer the parties for the settlement hearing to an amicable settlement judge not competent for the decision on the merits. This judge may use all pertinent methods of dispute resolution, including mediation.'

[39] See n. 24 above.

[40] Ahrens 2012, p. 2465 *et seq*.

Hau W (2011) Recent German reforms of civil procedure. In: Lipp V, Frederiksen HH (eds) Reform of civil procedure in Germany and Norway. Mohr Siebeck, Tübingen, pp 61–69
Hess B (2005) Die Konstitutionalisierung des Europäischen Zivilprozessrechts. Juristenzeitung: 540–552
Hess B (2008) Mediation und weitere Verfahren konsensualer Streitbeilegung – Regelungsbedarf im Verfahrens- und Berufsrecht? In: Verhandlungen des 67. Deutschen Juristentages Erfurt 2008, Band I, Gutachten. Beck, München, pp F 1–F 146
Hess B (2010) Europäisches Zivilprozessrecht. Müller, Heidelberg
Hess B (2011) Perspektiven der gerichtsinternen Mediation in Deutschland. Zeitschrift für Zivilprozess 124:137–162
Hess B (2012) Procedural harmonisation in a European context. In: Kramer X, Van Rhee CH (eds) Civil litigation in a globalising world. Asser Press, The Hague, pp 159–173
Hess B, Pelzer N (forthcoming) Regulation of dispute resolution in Germany. In: Unberath H, Steffek F (eds) Regulation of Dispute Resolution. Hart Publishing, Oxford/Portland
Hodges C, Benöhr I, Creutzfeldt-Banda N (eds) (2012) Consumer ADR in Europe. Hart Publishing, Oxford/Portland
Hopt KJ, Steffek F (eds) (2008) Mediation: Rechtstatsachen, Rechtsvergleich, Regelungen. Mohr Siebeck, Tübingen
Jauernig O, Hess B (2011) Zivilprozessrecht, 3rd edn. Beck, Munich
Matthies H (2007) Die Göttinger Mediationslandschaft. Schleswig-Holsteinische Anzeigen, pp 130–134
Prütting H (2011) Ein Plädoyer gegen Gerichtsmediation. Zeitschrift für Zivilprozess 124:163–172
Spindler G (2007) Gerichtsinterne Mediation in Niedersachsen. Zeitschrift für Konfliktmanagement: 79–83
Steffek F (2010) Rechtsvergleichende Erfahrungen für die Regelung der Mediation. Rabel J Comparative Int Private Law (RabelsZ) 74:841–881
Tochtermann P (2013) Mediation in Germany. In: Hopt KJ, Steffek F (eds) Mediation: principles and regulation in comparative perspective. Oxford University Press, Oxford, pp 521–584
von Olenhusen G (2004) Gerichtsmediation – Richterliche Konfliktvermittlung im Wandel. Zeitschrift für Konfliktmanagement :104–107
Wagner G (2012) Harmonisation of civil procedure: policy perspectives. In: Kramer X, Van Rhee CH (eds) Civil litigation in a globalising world. Asser Press, The Hague, pp 93–119

Part IV
Croatia

Chapter 10
Croatia: Omnipotent Judges as the Cause of Procedural Inefficiency and Impotence

Alan Uzelac

10.1 Origins and History of Civil Procedure in Croatia[1]

In the second half of the nineteenth century Croatia developed as an autonomous constituent part of the Habsburg Monarchy (later, Austria-Hungary). This led to a large extent to the reception of legislative models from other areas of the then complex community of states, for example, of laws enacted in Vienna. But that process did not develop harmoniously, in full, or without delays.[2] Some of the key pieces of procedural legislation (or the commentaries on them) were adopted in Croatia after they had already been superseded in Austria.[3]

For example, the Temporary Rules of Civil Procedure for Hungary, Croatia, Slavonia, Serbian Vojvodina and Tamiški Banat were adopted in Croatia in 1852, almost 70 years after the enactment of their Austrian model and principal source of inspiration, the General Rules of Court Procedure (*Allgemeine Gerichtsordnung*) of 1781. The major commentary on the Temporary Rules of Civil Procedure for Hungary *et al.* was published in Croatia in 1892,[4] only a few years before a completely different procedural model – the *Zivilprozessordnung* of Franz Klein – was adopted in Austria.

The same Austrian *Zivilprozessordnung* of 1895 was accepted in Croatia 30 years later, during the process of unification of procedural law that took place in Yugoslavia in 1929. The standard commentary on the Yugoslav Code of Civil Procedure (which was practically a literal translation of the Austrian *Zivilprozessordnung*) was a

[1] The historical part of this text relies on Uzelac 2004.

[2] For the delayed reception of foreign models in the 'periphery', see Čepulo 2000, pp. 889–920.

[3] Some useful, although very short and overly simplified, remarks on the reception of Austrian law in Croatia can be found in Jelinek 1991, pp. 72–74, 85–86. See also Uzelac 2002, pp. 177–179.

[4] See Rušnov and Šilović 1892.

A. Uzelac (✉)
University of Zagreb, Zagreb, Croatia
e-mail: auzelac@pravo.hr

C.H. (Remco) van Rhee and Fu Yulin (eds.), *Civil Litigation in China and Europe*, Ius Gentium: Comparative Perspectives on Law and Justice 31,
DOI 10.1007/978-94-007-7666-1_10,

translated Austrian commentary.[5] It was published in the Kingdom of Yugoslavia in 1935, almost 40 years after the first publication of this commentary in Austria. Ominously, it was also the year in which Georg Neumann, its author, died.

As a consequence, the model of civil proceedings conceived by its creator, Franz Klein, in Austria – a model of quick, efficient, simple and concentrated proceedings, in which an activist judge holds a public hearing and then pronounces his judgment immediately[6] – never became complete reality in the territory of Croatia (and in the wider region).

Delays in the reception of the original Austrian model and the prevailing practice of earlier written, formal and secret proceedings seemingly led to a specific mixture of forms that were not fully in keeping with the original Austrian models. This development was intensified by certain political facts – first, the fact that the Austrian *Zivilprozessordnung* and its *Jurisdiktionsnorm* were accepted only 10 years after Croatia had broken free from all governmental and legal ties to Austria and, second, the fact that the unification of civil procedural law in the Kingdom of Yugoslavia took place during the dictatorship of King Alexander I of the Serbian royal house of Karađorđević. So, although legal doctrine was changed and legal teaching adjusted to the new procedural principles, the law in action continued its own autonomous way, developing a *stylus curiae* that still contained a great degree of the use of writing, seclusion and indirectness.

Other circumstances also contributed to these developments. The law on civil proceedings of 1929 was introduced barely 11 years before World War II. In addition, the revolution left its mark on the courts and their procedures. Although procedural legislation in the Socialist Federal Republic of Yugoslavia continued to follow earlier models, it was adjusted in some respects. The inquisitorial elements and judicial activism of the Austrian procedural legislation were no longer only a warrant for concentration, publicity, directness and efficiency but also became an instrument of paternalistic control with the primary purpose of protecting the state from party autonomy and the uncontrolled actions of civil society. However, it was impossible to remove the party's initiative in civil proceedings completely, so civil procedural law continued to develop partly on the foundations of classical procedural patterns.[7] However, a consequence of the suspect 'civil' and 'private' nature of proceedings was the marginalisation of court proceedings. They were reduced to the level of a second-rate mechanism of social regulation, aimed at resolving 'secondary' problems only, disputes related to the relics of private property in a society in which a collectivist doctrine otherwise dominated.

As a consequence, the speed and efficiency of judicial proceedings were not high political priorities until the changes in the 1990s. Quite the opposite, the relative length of proceedings and the high level of formalism were used in some cases as a

[5] Najman 1935. This commentary was largely a translation of G. Neumanns' *Komentar zum österreichischen Zivilprocessordnung*.

[6] For Klein's reforms and their meaning today, see Sprung 2002.

[7] For the development of civil procedural law in Croatia, see, e.g., Triva et al. 1986, § 1–5.

tool to protect judges (who did not enjoy full guarantees of independence and who were subject to re-election by political bodies) from political persecution and the rage of the ruling elites.

On the other hand, the previous, already generous system of pleading that enabled the change of claims and issues in the course of the proceedings and the reconsideration of first instance court rulings, was further loosened. The party dissatisfied with the outcome of the proceedings had many opportunities to bring about a retrial through appeal and other legal remedies. On the basis of the Socialist understanding of the 'principle of material truth', virtually unlimited possibilities of introducing new facts and evidence were established at first instance and in appellate proceedings. In addition, there was an established practice of the appellate courts limiting themselves to revoking a decision and sending the case back for retrial. Theoretical justification was found in the principle of immediacy (direct, personal evaluation of evidence) although very little of this principle remained in practice. Possibilities of state intervention through so-called 'requests for protection of legality' (*zahtjev za zaštitu zakonitosti*) by the State Attorney were introduced into civil proceedings. All this, taken together, served as a specific shock absorber for political blows against justice. But, on the other hand, it surely did not contribute to the authority of judicial decisions and the firmness of court decisions, even with respect to those that were formally considered to be *res iudicata*.

Such a state of affairs certainly did not raise the awareness of judges of the need for the efficient management of proceedings and for ensuring a reasonable duration for pre-trial, trial and post-trial routines. This was reflected in the expectations of candidates for judicial service, the recruitment and the selection of judges. Through several decades of Socialist rule, the judicial profession was considered by graduate lawyers as a relatively poorly paid and bureaucratic branch of the civil service. Its advantages were seen in providing a relatively non-demanding job, with no pressure to do the work urgently, and a lot of free time.

Thus, the typical distribution of jobs in families of lawyers was the following: the spouse who took care of the children went into judicial employment, while the other, bread-winning spouse supported the family by practising law as a private attorney. Even if this typical perception has an anecdotal character, the numbers are incontestable: in the ranks of judges of the courts of first instance at the beginning of the 1990s in Croatia, women were significantly more numerous than men.[8]

When Croatia left the Yugoslav Federation in 1991, through a painful process marked by war and instability, there was a radical turn away from the collectivist doctrines. The doctrines of Marxism, of 'social property' and self-management were abandoned, and the prevalence of private ownership was re-established. That was a completely new situation for the national Judiciary. In the first place, there

[8] According to statistical data for 1998, about 65 % of first instance judges were women. However, at the same time, they constituted only about 40 % of the judges of the Supreme Court. These ratios remained the same until today: at the end of 2009, out of 1,886 judges, 1,251 were women, which make exactly two thirds (66 %).

were much greater expectations, judges had much greater responsibility and much more important tasks. Yet, some things did not change. For example, the attitude of politicians towards the Judiciary remained unchanged and – especially under war conditions – it was expected that judges would serve the interests of the political regime. For a period of 6–7 years, the newly introduced constitutional principles of the independence of justice, tenured appointments and the separation of powers were not applied in practice.

Many judges were appointed and dismissed in that period, again not according to objective and well-defined criteria of competence and responsibility, but according to their closeness to the centres of power, and political and ethnic affiliation. A prolonged period of uncertainty and political purges led to the departure of the better and more proficient judges to other private legal work where they expected to find more peace, higher incomes and a greater level of personal and professional freedom.

On the other hand, those judges who did not have a choice, or were ready to live under conditions that were considered by others to be unbearable, remained in the system. Newly appointed judges – there were many of them, in some courts over two-thirds – were mostly young and without experience. Not infrequently they were appointed according to criteria of political and ethnic 'appropriateness', or under the influence of an unavoidable dose of nepotism, a common characteristic of southern European countries.[9]

As a consequence, the efficiency of the justice system (which has in any case never really embraced the rule 'justice delayed is justice denied') radically changed for the worse in the 1990s and later. General indicators of the backlog in courts demonstrate that the number of unresolved cases almost tripled between 1990 and 2000.[10]

10.2 Current Procedural Structures: Distribution of Powers Between the Judge and the Parties

The judicial branch of government in Croatia consists of various courts. Civil litigation is handled by the courts of general jurisdiction, but for commercial cases the commercial courts, as specialised courts, have *in rem* jurisdiction. There are also the newly established administrative courts that decide on administrative suits, and misdemeanour courts (competent for petty crimes).

The courts of general jurisdiction in civil matters are the municipal courts (as courts of first instance) and the county courts (operating mainly as appellate courts, with very few types of cases that are decided at the first instance). The commercial courts also

[9] For this development, see Uzelac 2000; see also Uzelac 1995, pp. 413–434.

[10] See above.

have 2 layers – commercial courts, as the courts of first instance, and the High Commercial Court, as the appeals court in commercial matters. There are currently about 67 municipal courts, 21 county courts and 13 commercial courts. At the top of the judicial hierarchy is the Supreme Court. In civil cases the Supreme Court is competent to decide in the third and last instance upon the remedy called *revizija* (revision).

The total number of judges in Croatia is 1,924 (as of 31 December 2011). Except in the misdemeanour courts, there are also 518 judicial counsels, who generally work in the same manner as judges in smaller cases.[11] Previously, most of the new judges were recruited among the judicial counsels, but since the establishment of the new School for Magistrates, the system has been changing (after 2013, judicial appointments will be made exclusively through the School for Magistrates).

In procedural theory,[12] the relationship between the powers of the judge and the powers of the parties is often discussed. The relevant procedural principles in this discussion can be grouped in two pairs: first, the principle of party disposition and the principle of *ex officio* judicial activity; and second, the adversarial and the inquisitorial principles. The first pair of principles concerns the initiative for the commencement and further development of the proceedings as well as their completion, while the second pair concerns the initiative for the collection of material relevant for decision-making such as facts and evidence (see below).

As to the principle of party disposition, it denotes that the parties are principally responsible for commencement of the proceedings, as well as for the determination of the subject matter of the proceedings. Civil litigation is commenced by the submission of a statement of claim to the competent court. Another important moment is the communication of the statement of claim to the respondent – it is the moment from which the civil suit is pending (*lis pendens* or litispendence). The service of the statement of claim is effected under the supervision of the court, mainly by means of postal delivery. The statement of claim should also indicate the facts upon which the claims are grounded, and specify the relief sought. The court is bound by the claims raised in the proceedings, and the judge may not award a relief that was not sought, or adjudicate more than what was requested by the claimant (*nemo iudex ultra et extra petita partium*).

On the other hand, the development of a civil suit, the setting up of the procedural calendar, the terms for hearings and the ordering of procedural steps should all be fixed by the court, at least in theory. However, control of judicial decisions will not take place *ex officio*, and appeals and other remedies may only be raised by the dissatisfied party. The court is also responsible for finalisation of the proceedings, and is bound to decide on the merits when the case has been sufficiently discussed among the parties. The parties are, however, free to settle the case, or end it by

[11] Statistical information (*Statistički pregled*) of the Ministry of Justice for 2011; see http://www.mprh.hr (last consulted in June 2012). See also the web pages of the Supreme Court, http.//www.vsrh.hr (last consulted in March 2012).

[12] All of the following explanations of Croatian civil procedure are derived from the current edition of the standard textbook of civil procedure, Triva and Dika 2004.

waiver or admittance of the claim (in the latter cases, the court will issue a 'dispositive judgment' – a judgment based on party dispositions).

In standard doctrine of civil procedure, it is often argued that the powers to collect substantive material needed for decision-making are evenly distributed between the judge and the parties. It is also argued that civil procedure is mostly founded on the adversarial principle, which is in regard to various matters modified by judicial inquisitorial powers and duties.

The scholarly definitions of the inquisitorial and adversarial principles in civil procedure relate to the level of powers regarding the collection of procedural material (*Prozeßstoff*). The procedural material consists of everything needed to make a decision on the merits. The procedural material is composed of (1) facts (factual allegations), (2) evidence, (3) legal rules and (4) non-normative rules (rules of experience, empirical knowledge).

1. *Facts*: As a general rule, the introduction of facts is governed by the adversarial principle. The judge should limit examination to the facts that are alleged by the parties. Furthermore, the judge should not take any evidence relating to facts that are not in controversy (i.e. facts admitted by the other party). However, there are two types of exceptions:
   (a) Particular types of cases (e.g. family law cases) are expressly defined as cases in which party dispositions do not have binding effect on the judges, including factual allegations, which should in principle be supported by the taking of evidence. In these types of cases, the inquisitorial powers of judges are dominant.
   (b) Even in regular civil (and commercial) cases, judges are authorised to find facts not alleged by the parties (as well as facts admitted in the procedure) if they suspect that the parties are attempting to reach effects that are contrary to mandatory rules of law (e.g. tax fraud, violation of third parties' rights) or to public morality.
2. *Evidence*: The introduction of evidence is also governed by the adversarial principle, in the same way as the definition of the facts that are to be found in the procedure. The judge may, in principle, only order the taking of evidence requested by the parties. However, in cases where the judge may establish the facts *ex officio* (see above), he or she may also order the taking of evidence *ex officio*, in particular if such evidence is needed for facts that are investigated due to a decision of the court.
3. *Law*: The legal pleadings of the parties are not binding for the court. The judge has the duty to apply the relevant legal provisions, irrespective whether they were invoked by any of the parties. The rule *iura novit curia* applies to all domestic legal sources, and even to foreign law. However, the parties may help the judge by submitting duly authenticated foreign documents which prove foreign law. This is, however, not regarded as the taking of evidence, as foreign law is treated as law, not as fact. To that extent, legal matters are entirely under the inquisitorial powers of the judge.

4. *Rules of experience: Mutatis mutandis*, the rules applicable to legal rules are also applied to rules of experience. The judge has to establish them *ex officio*, assisted – if needed – by experts appointed by the court. The parties may propose the experts to be appointed, but the appointment itself is always made by the court. Experts act as neutrals (there are no party-appointed experts). In this respect, again, the inquisitorial principle is dominant.

The actual practice in civil procedure is somewhat different from the theoretical scheme outlined above. Especially, the self-understanding of the Judiciary and legal scholars regarding the adversarial nature of civil proceedings may be questioned in the light of the considerable powers exercised by the judges in the course of the proceedings (or, better, in the light of the considerable passivity of the parties and their lawyers). It is true that the court is in principle limited to the facts and evidence alleged by the parties (*iudex iudicare debet secundum allegata et probata partium*). Yet, the active way of handling the procedure (in which judges should not only assist the legally illiterate, unrepresented parties, but also explain their initial ideas and perceptions in regard to the substance of the dispute – *richterliche Aufklärungspflicht*) enables judges to suggest which supplementary allegations parties should make. In case law, there are reported cases which even suggest that higher courts regarded the absence of such suggestions as procedural errors which led to the annulment of the decisions.

The extra-inquisitorial powers of the judge are in practice particularly visible in the process of the taking of evidence. Formally, the judge should be limited to the evidentiary proposals of the parties. In practice, however, this is more or less the case, but the active role of the parties is often limited to a mere proposal of the document that has to be procured, or the witness or expert who has to be heard. The search for the individual items of evidence is usually left to the court. As the judges are often reluctant to apply the burden of proof rules and continue to wait for evidence to be supplied (or the witnesses to appear), the search for evidence prolongs the procedure and contributes to the length of the proceedings.

Another inquisitorial aspect is in the style of conducting oral hearings. The judges definitely dominate the courtroom, dictating the protocol, questioning all participants in the process, conducting the hearing of the witnesses and experts, etc. In many oral hearings the parties and their lawyers act in a rather passive way, sometimes limiting their interventions to a mere assertion of their presence in the courtroom. The burdens of going forward and the burden of proof are thus, even in clear civil cases, in practice to a great extent transferred to the judge. However, the passivity of the parties often triggers a less-than-active behaviour on the part of the judges, in particular with respect to case management. The tolerance for late evidentiary proposals is considerable, as well as the tolerance for the non-appearance of witnesses, and even the parties themselves. Altogether, this leads to many adjournments and postponements, so that the theoretical ideals of a concentrated trial and the principle of immediacy are very rarely realised in practice.

10.3 Recent Reforms in Croatian Civil Procedure

10.3.1 Reforms of the Code of Civil Procedure

The awareness of the serious systemic deficiencies of civil procedure (delays, backlogs, inefficiencies), as well as the emerging interest of the public media in the problems of justice, and a series of judicial scandals, stimulated the reform of procedural legislation. Reform of the judicial system was among the pre-election promises of the coalition of parties which won the elections at the beginning of 2000. There were indeed many legislative and other projects from 2000 onwards concerned with reform of the judicial system. However, assessments of what was achieved were rather different. Many critics reproached the government for the lack of concrete effects derived from the changes, and pointed to the further accumulation of cases and the lack of clear concepts and strategies for the judicial sector. Others objected to every governmental action in this area as a violation of the constitutional principle of the independence of the Judiciary. The debates about what needs to be changed and what should be the fundamental features of judicial reform are not even close to an end at the time of the writing of this paper.[13]

Some changes and trends can, however, be distinguished. The Croatian Code of Civil Procedure, although still only an amended version of the Yugoslav Code of Civil Procedure of 1976,[14] has been subject to more or less significant changes in the 2000s.[15] The most significant reforms were introduced by the amendments to the Code of Civil Procedure in 2003. These amendments tried to introduce a more adversarial style of litigation by diminishing the rights and duties of the judges to introduce evidence *ex officio*, and by strengthening procedural discipline through higher sanctions for the parties that aim to delay the proceedings by the use of various vexatious tactics. These amendments, together with those enacted in 2008 and 2011, also changed the structure of legal remedies, excluding the possibility of secondary appeal (*zahtjev za zaštitu zakonitosti*) by the public prosecutor (state attorney), and by changing the role of recourse to the highest court (*revizija*). Yet, in practice, the changes did not cause significant changes in the style and speed of civil litigation. The procedural changes were more incremental than substantial. This can partly be brought into connection with the fact that many intended reforms were met by the resistance of legal elites. After more ambitious legislative plans, the adopted changes to procedural legislation often went only half-way. These changes were

[13] For some of the critical elements of the attempted reforms, see Uzelac 2002.

[14] Yugoslav Code of Civil Procedure – *Zakon o parničnom postupku* was originally published in the Official Gazette (Službeni list SFRJ) No. 4/77. It was amended by changes published in Official Gazette Nos. 36/77, 36/80, 69/82, 58/84, 74/87, 57/89, 20/90, 27/90 and 35/91.

[15] For the reception of the Yugoslav Code of Civil Procedure and the further amendments, see Croatian Official Gazette (*Narodne novine*) Nos. 53/91, 91/92, 58/93, 112/99, 88/01, 117/03, 88/05, 02/07, 84/08, 123/08 and 57/11.

further diluted due to their slow and incomplete adoption among judges and legal practitioners, which further obstructed the realisation of the desired goals and resulted in only cosmetic changes, often limited to special courts or types of proceedings.

A good example may be the way in which the intention to reduce the passive behaviour of the parties by relieving the judges of the right to take evidence on their own motion was circumvented through the obligation of judges to warn the parties about their duty to introduce evidence. In case law, there are reported cases in which the higher courts considered the failure of the lower court judges to warn the (lawyer-represented) parties of their right and duty to propose additional evidence as a reason for quashing the first instance judgment.[16]

Another example is the failure of the plans to concentrate the proceedings by reducing the number of hearings and introducing a ban on new facts and evidence after the preliminary hearing. These reforms, although planned as a general regime for all civil suits, were finally introduced only as special rules for small claims proceedings. Thereby, once again, the reforms, which were perhaps suitable as a basis for the overall reform of procedure before ordinary courts, were 'tested' only in the confined area of small claims. The fact that the same courts have to apply both sets of rules also contributed to the fact that in many courts the special rules on the preclusion of new evidence after the preliminary stage of the proceedings are still ignored. An interesting point is also the apparent contradiction between the new rules on small claims (which, due to the fact that they lead to preclusion only after a preliminary hearing, in fact require *two* oral hearings) and the European Union (EU) small claims procedure introduced by Regulation No. 861/2007 in cross-border cases, which basically foresees a written procedure.[17]

A similar marginalisation of the reformist ambitions happened as regards plans to eliminate successive remittals upon appeals. The practice of successive remittals was proclaimed to be one of the systemic deficiencies of Croatian civil procedure in several cases decided by the European Court of Human Rights.[18] Successive remittals frequently occur in practice.[19] Therefore, the reforms (also those stimulated by

[16]This was, *inter alia*, confirmed in discussions that the author of this text held with the judges of the Zagreb Commercial Court during his lectures in July 2011.

[17]The changes of the procedural rules in small claims were introduced by the Code of Civil Procedure Amendments of 2008 (*Narodne novine* 84/2008).

[18]See *Vajagić v. Croatia* (ECtHR case 30431/03, judgment of 20 July 2006, at 44): 'The Court observes that the delays in the proceedings were caused mainly by the successive remittals. Given that a remittal of a case for re-examination is usually ordered as a result of errors committed by lower instances, the Court considers that the repetition of such orders within one set of proceedings discloses a deficiency in the procedural system as applied in the present case (see, *mutatis mutandis, Wierciszewska v. Poland*, No. 41431/98, § 46, 25 November 2003)'. See also *Zagorec v. Croatia*, 10370/03, judgment of 6 October 2005; *Čiklić v. Croatia,* judgment of 22 April 2010, 40033/07. On this issue, see also Grgić 2007, p. 159.

[19]According to the statistics of the Ministry of Justice, it can be estimated that about 20 % of all appealed judgments in civil cases get remitted (see Statistical Survey of the Ministry of Justice 2010, 31), and it is likely that this percentage is at least equal upon second appeal.

the EU in the context of the accession negotiations between Croatia and the European Commission) originally aimed at ordering the higher courts to decide on the merits in all cases that were previously remitted to the first instance. Again, after initial ideas to introduce a universal rule that would prohibit more than one remittal, such a provision was in 2011 only adopted in commercial cases, family law cases and employment/work dismissal cases.[20] It is too soon to estimate what effect (if any) this change will have in practice, but the half-hearted, unwilling approach to reform is visible again. It can be underlined by the fact that the ban on successive remittals was already a semi-reform, as a more determined and far-reaching step would address the very frequency of the quashing of judgments upon appeal (as this is something that happens all too often).[21]

10.3.2 Attempts to Stimulate Mediation and Other Methods of Alternative Dispute Resolution

One of the directions of the procedural reforms in the 2000s was directed towards stimulation of mediation and other alternative methods of dispute resolution. This trend corresponds to the general growth in the popularity of mediation in European countries.

Of course, conciliation and mediation were not entirely new discoveries. Throughout the Croatian history of civil procedural legislation – starting from the 1930s onwards – attempts to reach a settlement between the parties were recognised as desirable. The 1977 Code of Civil Procedure contained a specific provision on court settlement[22] which not only allowed the parties to conclude a binding and enforceable settlement during civil proceedings at first instance, but also encouraged the judges to inform the parties of this option, and assist them in concluding such a settlement. The only limit was in the nature of the disputes, as court settlements were not permitted in disputes regarding rights that the parties could not freely dispose of.

However, this option was in practice not widely used. According to statistical surveys of the Ministry of Justice, in the total number of cases before the courts of general jurisdiction, only about 2–3 % were terminated by court settlements (3–4 %

[20] See Amendments to the Code of Civil Procedure of 2011 (*Narodne novine*, 57/2011, Arts. 437a, 497b Code of Civil Procedure and Art. 52 of the Amendments, introducing a new Art. 266a in the Family Law).

[21] If an appeal in civil proceedings is successful, the ratio of cases remitted and cases decided on the merits by the appeals court is at least 2:1. See data for 2008–2010 for county courts' decisions upon appeal in civil procedure, Statistical Survey of the Ministry of Justice for 2010, 31, table 4/7. Some improvement is visible as the ratio of remitted cases is decreasing while the ratio of re-adjudicated cases grows.

[22] See Art. 321 of the Code of Civil Procedure.

in cases before the commercial courts).[23] Some out-of-court settlements may have been reached in about 30–40 % of cases which did not end with a final judgment but 'otherwise' (procedural decisions, withdrawal of the claim); this can, however, not be confirmed. In cases that ended with a final judgment, about 10 % were cases in which the respondents admitted the claim.[24] Even if all of these cases are considered as a form of consensual conclusion of litigation, most cases still end with judgments issued after a full-fledged trial.

In the light of such statistics, it seemed that there was ample room for improvement. Indeed, in 2003 Croatia was among the first countries in South-eastern and Central Europe that adopted a Law on Mediation.[25] According to the concept of this law, mediation is conceived as a process in which a third person, a neutral, assists the parties in a dispute to reach a settlement. The mediator should not be the acting judge or other person entrusted directly with decision-making in the same case.

With the assistance of some foreign organisations, mainly from the USA, an initial group of about 20 people was sent to mediation training. They were among the core who founded the national mediators' association, the HUM. As in Slovenia, a significant part of those who took mediation training were judges, although some others – attorneys, corporate lawyers, academics and even some non-lawyers – were trained as well. Several organisations established their mediation centres.[26] These mediation centres are generally meant to provide out-of-court, independent mediation services on a commercial basis.

The practice of mediation, however, has not developed according to expectations, in spite of the political support and continuing efforts to improve its legislative framework.[27] Most successful was the programme of court-annexed mediation, in which the judges-mediators at the courts offered their services free of charge, based on the recommendations given to the parties by the judges who considered particular cases as fit for mediation. If we exclude family mediation in divorce cases (which is mandatory, and which has a long tradition), mediation attempts started to take place in proceedings in several larger commercial courts and in the courts of general jurisdiction, as well as in some appellate courts, such as the High Commercial

[23] Statistical surveys of the Ministry of Justice for 2001–2007. In 2001, there was 2.8 % of settlements, and in 2007 2.1 %. In later surveys, the necessary information is not included.

[24] *Ibidem*.

[25] See Official Gazette (*Narodne novine*) 163/2003.

[26] For example, mediation centres at the Croatian Chamber of Commerce (*Hrvatska gospodarska komora*); Croatian Association of Employers (*Hrvatska udruga poslodavaca*); Croatian Insurance Office (*Hrvatski ured za osiguranje*); Croatian Chamber of Small Business (*Hrvatska obrtnička komora*); Croatian Bar Association (*Hrvatska odvjetnička komora*).

[27] The Ministry of Justice expressed strong political support for ADR in a 2004 document 'The development of alternative ways of resolving disputes – The strategy of the Ministry of Justice'. The Law on Mediation was amended in 2009 (Official Gazette 79/09), and in January 2011 a wholly new Law on Mediation was passed (Official Gazette 18/2011). Several pilot projects were initiated, funded mainly by foreign donors – e.g. by the British Foreign & Commonwealth Office. In 2006, a pilot project at the Zagreb Commercial Court and 8 municipal courts was initiated.

Court. According to official statistics, in 2009 there were 156 and in 2010 125 cases terminated by way of a mediated settlement, which was about 0.1 % of the total number of disposed litigious cases (about 66,000).[28] In the total number of attempted mediations, about 30 % were successful.[29] These figures, although not impressive, are still far better than the (publicly rarely available) figures from private mediation centres, which, although occasionally also offering free services and *pro bono* mediation, generally do not have more than ten cases on an annual level.[30] Some specialised projects, such as the project on conciliation in individual labour disputes (conducted in association with Dutch experts), did not have a major impact either.[31]

10.4 The Transfer of Case Management Powers from the Parties to the Judge

In the previous text, I made clear that the course of procedural reforms in Croatia was by no means a simple and straightforward one. This process was particularly ambiguous when it came to the transfer of case management powers. Some of the reforms precisely tried to take away some case management powers (and duties) from the judges, and transfer them to the parties. If the authority to take evidence *ex officio* is to be understood as a case management power, then these powers were, starting from the Code of Civil Procedure amendments of 2003, transferred from the judges to the parties. Until the reforms of 2003, the court was empowered to order the taking of any evidence that it deemed relevant for the establishment of the facts that had to be proven. After 2003, the power to order the taking of evidence *ex officio* was reduced to evidence needed to establish facts indicated by the court on its own motion. Along the same line, in 2007 family law procedure was amended, introducing more dispositive powers on the side of the parties (e.g. by introducing limited options for binding admissions and settlements in alimony cases).

On the other hand, some case management powers of the judges were reinforced. As noted above, among the principal goals (and slogans) of the procedural reforms in the 2000s were 'strengthening party discipline' and 'prevention of procedural abuses'.[32] Various instruments were inserted into the Code of Civil Procedure, with the purpose of giving the judge tools to sanction and punish attempts to prolong the proceedings. Such tools included general bans on certain procedural actions (e.g. general challenges of judges), the limitation of actions that were often used to prolong the proceedings (e.g. requests for delegation of jurisdiction), discretionary

[28] See Statistical Survey of the Ministry of Justice for 2010, p. 21. It seems that this figure was so low that it was not even further reported in the statistics for 2011.

[29] *Ibidem*.

[30] See in more detail Bilić 2008; Uzelac et al. 2010; Vukelić 2007.

[31] On this project, see Jagtenberg and De Roo 2006.

[32] See further in Uzelac 2004.

powers of judges to refuse certain procedural motions if they were regarded to be vexatious, and a broader ability to impose fines for contempt of court (accompanied by a substantial increase in the number of fines).

Both trends of reshuffling the powers between the players in the process were motivated by the political wish to reduce the length of proceedings, and to enable cutting the considerable backlog of cases (in particular the backlog of so-called 'old cases', i.e. those lasting for over 3 years).

In the domain of formal case management, there were no significant changes, as – in theory – the powers to conduct the proceedings, adjourn the hearings, order the schedule of issues to be decided, set deadlines, etc. (*formelle/materielle Prozessleitung*) were in the hands of the judges. Yet, in practice, these powers faced considerable obstacles, also in the still present ideology that the purpose of civil litigation is to find the 'material truth' (*materielle Wahrheit*). Therefore, indirectly, other reforms in specific areas helped to reinforce the legal role and active position of the judge – e.g. rules on service of documents (amended extensively, most recently in 2008) and rules on deadlines for the submission of new facts and evidence (amended in 2003, with new rules for small claims in 2010).

10.5 Effects of the Reforms: Efficiency, Quality and Costs

The empirical data regarding the effects of the shifts in case management powers are insufficient to give conclusive answers. In particular, there were never systematic measurements regarding the length of civil procedure in general, and in specific types of cases and courts in particular.[33] Since 2005, there has been a special target project for the reduction in the number of so-called 'old cases' (defined as cases pending for over 3 years). It has achieved certain results,[34] yet there have also been signs of reverse trends (growth in the number of old cases). Another project – unsupported by publicly available exact figures – related to cases that have lasted over 15 years, which should have absolute priority in case-processing. It seems that the number of such cases is still significant, particularly in larger courts.

More extensive data exist only on court backlogs. In this respect, after a period of continuing growth in court backlogs (1990–2005), in the years after 2005 the

[33]The only available indicators demonstrate that the average length of civil cases is at least about 2.5 years. These data relate to some measurement of the length of litigation from the beginning of 2000, made by foreign experts who were involved in Croatian judicial reforms. No later information on the average length of litigation is available from any reliable sources, but it seems that this average has not been significantly decreased.

[34]The Ministry of Justice emphasised that in a period of 2 years (in 2008–2009) the number of 'old' cases (those pending before the courts for more than 3 years) dropped from 149,250 to 84,251 (a decrease of 43 %). See Strategic Plan of the Ministry of Justice for 2011–2013, July 2010, http://www.mprh.hr, p. 6 (last consulted in June 2012). This number is, however, still high (compare it to the annual influx of civil cases of about 140,000 – about 120 to 130,000 civil and 15 to 20,000 commercial cases).

government reported significant cuts in backlogs. It is, however, very difficult to attribute these cuts to successful reforms in the area of case management powers. It is likely that the thrust of the cuts has been obtained through outsourcing of certain activities that were previously within the jurisdiction of the court (inheritance cases, collection of uncontested debts, enforcement).

The general impression, which still has to be backed by concrete figures, is that – in practice – the changes are insufficient, so that the procedural style and practices have remained the same to a large extent. Some improvements may be due to certain technical procedural changes which now require more active efforts of the parties (the obligation to submit a written answer to the statement of claim, the re-introduction of default judgments, abolishing new evidence upon appeal, targeting particular vexatious strategies, etc.), but they still have to be demonstrated by research and tangible evidence.

When we discuss which measures have not had the expected results, it seems that one of the apparently major changes (highly commented on in the literature and in the media) – abolishing the right to take evidence *ex officio* – has had the least results in practice. The principal reason for this may be that it was silently by-passed in the day-to-day work of the courts. In particular, the higher courts required that the first instance courts give instructions to the parties to pay attention to their duty to submit factual allegations and present evidence, so that little has changed. Also, the obligation of the parties to propose evidence is still discharged by the mere allegation of the existence of particular sources of information. The courts are reluctant to use burden of proof rules, and therefore they wait for a long time for the appearance of witnesses or for the official procurement of documents, which contributes to the loose style of the proceedings. As noted above, the reforms aimed at more stringent case management by the introduction of a preparatory phase after which new evidence is precluded, were largely marginalised due to the opposition of judicial elites, and limited to small claims, and therefore their impact was also largely insignificant.

As to the impact that the above-described reforms related to case management had on the impartiality of the judges, it seems that the increased pressure on efficiency led to a more active involvement of presidents of courts in ensuring that no undue delays and backlogs occurred. In some cases this involvement caused these presidents to be challenged, which resulted in some interesting cases before the Strasbourg Court of Human Rights.[35] Although the Strasbourg Court by narrow margin found that court presidents do not discharge functions that can affect adjudication, this has not put an end to this issue. It is also a relevant issue in the light of the leading role of the President of the Supreme Court in the fight against delays, *inter alia* by using his right to transfer and delegate jurisdiction in concrete cases from overburdened courts to less burdened ones.

All the reforms have not, however, changed the public image of the Judiciary very much. Businesses and the public at large still regard the present situation as negative. For the public, the Judiciary is perceived as slow and ineffective. The

[35] See *Parlov-Tkalčić v. Croatia*, 24810/06, judgment of 22 December 2009.

reforms are being greeted favourably, but there are still no definite signs of significant improvement in the public rating of the Judiciary.

10.6 Relevance of the Croatian Reforms for Other Jurisdictions

The developments of reforms in Croatia show that an effective reform of the Judiciary may be very difficult, if not impossible, without strong instruments and political resolve to change the course of affairs. Even in the situation when reform is of the utmost political interest for the nation, the changes may lead to poor or even counter-productive results. In the context of the EU accession process, reforming slow and inefficient courts indeed had the highest level of political priority. Many laws were changed, all with the view to prove that the criteria and benchmarks set by the European Union are being met. Still, the negotiation chapter on the Judiciary (Chap. 23) was the hardest nut in the whole negotiation process. Was the closure of that chapter, which took place after 7 years of negotiations, on 30 June 2011, and the signing of the accession treaty on 9 December 2011, proof that the judicial reforms (including those pertaining to civil procedure) were successful? Neither European negotiators nor the Croatian public seriously think that great steps forward were made; if anything, it is only proof that some (though often hesitant and half-hearted) attempts were made. It may also be a sign that the lack of clear standards and tangible indicators of the reforms prevent the harmonisation of approaches and a rational assessment of achievements. This should motivate scholars of comparative civil procedure to further research and debate on the methodology of comparative assessment of national civil justice systems.

In particular, the history of developments in the field of civil procedure in Croatia sends a clear message that legislative changes are not sufficient (and sometimes even not appropriate) to change court processes. Legislative transplants from other countries (e.g. the reception of the Austrian ZPO) may in practice function very differently than in their original environment. The relationship between the powers of the judge and the powers of the parties provides a good example. The judge who is 'omnipotent' (at least on paper) may be the cause of procedural inefficiency and impotence. The lack of powers on the side of the parties may lead to a lack of responsibility, and trigger abundant options for delaying the proceedings. In such a setting, unlike in Western European countries, less can be more, and more can be less: less powers for the judge may give the judge more tools for effective case management; and, more powers for the parties may motivate them to act responsibly and co-operate with the court in the fulfilment of a joint mission: the fair and timely resolution of the dispute. For Croatia, striking an appropriate balance between the powers of the court and the powers of the parties may still be a task for the future, but the country's quest for this balance (shared with a number of other Southern European jurisdictions) may be observed by spectators from other jurisdictions as a laboratory that provides important examples of a few successful and a large number of unsuccessful experiments.

Appendices

Appendix 1: Facts and Figures Relevant for the Powers of the Judge and the Parties in Civil Litigation

Croatia

Year of Reference: 2011

Part I: General Data on the National Civil Justice System

1. Inhabitants, GDP and average gross annual salary

Number of inhabitants	4,290,612[36]
Per capita GDP (gross domestic product)	€10,394[37]
Average gross annual salary	€12,646[38]

2. Total annual budget allocated to all courts €225,955,724[39]

3. Does the budget of the courts include the following items?[40]

	Yes	Amount
Annual public budget allocated to salaries	✓	€147,758,459
Annual public budget allocated to computerisation	✓	€13,294,887
Annual public budget allocated to court buildings	✓	€13,814,864
Annual public budget allocated to training and education	✓	€1,650,201
Annual public budget allocated to legal aid[41]	Partly	Approx. €530,000
Other	✓	Budget for justice expenses €32,551,399

[36] According to census 2011, Croatian Bureau of Statistics, http://www.dzs.hr (last consulted in July 2012).

[37] The per capita GDP according to the CBS Statistical Yearbook 2011 (data 2010), 201 (11-1).

[38] Average monthly gross earnings per person in paid employment in legal entities (multiplied by 12), *CBS Statistical Yearbook 2011*, 160 (7-1).

[39] http://www.budget.gov.hk/2011/eng/pdf/head080.pdf (last consulted in July 2012).

[40] Extracted from the latest CEPEJ report containing data provided by of the Ministry of Justice (edition 2010, data 2008) available at http://www.coe.int/t/dghl/cooperation/cepej/evaluation/2010/2010_Croatia.pdf (last consulted in July 2012).

[41] From *Ministry of Justice Legal Aid Report for 2010*. This is the total planned budget for 2011; actual total budgetary expenses for 2010 were only €226,000.

4. Is the budget allocated to the public prosecution included in the court budget?

☐ Yes
☒ No

(a) If yes, give the amount of the annual public budget allocated to the prosecution services

Legal Aid (Access to Justice)

5. Annual number of legal aid cases and annual public budget allocated to legal aid

	Number	Amount
Civil cases	N/A	N/A
Other than civil cases	N/A	N/A
Total of legal aid cases	3,267[42]	Approx. €9,500[43]

Organisation of the court system and the public prosecution

6. Judges, non-judge staff and *Rechtspfleger*

	Total number	Sitting in civil cases[44]
Professional judges (full time equivalent and permanent posts)	Total Number: 1,883[45] (1,924 in 2011)[46] **Components:** Municipal Courts 868 Misdemeanour Courts 424 County Courts 379 Commercial Courts 114 High Commercial Court 28 Administrative Court 32 Supreme Court 38	N/A (except for misdemeanour courts, administrative and commercial courts; other courts and judges are not specialized and deal both with civil and criminal cases)

(continued)

[42] Based on the *Ministry of Justice Legal Aid Report for 2010*. This info relates to the number of referrals (awarding legal aid), not to the actual number of users or cases. It comprises both civil and administrative cases. *Pro bono* representation by the Bar is excluded from the table.

[43] Based on the Ministry of Justice data on actually paid expenses of legal aid for 2010; 'calculated' legal aid expenses (based on the possible expenses of the providers) were approx. €280,000 (see p. 6 of the Report).

[44] Judges sitting in civil cases include those in matrimonial cases and land disputes cases.

[45] Croatian Report for the CEPEJ, situation 31 December 2008.

[46] Ministry of Justice Statistics for 2011, p. 5 (situation at the end of 2011).

(continued)

	Total number	Sitting in civil cases
Professional judges sitting in courts on an occasional basis and paid as such	None	None
Non-professional judges (including lay-judges) who are not remunerated but who can possibly receive a defrayal of costs	judges-jurors – about 4,776 are listed but they act only occasionally	None
Non-judge staff working in the courts (full time equivalent and permanent posts) – misdemeanour courts not included.	484 court counsel 156 interns 5,211 others	N/A
Rechtspfleger	202	202[47]

The performance and workload of the courts

7. Total number of civil cases in the courts (litigious and non-litigious): 1,076,155[48]

Municipal		County		Administrative	
Litigious	153,415	Civil appeals	73,359	Adm. Suits	13,276
Inheritance	12,748			Other	244
Enforcement	171,209	Commercial			
Non-contentious	108,998	Litigious	27,560		
Land registry	473,774	Enforcement	18,691		
TOTAL Munic.	920,144	Bankruptcy	4,879		
		Com. appeals	9,002		

[47] Senior court counsel who independently deal with land registry cases (source: Maganić 2011).

[48] Source: Ministry of Justice Statistical Survey for 2011, 20.

8. Litigious civil cases and administrative law cases in the courts

		Litigious civil cases in general	Civil cases by category (e.g. small claims, family, etc.)		
Total number of first-instance cases[49]	Pending cases on 1 January of the year of reference (2009)	183,975	N/A	N/A	N/A
	Pending cases on 31 December of the year of reference	175,906	N/A	N/A	N/A
	Incoming cases	120,455	N/A	N/A	N/A
	Decisions on the merits	66,328	N/A	N/A	N/A
Average length of first-instance proceedings[50]		Official data not available. According to an estimate, the average length at the Municipal Court in Zagreb in 2000 was 29.2 months (2.43 year). Source: NCSC Report.			

Appendix 2: Data on Civil Cases in a Selected Court or Courts to Be Answered by a Judge or Judges of That Court

Municipal Court in Varaždin, 2006[51]

1. What types of civil cases does your court decide? Please include a brief definition of the types of cases

[49] Source: Ministry of Justice Statistical Report for 2009, at 4/2 (in later reports data on decisions on the merits is not included).

[50] The average length of the proceedings refers to the average time taken by an action from the date of commencement to the date of trial at the Court of First Instance.

[51] Source: SATURN Centre questionnaire on common case categories, judicial timeframes and delays, replies by Pilot Courts, CEPEJ-SATURN (2007)3, doc. of 22 November 2007 (ref. year: 2006).

Type of cases

CRIMINAL CASES:
Deciding on criminal proceedings of authorised prosecutors on whether the accused is guilty of the criminal act or not. In connection to that, procedures and decisions on security measures for the appearance of the accused at the main hearing and on the revocation of conditional sentences, as well giving opinions or making proposals on extraordinary legal remedies.

CIVIL CASES:

1. Disputes between physical entities, and between physical and legal entities in connection to damage compensation, rights in rem, labour law and family law;
2. Non-contentious proceedings regarding boundary disputes concerning plots of land, cancellation of joint ownership, settlement of co-ownership relations, securing evidence, etc.

ENFORCEMENT CASES:
Cases in which certain obligations are executed based on the enforcement/execution of authentic documents which the enforcement debtors did not comply with out of their own free will within the set time frame.

2. What is the volume of cases and their proportion to the caseload that your court decides on an annual basis? Reference year 2006

	Caseload of the court				
Common case categories	Cases pending on 01-01-2006	Incoming cases	Decisions	Pending cases on 31-12-2006	Percentage of cases pending for over 3 years
Civil law cases (total number)	**2112**	**12117**	**12180**	**2049**	**7.05 %**
1. Small claims	26	158	161	23	13.04 %
2. Contract	31	15	19	27	18.51 %
3. Tort (esp. car accidents, medical liability, liability of other professionals)	226	92	132	186	15.05 %

(continued)

(continued)

	Caseload of the court				
Common case categories	Cases pending on 01-01-2006	Incoming cases	Decisions	Pending cases on 31-12-2006	Percentage of cases pending for over 3 years
4. Inheritance	18	13	17	14	
5. Labour	155	177	186	146	1.36 %
6. Litigious employment dismissal	47	70	79	38	2.63 %
7. Land registry	51	9,228	9,055	224	7.14 %
8. Enforcement of judgments and other enforceable titles	1,501	2,098	2,332	1,267	6.78 %
9. Divorce	28	161	98	91	0.15 %
10. Child custody	1	60	52	9	–
11. Actions for support and maintenance	28	45	49	24	–

3. Do you consider some of the types of cases as complex cases? If yes, please indicate which cases are regarded as complex, in terms of time and efforts needed.

   No.

4. Do you consider some of the types of cases as urgent cases? If yes, please indicate which cases are regarded as urgent, and how this does affect the time of processing.

   Small cases, labour cases (especially litigious employment dismissal cases), family cases (especially when children are concerned).

5. Do you have information on the average or median duration of particular types of civil cases? If yes, please provide information on average/median duration of these cases.

   No average/median, only percentage of cases decided within a given period.

6. Are there targets in respect of the time needed to process each type of case in your court? If yes, please define how these targets are established (e.g. minimum and maximum time; average or mean time; percentage of cases completed within a certain period of time, etc.).

In family cases, there are legislative targets, but they are mostly ignored (e.g. Art. 265 Family Act: first hearing must take place within 15 days from submission of the statement of claim; Art. 266: appeals have to be decided and decisions dispatched within 60 days from the time of lodging the appeal).

7. Do you discuss the timetable and the expected duration of the proceedings with the parties and other participants in the proceedings? If yes, please give examples.

No.

8. Do you monitor cases that are considered to last excessively long? If yes, please explain which cases are considered to be excessively lengthy (e.g. cases pending more than 3/4/5 years), what their proportion is in your caseload, and which measures have been introduced for speeding up these cases.

Cases pending over three years are considered urgent, as they are categorized as 'old' cases. They are being monitored by the Supreme Court. For figures, see table below.

9. Do you monitor the duration of the proceedings in the following terms? If yes, please provide data. If you have a different way of monitoring, please give information on the categories used.

Common case categories	Applicable	Percentage cases decided within a period of:						
	Yes	Average length in days	<1 month	>1 month and <6 months	>6 months and <1 year	>1 year and <2 year	>2 year and <3 year	>3 year
Civil law cases (total number)	☐x	**N/A**	**29.89 %**	**18.57 %**	**17.42 %**	**19.98 %**	**9.84 %**	**4.27 %**
1. Commercial litigious and regular litigious civil claims	☐x	**N/A**	19.25 %	32.29 %	23.60 %	22.36 %	1.86 %	0.62 %
2. Contract	☐x	**N/A**		15.78 %	42.10 %	36.84 %		5.26 %
3. Tort (esp. car accidents, medical liability, liability of other professionals)	☐x	**N/A**	10.60 %	27.27 %	24.24 %	12.12 %	9.09 %	16.66 %
4. Inheritance	☐x	**N/A**		23.52 %	47.05 %	17.64 %	5.88 %	5.88 %
5. Labour	☐x	**N/A**	10.22 %	23.12 %	37.63 %	22.04 %	4.83 %	2.15 %
6. Enforcement of judgments and other enforceable titles	☐x	**N/A**	33.66 %	14.15 %	14.58 %	21.61 %	11.75 %	4.24 %
7. Litigious divorce	☐x	**N/A**	31.96 %	45.36 %	23.71 %			
8. Child custody	☐x	**N/A**	35.84 %	58.49 %	5.66 %			
9. Actions for support and maintenance	☐x	**N/A**	24.48 %	46.94 %	18.36 %	4.08 %	2.04 %	4.08 %
25. Criminal law cases (total numbers)	☐x	**N/A**	**27.64 %**	**27.23 %**	**13.82 %**	**15.45 %**	**5.69 %**	**10.16 %**

10. Do you collect and analyse information on the duration of the particular stages in the proceedings? If yes, give some examples regarding the duration of particular stages of the proceedings. Ideally, give us information on the ideal/average/mean duration of the preparatory stage (from the commencement to the first oral hearing on the merits), the trial stage (from the first oral hearing to closure of the proceedings) and the post-hearing stage (from the closure of the proceedings to judgment). If you cannot give data, but have another way of monitoring, please give information in terms of the categories used.

The data collected only deals with first instance proceedings, starting with the day of receiving the writ or act initiating the proceedings, and ending with the day of dispatching the written court decision (first instance judgment).

References

Bilić V (2008) *Alternativno rješavanje sporova i parnični postupak* (Doktorska disertacija). Pravni fakultet, Zagreb

Čepulo D (2000) Središte i periferija. Zbornik Pravnog fakulteta u Zagrebu, pp 889–920

Grgić A (2007) The length of civil proceedings in Croatia – main causes of delay. In: Uzelac A, Van Rhee CH (eds) Public and private justice. Dispute resolution in modern societies. Intersentia, Antwerp, pp 53–171

Jagtenberg R, De Roo A (2006) Conciliation in individual labour disputes in Croatia – Analitical Report, September 2006 (unpublished)

Jelinek W (1991) Einflüsse des österreichischen Zivilprozeßrechts auf andere Rechtsord-nungen. In: Habscheid WJ (ed) Das deutsche Zivilprozessrecht und seine Ausstrahlung auf andere Rechtsordnungen. Gieseking, Bielefeld, pp 41–89

Maganić A (2011) Reception of the Rechtspfleger in Eastern Europe: Prospects and difficulties. In: Uzelac A, Van Rhee CH (eds) The landscape of the legal professions in Europe and the USA: continuity and change. Intersentia, Antwerp, pp 183–199

Najman G (1935) (Neumann), *Komentar Zakona o sudskom postupku u građanskim parnicama*. Planeta, Beograd

Rušnov A, Šilović J (1892) Tumač građanskom parbenom postupniku. Kugli & Deutsch, Zagreb

Sprung R (2002) 100 Jahre Österreichische Zivilprozeßordnung. In: Rechberger WH, Klicka T (eds) Procedural law on the threshold of a new millenium – Das Prozessrecht an der Schwelle eines neuen Jahrtausends. Manz, Wien, pp 11–30

Triva S, Dika M (2004) Građansko parnično procesno pravo, 7th edn. Narodne novine, Zagreb

Triva S, Belajec, Dika M (1986) Građansko parnično procesno pravo, 6th edn. Narodne novine, Zagreb

Uzelac A (1995) Lustracija, diskvalifikacija, čistka. O procesnim i ustavnopravnim problemima izbora sudaca u prijelaznom razdoblju. Iudex 1(3):413–434

Uzelac A (2000) Role and status of judges in Croatia. In: Oberhammer P (ed) Richterbild und Rechtsreform in Mitteleuropa. Manz, Wien, pp 23–66

Uzelac A (2002) Ist eine Justizreform in Transitionsländern möglich? Das Beispiel Kroatien: Fall der Bestellung des Gerichtspräsidenten in der Republik Kroatien und daraus zu ziehende Lehren. Jahrbuch für Ostrecht, Sonderband: Justiz in Osteuropa, Band 43 (2002), 1. Beck, Halbband, München, pp 175–206

Uzelac A (2004) Accelerating civil proceedings in Croatia – a history of attempts to improve the efficiency of civil litigation. In: Van Rhee CH (ed) The history of delay in civil procedure. Intersentia, Antwerp, pp 283–331

Uzelac A, Aras A, Maršić M, Mitrović M, Kauzlarić Ž, Stojčević P (2010) Aktualni trendovi mirnog rješavanja sporova u Hrvatskoj: dosezi i ograničenja. Zbornik Pravnog fakulteta u Zagrebu 60(3):1265–1308

Vukelić M (2007) Alternative dispute resolution and mediation in Croatia. In: Uzelac A, Van Rhee CH (eds) Public and private justice. Dispute resolution in modern societies. Intersentia, Antwerp, pp 225–231

Chapter 11
Commercial Courts in Croatia and Case Management

Mario Vukelić

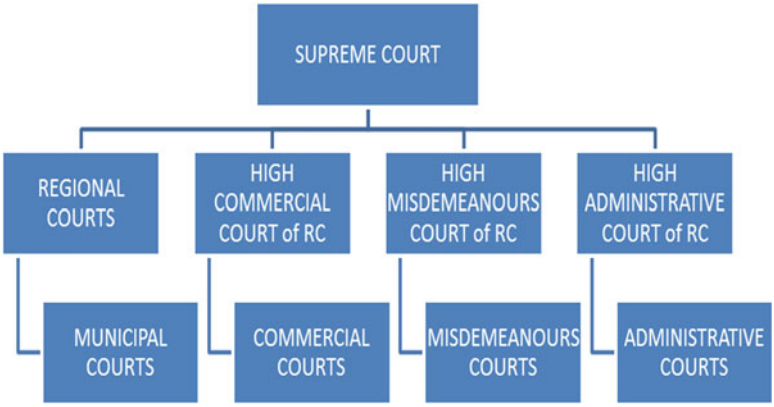
11.1 Croatian Courts in General

The Constitution of the Republic of Croatia (RC) guarantees the autonomy and independence of judicial power which is exercised by the courts established by law. In Croatia, judicial power is vested in regular and specialised courts. Regular courts are municipal courts, regional courts and the Supreme Court of the Republic of Croatia. Specialised courts are misdemeanours courts, commercial courts, administrative courts, the High Misdemeanours Court, the High Commercial Court and the High Administrative Court. In total there are 124 courts in Croatia. The Constitutional Court of the Republic of Croatia is a separate body.

The municipal courts, misdemeanours courts and commercial courts are the courts of first instance. Along with the general second instance courts, the High Commercial Court is the court of second instance. Since January 2012, administrative procedures are conducted by four administrative courts at first instance and by the High Administrative Court in the second instance. The Supreme Court, as the highest judicial instance, ensures the uniform application of the law and the equal position of citizens under the law.

M. Vukelić (✉)
High Commercial Court of the Republic of Croatia, VERN-University of Applied Sciences, Zagreb, Croatia
e-mail: mario.vukelic@vts.pravosudje.hr

C.H. (Remco) van Rhee and Fu Yulin (eds.), *Civil Litigation in China and Europe*, Ius Gentium: Comparative Perspectives on Law and Justice 31,
DOI 10.1007/978-94-007-7666-1_11,



The Constitutional Court guards constitutionality and legality, and notifies the Croatian parliament of instances of unconstitutionality and illegality.

The greatest challenges facing the Croatian Judiciary are the resolution of the extensive backlog of cases and the excessive length of proceedings. These have resulted in many cases being brought before the European Court of Human Rights.

In general, the public is made to believe that the failures of the courts due to insufficient working conditions are court failures *per se* – the media is not very interested in objective opinions and reasons. Although numerous measures have been taken and judges are, rightly so, further improving the performance of their judicial duties, reducing the number of unresolved cases is key to improving the public perception of the courts. Basically, this means increasing the number of judges, which leads to increasing the budget of the courts. And that is definitely not popular in the present recession.

In order to increase the efficiency of the justice system, Croatia is devoting special attention to reducing the number of unresolved court cases. The rate of resolution of current unresolved court cases is higher than the inflow of new cases, which has created the conditions for the continuous reduction of the backlog. Currently, Croatia is directing its efforts towards so-called old cases, that is, cases that have been pending for more than 3 years.

In Croatia, a system is in place for the protection of the right to a trial within a reasonable time. Acting further to a request by the parties for a trial within a reasonable time, higher courts can accelerate court proceedings conducted by lower courts by setting a term within which the court conducting the proceedings must issue a decision and by defining suitable compensation for the infringed right. A 3-month deadline has been set within which the higher court must decide upon the request.

11.2 The Court Management System

The operation of the courts (i.e. the budget of the courts) along with funds needed for technical equipment and office space in accordance with defined standards are financed through the national budget. Costs for the operation of the courts include funds needed for regular court operations (the salaries of judges, judicial officials and employees, utilities and supplies, replacement costs and costs of depreciation of equipment and buildings) and money for special purposes. The funds are allocated in a way which ensures the regular financing of the entire operation of the courts on the basis of a previously obtained opinion of the Supreme Court.

Presidents of the courts submit to the Ministry of Justice, within the time specified in the Budget Act, a proposed budget for the work of the court in the next fiscal year. Based on the budget proposed by the court president, the Ministry of Justice, together with the court president, determines the court budget necessary for the work of the court in the next fiscal year based on the needs and results achieved by the court. Presidents of the courts decide on the engagement and allocation of particular persons to positions of qualified administrative court staff.

Judges have the right to a salary established for such a position according to the Courts Act and the Act on the Salaries of Judges.

11.3 Appointment of Judges

Croatia has set a new legislative framework for the system of recruitment, training, appointment and promotion of judicial officials. According to the provisions of the Judicial Academy Act, a key step in the career of judicial officials who are appointed for the first time to judicial office is enrolment in the State School for Judicial Officials as a separate unit of the Judicial Academy.

The State Judiciary Council is the only body vested with the authority to appoint, relieve from duty and decide on the disciplinary liability of judges. The State Judiciary Council consists of 11 members (7 judges, 2 university law professors and 2 representatives of the Croatian Parliament). Decisions on appointments and promotions adopted by the State Judiciary Council are based on objective criteria.

Croatia has a legislative framework for the system of recruitment, training, appointment and promotion of judicial officials. The eligibility requirements for appointment as a judge are, in general, that the candidate must be a citizen of the Republic of Croatia, have completed a law degree programme and passed the bar examination, and have the professional experience that is required by the Act of the State Judiciary Council, depending on the type of court the candidate is applying for.

Judges are appointed on the first occasion for a 5-year period after which they are assessed and undergo the procedure for permanent appointment. Councils of judges, which are bodies composed solely of judges elected by the judges of individual courts, regularly assess the work of judges.

In order to be appointed as a judge of a court of higher instance, in addition to the requirements listed above, candidates must have expert knowledge and the ability to fill the position of judge as determined by an evaluation of the fulfilment of judicial obligations. In the field of the education of judges, the Judicial Academy has the central role.

11.4 Commercial Courts in General

The first commercial courts in Croatia were established in 1876. After undergoing a number of changes in the past, their present organisation generally has remained unchanged for the last 57 years.

All commercial courts are hierarchical and are organised in two instances. At first instance there are seven commercial courts. There is one High Commercial Court for the entire territory of the country with its seat in the capital Zagreb. Commercial courts play a very important role in ensuring the rule of law, but also as one of the important factors within the economic system. One should note in this context that the value of the cases pending at the commercial courts reaches into the hundred of millions of euros on an overall basis. The effectiveness of the commercial courts is thus directly related to the competitiveness and development of the Croatian economy. Their efficient functioning is also necessary in order to attract foreign and domestic investment.

The particular relevance of the commercial courts has been pointed out not only by leading figures in Croatian politics, science and economics, but also by high representatives of the European Union and the World Bank. The need for specialised commercial courts is basically the need for judges who have specialised knowledge and training for commercial cases because of the specific nature of the matters they deal with.

The legal position of commercial courts should make it possible for them to specialise in legal areas important to the functioning of economic entities. This should be reflected primarily in the quality of their decisions, and also contribute to effective legal protection. That should create a good business environment which encourages economic investment. This demands continuous adaptation to new legal solutions and the rapid development of case law in commercial relations. This adaptation is not only in the content of material legal standards, which are applied, but also in the manner in which this is done and in the methods of interpretation, procedures, etc. This also means a huge inflow of new information and sometimes a change in the approach to the application of the law.

Croatia has established a commercial mediation programme. Commercial courts were among the first in Croatia (as early as 2006) to begin dealing with mediation. The High Commercial Court is charged with mediation in appeal procedures.

11.5 First Instance Commercial Courts

Generally, commercial courts are competent in disputes between legal persons, bankruptcy proceedings, intellectual property disputes, handling the register of companies, maritime and air law disputes, disputes concerning the status of companies, unfair market competition, monopolistic agreements and pursue other activities provided for by law. New economic relationships have also given new significance to the court register. Data from this register are available to the public and in electronic form.

More in detail, commercial courts in the first instance adjudicate in:

1. disputes between legal persons, between legal persons and craftsmen, and between craftsmen in disputes arising from their commercial activities;
2. disputes arising from the foundation, work and termination of companies and the disposal of membership and membership rights in companies;
3. disputes between members of companies themselves, between members of a company and the company related to the management of the company and the running of the company's business and the rights and obligations of members of the company arising from their position in the company, and in disputes between the president and members of the management board or supervisory board of the company and the company or its members which arise in relation to their work in the company or for the company;
4. disputes about the liability of members of a company, a member of the management board or supervisory board of a company for the liabilities of the company;
5. disputes in which the party is a person in respect of whom bankruptcy proceedings have been opened, regardless of the character of the other party and the time of the institution of the dispute, and in all disputes arising from bankruptcy if for individual types of dispute the law does not specifically prescribe that courts of another type always have subject matter jurisdiction;
6. disputes relating to ships and navigation on the sea and inland waterways, and in disputes to which navigation law is applied (navigational disputes), apart from disputes over passenger transport;
7. disputes relating to airplanes, and in disputes to which air navigation law is applied, apart from disputes over passenger transport;
8. disputes related to the protection and use of industrial property, copyright and related rights and other intellectual property rights, for the protection and use of inventions and technical advances and trade names if this is not regulated differently by a separate law; and
9. disputes arising from unfair market competition, monopolistic agreements and disruption of equality in the single market of the Republic of Croatia.

Commercial courts have broad jurisdiction in non-litigation (non-contentious) procedures in which they shall:

1. act in matters regarding registration and keep court registers;
2. decide on the registration of vessels in the shipping register and on the registration of rights related to these vessels, the limitation of liability of shipping

operators, appeals concerning the allocation of liability in shipping disasters unless otherwise provided for by law in individual types of cases;
3. decide on motions related to the incorporation, operation and winding-up of companies;
4. decide in non-contentious matters determined in the Companies Act;
5. decide and enforce decisions delivered in the first instance, as well as disputes which arise in the course of the enforcement of these decisions. They may delegate the execution of non-pecuniary means of the execution debtor to municipal courts;
6. conduct proceedings for the recognition and enforcement of foreign judicial decisions and arbitral awards in commercial cases;
7. provide evidence related to proceedings falling within their jurisdiction;
8. decide on conservatory measures in cases in which they have jurisdiction;
9. decide on motions to initiate bankruptcy proceedings and conduct bankruptcy proceedings;
10. carry out tasks relating to international judicial assistance in presenting evidence in commercial cases; and
11. pursue other activities provided for by law.

11.6 The High Commercial Court of the Republic of Croatia

Briefly stated, the High Commercial Court is the court that decides upon appeals of decisions of the first instance commercial courts and upon conflicts of jurisdiction between courts of first instance, and performs other procedures specified by law. As a rule, the High Commercial Court makes decisions in a panel of three judges. Against particular decisions of the High Commercial Court in which, as a rule, the amount exceeds approximately €68,000 parties may bring revision proceedings as a specific exceptional remedy upon which the Supreme Court will decide. At their meetings, the judicial departments of the High Commercial Court discuss issues of common interest to the inferior courts in their respective territories. Legal interpretations adopted at the meeting of the judicial departments of the High Commercial Court are binding for all second-instance panels of judges and individual judges of the same department.

11.7 Laws Applied by Commercial Courts

As to the law that commercial courts apply in proceedings, the Civil Obligations Act, the Companies Act and the Bankruptcy Act merit particular mention. The Companies Act regulates questions of the status of companies such as the establishment of an enterprise, the nature of its business, its headquarters, its own internal regulations, etc. It also regulates the issues of partnership, limited partnership, joint stock companies, limited liability companies, economic interest groupings and

silent partnerships. In Croatia these companies possess the same features as in other legal systems. The Companies Act is based on the German model. However, this law does not regulate commercial contracts. This area is regulated by the Civil Obligations Act, whose origins derive from the Swiss law of obligations. The Bankruptcy Act addresses the liquidation and reorganisation of a debtor, is consistent with a market-based economy and is based on the German model. Croatian legislation is aligned with European Union law (*acquis communautaire*).

11.8 How to Set Up a Company in Croatia?

Foreign investment in Croatia is widely encouraged. The laws for foreign investors are the same as for Croatian investors and there is no discriminatory treatment. Croatia has successfully implemented the e-*Tvrtka* (e-Company) project in all commercial court registers. This system allows – through the website www.hitro.hr, which is a service of the Croatian government – for the establishment of a limited liability company (whose original capital is deposited in cash) within 24 h via the Internet. Prior to the registration of a company, the founders must choose a company name and verify its uniqueness. This procedure implies checking with the commercial court register which verifies the name and, if it is available, provides the name to the founder (additional information is available at: http://sudreg.pravosudje.hr). The founders must notarise the memorandum of association or the company charters and the application for court registration together with the director's statement of acceptance of the appointment. If there are relevant documents in another language, then the founders must obtain a certified translation into Croatian. Furthermore, the company must have a legal residence in Croatia.

In order to engage in commercial activities, a company must be registered in the commercial court register. The application must contain the notarised documents, which include the amount of capital, the list of owners and shareholders, and another list of the members of the board. The company must obtain a statistical file number from the State Office for Statistics. The company founders must also incorporate their company with the tax administration office. After the registration is complete, the Croatian company is provided a tax identification number. Within 15 days of incorporation, the company members must register the company with the Croatian Pension Insurance Institute and the Croatian Institute for Health Insurance.

11.9 Overview of the Croatian Bankruptcy System

The Bankruptcy Act addresses the liquidation and reorganisation of a debtor. It is consistent with a market-based economy. In particular, the law is far more creditor-oriented than the American system, and it is similar to the German and Austrian bankruptcy codes.

The bankruptcy procedure shall be instituted in order to jointly satisfy the creditors' claims by the realisation of the debtor's assets and their distribution among the creditors. During bankruptcy proceedings, the reorganisation of the debtor may be instituted in order to regulate the debtor's legal status and relation to the creditors, especially in order to preserve the debtor's operations. The bankruptcy procedure may be instituted against a legal entity as well as against the assets of an individual debtor who is the sole proprietor or tradesman. Croatia has not yet drafted a consumer bankruptcy law. The reasons for bankruptcy are insolvency and over-indebtedness. In general, a debtor shall be considered insolvent if he is not able to pay his monetary obligations during a 60-day period. A debtor shall also be considered insolvent if his debts exceed his existing obligations. Bankruptcy proceedings shall be initiated by a proposal filed by a creditor or the debtor. A creditor with a legal interest in the initiation of bankruptcy proceedings shall be entitled to submit a proposal for commencing bankruptcy proceedings if the creditor makes the existence of his claim and any of the reasons for initiating the bankruptcy proceedings plausible.

A debtor may propose the opening of a bankruptcy procedure in case of insolvency or over-indebtedness (if the debtor shows that he will not be able to pay the existing obligations when they become due). The management is bound to submit a proposal in case of the existence of any of the reasons for bankruptcy. The most common types of security in real and personal property in business financing are a mortgage on the real estate and pledges on shares or on a bank account. Most loans to businesses are secured and in banking this is obligatory in many cases.

In bankruptcy proceedings, the real property estate against which secured claims (a separate right) exist may be sold by the bankruptcy judge upon proposal of the trustee, in accordance with the provisions on enforcement against real estate. Creditors who have a separate claim (secured creditors) against real estate, fixtures or rights that are inscribed in a public register have the right to separate satisfaction.

The majority of claims in bankruptcy proceedings are unsecured. The creditors report their claims to the trustee; the claims shall be considered established if they have not been refuted during the examination hearing. Creditors can satisfy their claims by the realisation of the debtor's assets and their distribution among the creditors according to the provisions of the Bankruptcy Act.

In Croatia, an insolvent business is liquidated by a judicial proceeding typically commenced by creditors (mostly unsecured). Liquidation of an insolvent debtor is a court-supervised proceeding. The trustee who is in charge of liquidation is appointed by the court. Non-judicial liquidation carried out by members of the company is a method of settling accounts and distribution among company members. This is possible only if the debts of the company have been settled; and it is not possible for the liquidation of an insolvent business. The trustee and the debtor are entitled to file a reorganisation (bankruptcy) plan. The trustee can be instructed by the creditors to prepare a bankruptcy plan which has to be voted on during the hearing. If the plan is accepted by the creditors and the debtor, the bankruptcy judge shall decide whether the bankruptcy plan can be confirmed. By satisfying the creditors in accordance with the bankruptcy plan, the debtor is relieved of the rest of his obligations.

11.10 Current Problems Within the Commercial Courts

It is well known that justice delayed is justice denied. As the three-time Pulitzer Prize-winning journalist Thomas Friedman would say, globalisation is no longer characterised by the big eating the small, but by the fast eating the slow. Therefore, it is clear that the quick and efficient resolution of unresolved cases should be seen as a key priority within the commercial Judiciary, as well as within the Croatian legal system as a whole. However, there are still a number of problems in this area.

Statistical data show that, as one of the consequences of the present recession, there was a worrying increase of 251 % in bankruptcy cases brought before commercial courts in the first 6 months of 2011 with respect to the same period in the prior year, as well as an increase in litigation cases. Even though commercial courts were able to resolve about 20 % more cases in this period than in the same period in the prior year, the number of unresolved cases in the first instance commercial courts increased.

Another consequence of the current economic crisis in Croatia is the large number of companies that have seen their bank accounts blocked. As a result, there is an increased tendency to use the courts in order to delay the paying of obligations even though, in a large number of cases, these obligations are indisputable. It is the non-payment of obligations that is considered the most frequent cause of commercial disputes in Croatia. The number of corporations which do not have an open business account at all is estimated at around 5,000. In the near future, the process of liquidating about 14,000 companies that meet the conditions for being liquidated under the law will begin. There will also be tens of thousands of speedy bankruptcy proceedings concerning insolvent companies that have no assets, or assets of negligible value. The wave of bankruptcies that has occurred is a serious social problem, important not only from the point of view of pure economics, but also certainly important from the point of view of workers.

The crucial question is whether the quick resolution of unresolved cases that have accumulated over many years is possible within the existing legal and economic framework in Croatia. The answer, unfortunately, must be a negative one. Croatia ranks near the top among European countries when it comes to the number of judges relative to the overall population, but also when it comes to the number of legal cases relative to the population. As a result, judges in Croatia, including those working in the commercial Judiciary, have higher caseloads than most of their European peers. However, this problem cannot be resolved by indefinitely increasing the number of judges, especially at a time when public funding is scarce. The only way to render Croatian commercial courts more able to address the growing problems brought about by the current economic crisis is to introduce changes within the legal framework. In particular, the systemic laws concerning the Judiciary need to be reformed in a way that will allow speeding up and shortening legal procedures.

Another way to help the Croatian commercial courts is by reinforcing the discipline within the overall economic system, which would then reduce the flow of frivolous and unnecessary cases arriving at the commercial courts. This author

would therefore like to encourage the implementation of Directive 2011/7/EU of the European Parliament and of the Council of 16 February 2011 on combating late payment in commercial transactions (recast). Moreover, it is also necessary to put out of business those companies that are insolvent and that meet the legal requirements for opening bankruptcy procedures or for being removed from the court register. The Croatian business community and the overloaded Judiciary recognise the need for such change.

One of the founders of the European Union, Jean Monnet, once said that people only accept change once they face the need for it, and they only recognise the need for change once a crisis arrives. Thus, the most important task is to recognise the areas that need changing and to propose changes for the better. This can only be done by thinking outside of the box and by introducing new ideas, free from existing legal stereotypes.

Part V
Italy

Chapter 12
Italy: Civil Procedure in Crisis

Elisabetta Silvestri

12.1 Italian Civil Justice: The Basics

12.1.1 The Legal Sources of Italian Civil Procedure

The main source of the rules governing the path of Italian adjudication in civil and commercial matters is the Code of Civil Procedure (hereafter, the Code). The Code was enacted in 1940 and entered into force in 1942 at which time it replaced the Code of Civil Procedure of 1865, the first procedural code of the unified Kingdom of Italy. This Code had been profoundly influenced by the French *Code de procédure civile* of 1806.[1] Further signs of the enduring influence of French legislation can be found in other statutes passed in the second half of the nineteenth century and in the first decades of the twentieth century: for instance, when the issue of deciding which kind of supreme court the Kingdom of Italy should adopt and establish arose, the model of the French *Cour de cassation* prevailed over the German model of *Revisionsgericht*, and in 1923 a national Court of cassation – the *Corte di cassazione* – was established in Rome.[2]

When the Code was drafted, the fascist ideology was in full bloom, and therefore one could be naturally inclined to believe that the Code is a by-product of that ideology: in reality, according to a well-accredited theory,[3] the fascist regime was not very eager to condition the administration of civil justice (or, at least, not as eager as it was with regard to substantive criminal law and criminal procedure). The enactment of a new code of civil procedure was not an attempt to impose an authoritarian

[1] See Picardi 2006.

[2] Calamandrei 1976.

[3] See, in particular, Taruffo 1980 and, more recently, Verde 2002.

E. Silvestri (✉)
University of Pavia, Pavia, Italy
e-mail: elisabetta.silvestri@unipv.it

C.H. (Remco) van Rhee and Fu Yulin (eds.), *Civil Litigation in China and Europe*, Ius Gentium: Comparative Perspectives on Law and Justice 31,
DOI 10.1007/978-94-007-7666-1_12,

conception of adjudication, but a sort of energetic answer to the problems of a highly inefficient justice system. This can explain why the traditional liberal approach according to which the parties are the absolute masters of adjudication was abandoned in favour of a more active role played by the court; at the same time, it cannot be overlooked that the ideas of Franz Klein and his concept of a 'social function' of civil litigation[4] had gained wide popularity among Italian scholars, to the point of supplanting the previously dominant cultural model represented by the French approach to adjudication. In other words, the idea of a more interventionist court suited the fascist concept of a 'strong' state which was determined to watch over the resolution of private disputes, but that idea was not an original 'invention' of the fascist élite.[5]

The advent of the Republican Constitution (enacted in 1947 and in force since 1 January 1948) had remarkable side-effects on the rules governing the administration of justice at large. Among the 'rights and duties of citizens', the Constitution lists the right of access to justice as a fundamental right, providing that 'Anyone may bring cases before a court of law in order to protect their rights under civil and administrative law. Defence is an inviolable right at every stage and instance of legal proceedings. The poor are entitled by law to proper means for action or defence in all courts'.[6] In addition, a whole section of the Constitution is devoted to the judicial branch and to the basic guarantees that surround the exercise of judicial power, such as independence and impartiality.[7]

The Italian Constitutional Court has repealed several articles of the Code, since they were deemed to be at odds with constitutional provisions and, in particular, with the right of access to justice in its value as a 'dynamic prong' of the equality principle enshrined in Article 3 of the Constitution. Other procedural rules were not repealed, but the Constitutional Court made it clear that they had to be given a 'constitutionally oriented' interpretation when applied by the courts.

Finally, it is worth mentioning that one of the few revisions the Italian Constitution has undergone since its entry into force brought about the express recognition of due process of law as a fundamental guarantee. Today, Article 111 provides that 'Jurisdiction is implemented through due process regulated by law. All court trials are conducted with adversary proceedings and the parties are entitled to equal conditions before an impartial judge in third party position. The law provides for the reasonable duration of trials.'[8]

The constitutional reference to the 'reasonable duration' of judicial proceedings may sound almost paradoxical in light of the notorious unreasonable length of

[4] On Klein's thought, see extensively Van Rhee 2005, pp. 3–21, 11–14.

[5] For the sake of intellectual honesty, it seems correct to mention that a minority of Italian scholars do not share this view: see in particular Cipriani 2003a, b; Cipriani 1997, p. 179 *et seq*.

[6] See Art. 24 of the Italian Constitution. An official translation in English of the Italian Constitution can be read on the webpage of the Italian Senate, available at: http://www.senato.it/documenti/repository/istituzione/costituzione_inglese.pdf (last consulted in June 2013).

[7] See Arts. 101–113 of the Italian Constitution.

[8] Art. 111 of the Italian Constitution was modified in 1999.

Italian cases. As a matter of fact, excessive delay has always been one of the most egregious shortcomings of Italian justice, and the reason that brought about an endless series of reforms affecting civil procedure and the Code since the 1950s. Since no reform has proven to be effective, as is clearly demonstrated by the fact that at the end of June 2011 the backlog burdening civil courts amounted to the astronomical number of 5.5 million cases and that the average length of adjudication was estimated at 7 years and 3 months,[9] it is reasonable to expect a new wave of reforms in the near future.

Not only is the Code not what it was when it went into force, but also, due to the reforms mentioned above, it has become just one of the many legal sources of the rules governing civil and commercial litigation. The second half of the twentieth century witnessed a constant increase in a disparate variety of 'special proceedings' provided for by individual statutes that, typically, enlarged the catalogue of substantive rights recognised by the legal system and created new procedures for the judicial enforcement of such rights. It is fair to say that the situation went out of control, causing further inefficiency within a system already working at a painfully slow pace. When the government decided to get hold of the problem, a survey revealed that more than 30 'special proceedings' were in place besides the many other ones governed by the Code. A statute for the so-called 'simplification of special proceedings' was passed with the goal of bringing them back to one of the main procedural models provided for by the Code, that is, the ordinary procedure, the summary procedure, and the procedure for labour cases.[10] Even though the rationale behind the 'simplification' is sound, the adaptation of many special proceedings to one of the three main procedural models has proven to be difficult, and has required a large number of detailed rules necessary for the implementation of the changes: therefore, the statute on 'simplification of special proceedings' became the source of further confusion. However, since the statute went into force only in October 2011, a final judgment on its pros and cons seems premature.

12.1.2 The Organisation of Italian Courts

According to the Italian Constitution, the judicial power is vested in 'ordinary' courts.[11] The emphasis placed on the attribute 'ordinary' can be understood in the context of the constitutional rule forbidding the establishment of extraordinary or

[9] The author did not have access to more recent data. The data reported in the text, though, are at least official, since they were made public by the Ministry of Justice in the annual report to the Parliament on the state of judicial affairs: see 'Relazione sull'amministrazione della giustizia nell'anno 2011', available at: http://www.giustizia.it/giustizia/it/mg_2_7_3_2.wp?previousPage=mg_9 (last consulted in June 2013).

[10] The statute in question is statute No. 150 of 2011. Some basic information on its contents can be read in Consolo 2011.

[11] Art. 102(1) of the Italian Constitution.

special courts,[12] since at the time the Constitution was drafted the memory of the nefarious special courts set up by the fascist regime in order to suppress political dissent was still very fresh. However, on the one hand, the Constitution maintained some pre-existing special courts, that is, the administrative courts, and, on the other hand, it authorised the establishment of 'specialised sections' within ordinary courts, in charge of handling specific matters, and allowed the 'specialised sections' to include among their members also 'qualified citizens who are not members of the Judiciary',[13] namely, experts in the fields dealt with by each 'specialised section'.

In civil matters, courts of first instance are the justices of the peace and the *Tribunali*. The respective jurisdiction is determined according to the amount in controversy, even though detailed rules on subject matter jurisdiction override a strict application of the criterion based on the value of the claim. When the offices of the justice of the peace were established (in 1991), they were conceived essentially as small claims courts: over the years, though, their jurisdiction has been enlarged well beyond the typical jurisdiction of courts in charge of minor disputes. Therefore, even though in principle justices of the peace cannot handle claims whose value exceeds €5,000, their jurisdiction jumps up to €20,000 the claim is brought to recover damages caused by traffic collisions; justices of the peace also have a wide subject matter jurisdiction.[14]

The *Tribunali* hear cases that are outside the jurisdiction of the justices of the peace either by reason of the amount in controversy or because they affect an area of the law which falls within the exclusive subject matter jurisdiction of the *Tribunali* themselves: claims affecting personal status and family relationships are good examples of cases of this kind.[15] Before the *Tribunali*, most cases are heard and decided by a single judge; only in very specific matters are cases heard and decided by a panel of three judges. What is now the exception (that is, cases assigned to a panel of judges) used to be the rule until 1998, when the office of the single judge was established in order to maximise the ability of the *Tribunali* to process their huge caseloads.

Above the *Tribunali* sit the courts of appeals (*Corti d'appello*) and, at the apex of the judicial pyramid, the *Corte di cassazione*, which plays the role of supreme court also as regards administrative courts. Like the ordinary courts, administrative courts are organised along a two-tier system, with regional courts as courts of first instance (*Tribunali amministrativi regionali*) and a single appellate court (*Consiglio di Stato*) sitting in Rome: a further appeal, on very limited grounds, can be brought to the *Corte di cassazione*. Public entities can be either claimants or defendants before both ordinary and administrative courts, since what counts is not the nature (private or public) of the parties, but the nature of the claim. In fact, Italy adopts a very artificial

[12] Art. 102(2) of the Italian Constitution.

[13] *Ibidem*.

[14] See Art. 7 of the Code.

[15] See Art. 9 of the Code.

distinction between claims concerning 'subjective rights' and claims concerning 'legitimate interests': judicial enforcement of the former falls within the jurisdiction of ordinary courts, while the latter can be enforced only by administrative courts. In reality, things are quite complex, since the concept of what amounts to a 'legitimate interest' has changed over time and the boundaries of the respective jurisdictions of ordinary and administrative courts have followed suit.

In principle, the Italian Judiciary is composed of professional judges, recruited through a public competitive examination, according to a rule laid down by the Constitution.[16] However, notable exceptions to this rule do exist: the justices of the peace, for instance, are lay judges, and so are the experts called upon to become members of the 'specialised sections' mentioned above. The appointment of lay judges finds its legitimacy in yet another constitutional rule which provides that 'the law regulates the cases and forms of the direct participation of the people in the administration of justice'.[17]

A limited number of 'specialised sections' have been established within ordinary courts: the sections in charge of cases concerning agricultural property, the juvenile sections (with both civil and criminal jurisdiction) and the sections handling intellectual property (IP) cases. A recently enacted statute[18] has enlarged the jurisdiction of the sections (originally) handling IP cases: today, such sections are also in charge of a wide variety of commercial cases, corporate cases and class actions for damages as well, and have adopted a new denomination reflecting their modified roles, that is, *Tribunali delle imprese*, which can be roughly translated into 'Business Courts'. Only time will tell whether the new 'Business Courts' are the needed recipe for a faster disposition of commercial cases, but a good measure of scepticism is in order since the new 'Business Courts' will not be equipped with more judges, neither will they be filled with judges whose knowledge and proficiency in commercial matters have been tested.

The establishment of the new 'Business Courts' is just one of the many changes that are supposed to affect the judicial geography of Italy in the near future. A statute passed in September 2011 entrusted the government with the task of re-designing the entire territorial organisation of the judicial system, so as to make it more rational and efficient and, at the same time, to bring about savings in the public budget[19]: even though it may be difficult to believe, Italy still has the judicial map that was designed in 1859 for the Kingdom of Sardinia and which was later adopted for the Kingdom of Italy. In compliance with the mandate received by the Parliament, the Government has submitted to the legislature the draft of a first bill that provides for a drastic reduction in the number of the offices of the justices of the peace. Other bills will re-map the judicial districts, according to the number of inhabitants, the

[16] Art. 106(1) of the Italian Constitution.

[17] Art. 102(3) of the Italian Constitution.

[18] Statute No. 27 of 24 March 2012, at Art. 2.

[19] Statute No. 148 of 14 September 2012, at Art. 1(2).

courts' backlog, the average number of new cases filed each year, and so on: the goal is to reduce the number of *Tribunali*, unifying the smallest ones and assigning more judges to the *Tribunali* located in metropolitan areas, that is, the areas in which the growth of the judicial caseload is highest and the courts' backlog most serious. Large sectors of the legal profession are opposing this forthcoming reform, claiming that suppressing courts of first instance will make it harder for the citizens to exercise their right of access to justice. Needless to say, other, less noble reasons lie behind the 'arm wrestling' in progress between the government and the Italian Bar[20]: it will be interesting to see if, as it is often the case (at least in Italy), a compromise solution will pacify souls. Actually, as of September 2012, it seems that the government has decided to go its own way, without paying much attention to the protests coming from the Bar. Two recent statutory instruments have adopted a variety of measures affecting the territorial organisation of the courts and, most of all, have eliminated 37 courts of first instance, 220 'detached sections' of the courts of first instance, as well as 674 offices of justices of the peace: a true 'revolution' that the Italian system of civil justice will take a while to 'digest'.

12.2 The Path of a Civil Case Before a Court of First Instance

In this part, a capsule outline of adjudication will be given. As mentioned earlier, there are three basic procedural models to be followed before a court of first instance: the ordinary proceeding, the summary proceeding, and the proceeding originally devised only for labour cases and later adopted for other kinds of cases.

Here, the reference to civil cases must be interpreted as inclusive of commercial cases, too. Between 2003 and 2009, commercial cases were disposed of according to a set of special rules, whose rationale was to make the parties the exclusive masters of the various activities known as the 'preparation' of the case, that is, the identification of the questions of fact and of law in controversy, and the choice of evidence to be presented in support of the parties' contentions. The judge was supposed to enter the picture at a very late stage: in practice, his only role was to issue the decision, based upon the documents (pleadings, motions, collected evidence) submitted by the parties. The 'commercial procedure' was adopted as a sort of experiment, with the view to extending it to all civil cases after a trial period: the results were so poor that – fortunately – the government had a change of heart, and the 'commercial procedure' was repealed, leaving no regrets in the legal community.

[20]When the first draft of this report was being written (May-June 2012), some lawyers associations were in the middle of a 'work-to-rule' protest.

12.2.1 The Ordinary Proceeding

Conventionally, within the ordinary proceeding three stages can be identified: the introductory stage, the evidence-taking stage and the decision stage. Adjudication begins when the claimant serves the complaint on the defendant and summons him to appear before the court. The defendant, on his turn, shall serve his response on the claimant. Besides the exchange of the initial pleadings, the introductory stage includes the entering of an appearance performed by both parties and the docketing of the case, which takes place, in general, at the request of the claimant, at the time when his appearance is entered.

In principle, the initial pleadings (that is, the complaint and the answer) must set forth the claims and the defences of the parties. The Code lists several requirements that must be met by the initial pleadings. As far as the complaint is concerned, it must contain the statement of claim, that is, the cause of action the claimant states and all the facts upon which he intends to rely, the legal theory he advances, the evidence supporting his claim and the remedy he seeks. The defendant cannot limit his answer to a general denial, but he must specifically deny each and every allegation made by the claimant. In addition, the answer must set forth all the affirmative defences the defendant intends to offer, as well as both his counterclaims and the supporting evidence and documents.

According to a literal interpretation of the wording of the Code, the first hearing 'represents the focal point of the proceedings'[21] since it involves a series of steps aimed at shaping once and for all the boundaries of the dispute. A detailed description of the various steps that structure the first hearing seems beyond the scope of the informative purpose of this report, but it is worth mentioning at least some features of the first hearing.

1. The parties do not have any duty to be present in person; neither does the court have the duty to hear them. According to the Code (Article 185), the parties shall be present in person only insofar as they both have requested to be heard by the court with a view to attempting conciliation. Their joint request implies, in general, a postponement of the hearing. One must remember, though, that at present in a large variety of civil cases out-of-court mediation is mandatory, meaning that no proceedings can be commenced unless out-of-court mediation has been attempted first: this issue will be developed further on in this report.[22]
2. The court can request that the parties clarify the allegations made in the initial pleadings. The court can also signal to the parties the issues that shall be raised *ex officio*, so that the parties are afforded the opportunity to express their points of view as regards the same issues.
3. The claimant can assert new claims and make new allegations, insofar as they are necessary to respond and react to the defendant's defences and counterclaims.

[21] See Dalfino 2010, p. 76.

[22] See below, Sect. 4.

4. Both parties are allowed to amend their pleadings not only at the first hearing, but also by way of supplemental pleadings: if the parties avail themselves of this possibility, the court sets time-limits for the exchange of the supplemental pleadings, and the hearing is postponed, not only once but several times, because of the 'ping-pong effect' of the respective motions made by the claimant and the defendant.
5. Finally, the court issues an order as to the evidence that is deemed admissible and relevant, setting the date of the hearing devoted to the evidence-taking phase.

As can be inferred from the description given above, the so-called preparatory stage of the proceeding can be spread over several hearings, causing serious delay in the final determination of the issues in controversy since the interval between the hearings can be very long. It has been noted that the preparatory stage in an Italian adjudication can last as long as 1 year, which is the time that, in other European countries, corresponds to the length of an entire lawsuit before a court of first instance, from the inception of the proceeding to the rendering of the final decision.[23]

If the preparatory stage of the adjudication is long, the evidence-taking stage is even longer, since it takes place over an endless series of hearings scattered over an unpredictable time period. For the understanding of the dynamics of this stage of the procedure, it can be useful to recall that in an ordinary proceeding the court as a rule can rely only on the evidence offered by the parties, since the court is granted very limited powers as to the taking of evidence on its own motion (for instance, the court can order *sua sponte* inspections of persons, places and tangible things). Witnesses are examined by the court, which can ask only the questions set forth in writing by the parties. Cross-examination is not allowed. The parties cannot be heard as witnesses even though they can be heard in order to clarify their positions or be examined through the so-called formal interrogatory, whose purpose is to obtain admissions.

When the examination of the evidence is completed, there is another round of final briefs (that is, written summaries of the parties' allegations) exchanged between the parties. The date for oral argument is set by the court only if the parties so request, which happens rarely.

According to Article 275(1) of the Code, the judgment is supposed to be announced within 60 days from the expiration of the deadline set for the exchange of the final briefs. Since the court incurs no sanctions if the judgment is delivered well beyond the 60-day deadline, it is fair to say that the Code, in this regard as in many others, provides for a simple 'friendly suggestion' that the court is free to disregard.

The description of an ordinary proceeding given above highlights a procedural model lacking any features of real judicial case management. It is true that the wording of the Code hints at an active role the court could play: civil procedure,

[23] See Giorgiantonio et al. 2009, available at: http://www.bancaditalia.it/pubblicazioni/quarigi/qrg66/qrg_66/volume_66.pdf (last consulted in June 2013).

though, is a branch of Italian law in which the chasm between the law on the books and the law in action is very deep. Just to mention an example, according to the Code, the court 'is entrusted with all the powers necessary for the swift and fair development of the proceeding', including the power 'to set deadlines for the completion of procedural steps' (Article 175(1) and (2)) and the power to sanction the parties and their lawyers when they have breached the duty to conduct adjudication with fairness and integrity (Article 88(1) and Article 92(1)). More importantly, the court can, on its own motion, raise legal issues and arguments that the parties have overlooked or ignored, insofar as, in the court's discretionary evaluation, such issues and arguments must be taken into account for the proper disposition of the case (Article 183(4)). Therefore, at least in theory, the court is not completely passive and at the mercy of the will of the parties, since there are rules that could be appealed to by the court with a view to experimenting with at least minimal case management. Unfortunately, though, caseloads are so heavy and courts are so understaffed that judges can barely stay afloat in a sea of papers, since the procedure is essentially written, even though the Code takes pride in stating that, introductory pleadings aside, oral procedure is the rule (Article 180).

Mention has been made of the many reforms that have modified the Code: overall, the most recent ones have done nothing to change the *status quo*. Many Italian scholars emphasise that lawmakers cherish a sort of Italian exceptionalism, refusing to follow the trend that is clear in the most recent reforms of civil procedure adopted by European legal systems: while Germany, France and Spain (just to mention the systems conventionally ascribed to the same 'legal family' as Italy, that is, the Civil Law 'family') have moved toward a model of adjudication centred on the enhanced powers of the court with the view to pursuing efficiency and delay reduction in the administration of justice, Italy has followed a different path. This path is exemplified by a special procedure originally devised for commercial cases, but later provided as a possible alternative to the ordinary proceeding: according to this special procedure – fortunately repealed in 2009, as mentioned above[24] – the court became involved in a case only at a late stage, after the parties had defined by themselves (namely, by exchanging written pleadings) the factual and legal issues they wanted the court to decide. In other words, the preparatory stage of the proceeding was completely privatised, and the court had no business at all in interacting with the parties in a joint effort to pin down the issues in dispute so as to shape the *thema decidendi*.

One possible explanation for the Italian 'splendid isolation' lies in a cultural misunderstanding: often, judicial control of the procedure is mistakenly considered as the expression of an authoritarian and inquisitorial model of adjudication. It is not possible here to explain how this misunderstanding contributed to the emergence of a school of thought supporting a return to the liberal doctrine in its most classical version, that is, the version according to which the parties are the sole masters of procedure. Efficiency in adjudication is not important – it is argued – when the parties' rights are at stake; the parties' freedom cannot be constrained since that would

[24] See above, Sect. 2.

be at odds with the constitutional guarantee of due process. Management is a concept suitable for business-related matters, but not for the administration of justice. The list of arguments advanced to deny the need for shifting the balance of power in adjudication from the parties to the judge could go on, but it does not seem useful to elaborate any further on a theory stemming from a wrong assumption: the experience of the many legal systems where judicial case management has been adopted shows how false it is to state that more judicial control over the development of a case necessarily means to deprive the parties of their rights and responsibilities to present their claims and prosecute them.

Italian lawyers are among the main supporters of a strictly adversarial procedure; in fact, when an attempt was made (in 1990) to modify the procedure so as to have a sort of pre-trial phase devoted to the preparation of the case under the court's control and with strict time-limits for the exchange of pleadings between the parties, lawyers took action and lobbied successfully in favour of a counter-reform that allowed them to regain the monopoly over the development of the case. Judges, too, do not seem very keen on accepting a more active role. One example may clarify the point. One of the rules implementing the Code of Civil Procedure (Article 81 *bis, Disposizioni di attuazione del Codice di procedura civile*) could be invoked as a tool of judicial case management: it is the rule allowing the court to set a tentative timetable, not for the whole adjudication, but just for the taking of evidence. This rule entered into force in 2009, but – as of June 2012 – the case law consists of a handful of rulings only, one of which states that, first, the court has no duty at all to set the timetable, since the power to rule on the time frame of the hearings necessary for the taking of evidence is a discretionary one, and, second, that the court may consider whether to exercise such a power only if its caseload is manageable and suitable for a general planning affecting the entire docket.[25] Interestingly enough, a recent addition to the rule provides that the court, the attorneys for the parties or the experts, when they fail to comply with the timetable set for the case, may incur disciplinary sanctions[26]: too bad the rule does not elaborate on this point, leaving the questions of who should report the alleged disciplinary violation and to whom it should be reported unanswered. Faced with rules like the one just described, one could be forgiven for thinking that in Italy the issue of setting a reliable time frame for the development of adjudication, in order to expedite it, is not taken very seriously.

12.2.2 The Summary Proceeding

The summary proceeding (*procedimento sommario di cognizione*) is one of the newest additions to the Code, and it is devised as an alternative to the ordinary

[25]Trib. Varese, 15 April 2010, *Il Foro italiano*, 2011, I, p. 1262, commentary by U. Giacomelli, pp. 1262–1270.

[26]On the latest version of the rule, see Ghirga 2012.

procedure[27]: if it is chosen by the claimant, the defendant – at least in principle – has no means to oppose this choice, since only the court can decide that the case is not suitable for summary disposition.

From the point of view of judicial case management, the summary procedure is very interesting: according to the Code, the court, 'taking into account the introductory pleadings and having heard the parties, can decide how the case will develop dispensing with any formalities that are not essential to safeguard the due process rights of the parties' (Article 702 *ter* (5)). Therefore, the court can adapt the procedure to the specific needs of the case at stake, adopting a flexible approach as opposed to the rigid procedural steps governing, for instance, the path of ordinary proceedings.

Lawmakers had great expectations for the summary proceeding, which was presented as the key to a true Copernican revolution in Italian civil justice, based – for the first time in the history of Italian civil procedure – on the principle of proportionality, with a view to establishing a flexible and deformalised procedure for 'simple' cases, such as those that can be decided on documentary evidence alone. Needless to say, the hope was to speed up the disposition of cases.

The summary proceeding went into effect in the second half of 2009. After a little less than 3 years of operation, the results are not promising. According to recent findings, only a very small percentage (i.e. 1.29 %) of civil and commercial cases commenced in the relevant time frame (summer 2009 – spring 2011) has been brought to court choosing the summary proceeding instead of the ordinary one.[28]

The 'flop' of the summary proceeding can be attributed to many factors. Just to mention a few, the summary proceeding can be chosen only by the claimant and never by the defendant who – on the contrary – could have an interest in a swift disposition of the case if the claimant had filed a clearly groundless or vexatious claim in the form of an ordinary procedure. By the same token, it must be underscored that the court has no power to order the conversion of an ordinary proceeding into a summary one, not even when the introductory pleadings show that the case is suitable for being processed in a simplified way: only the reverse is possible, by an order the court issues either *ex officio* or upon a motion by the defendant. The issue of time-limits is addressed by the Code only partially, but nowhere can anyone find a rule entrusting the judge with the power of expediting the procedure by giving time-limits to the parties and imposing sanctions on them if they fail to observe the time-limits. Finally, the potential time savings brought about by the summary proceeding can be easily nullified by the unlimited possibilities of appealing against the judgment, with the further 'aggravating circumstance' that on appeal new evidence can be offered by the parties and examined by the appellate court.

[27] See Arts. 702 *bis*-702 *quater* of the Code; Pacilli 2011, Basilico 2010, Bina 2010.

[28] See Gerardo and Mutarelli 2011, available at: http://www.judicium.it (last consulted in June 2013).

12.2.3 The Proceeding in Labour Cases

This proceeding was introduced in the early 1970s, in a particular season of Italian politics and society. It is a model of adjudication in which the principles of orality, concentration and immediacy are fully enforced. According to the Code, the procedure revolves around a single hearing in which the preparatory stage, the proof-taking stage, the closing arguments of the parties and the rendering of the judgment develop along a continuum. The hearing can be adjourned only under special circumstances, and it must be resumed within a short time-limit. The court plays a very active role since it is entrusted with a variety of powers that can be exercised *ex officio*: for instance, the court can ask the parties to appear in person and provide clarifications as to the facts of the case, raise questions of law the parties have failed to raise and call for evidence the parties have not brought before the court (Articles 420–421 of the Code).[29] Probably, such powers may not be labelled as 'case management powers' in a strict sense; in any event, they allow the court to have firm control over the development of the proceeding, forcing the parties 'to do their homework' carefully in their introductory pleadings since once the hearing begins and the court takes charge new submissions of fact and new evidence cannot be presented.

All in all, the procedure described above is clearly more efficient than the ordinary procedure, and one may wonder why the former did not displace the latter. Actually, the original intent of lawmakers was to use labour disputes as a 'test bench' for a new model of adjudication; had it proved to be successful, it would have been generalised, replacing the ordinary procedure. Unfortunately, after a few years of swift and effective disposition of labour cases, reality began to bite again: the single hearing envisaged by the Code multiplied into several hearings spaced out over a long period of time, and courts lost their ability (or maybe their willingness) to keep a tight rein on the progress of cases. Many factors contributed, over the years, to the progressive failure of a procedural model theoretically very efficient: just to mention one, the constant growth of labour disputes and, most of all, of another kind of disputes submitted to the same procedure, that is, the disputes related to welfare benefits. In any event, when it was time to reform the ordinary procedure those who were opposing the alternative model, claiming that it was too inquisitorial, had an easy time showing that it had not been successful.

12.3 Present and Future of Italian Civil Justice

In 2011, Italy celebrated her sesquicentennial as a unified country. This anniversary was the occasion for many studies on the changes Italy has undergone in these 150 years of her history. In a report commissioned by the Bank of Italy on the evolution of the administrative system, several pages are devoted to the case of civil

[29] See Arts. 420–421 of the Code; Tarzia 2008.

justice.[30] The reporters, after having remarked that in the first decades following the unification of the country civil justice was relatively efficient, state that the situation began to deteriorate progressively, most of all after World War II. 'It is difficult to identify a single source of structural breakdown. As for the administrative system, some weaknesses were present since the beginning (the high number of lawyers, an excessively formal procedure). Never corrected, they produced greater inefficiencies, with an increasing gap between North and South'.[31] This is a correct picture of the Italian justice system today; both civil and criminal justice are in crisis, but it is in the field of civil justice that the problems are most serious, most of all in times of economic emergency. The blame game has reached the level of a national sport, and the author of this report neither feels inclined to take part in it nor is able to suggest any 'magic potions' that might work wonders and reverse the fate of Italian civil justice.

Italy is the holder of some international records no country would envy. According to the statistics prepared by CEPEJ,[32] Italy has the highest number of incoming civil cases in Europe. The data collected by the Ministry of Justice show that on 30 June 2011 the total number of pending cases amounted to 5,429,148, that is, 2.4 % less than in 2010: not a significant improvement, considering that an 8.7 % reduction in the number of incoming cases has been nullified by a 7 % decrease in the number of cases disposed of.

As far as the average length of civil cases is concerned, the data are equally disheartening[33]: 357 days before the justices of the peace (an increase of 11.3 % compared to 2010); 470 days before the *Tribunali* (an increase of 3.1 % compared to 2010); and 1,032 days before the courts of appeals (an increase of 9 % compared to 2010). These figures speak for themselves, and it does not seem necessary to elaborate on them to better describe the present situation. Neither does it appear useful to list the many Interim Resolutions issued by the Committee of Ministers of the Council of Europe urging Italy to address the problem of her justice system, or to recall, for instance, that in 2011, out of 2,166 judgments rendered by the European Court of Human Rights concerning Italy, 1,651 found a violation of the right to a fair trial within a reasonable time, as provided for by Article 6(1) of the European Convention on Human Rights. In this regard, it is worth emphasising that the cost for the public budget of the damages awarded by the Court as just satisfaction jumped from 6 million Euros in 2010 to 8.5 million Euros in 2011. According to the Bank of Italy, the cost of the inefficiency of the justice system is equal to 1 % of GNP.[34]

---

[30] Bianco and Napolitano 2011, available at: http://www.bancaditalia.it/studiricerche/convegni/atti/storico-internazionale/interventi/qse-24.pdf (last consulted in June 2013).

[31] *Ibidem*, p. 28.

[32] European Commission for the Efficiency of Justice (CEPEJ) 2010.

[33] The data offered in the text come from the report on the state of the administration of justice presented by the Chief Justice of the Italian Supreme Court at the beginning of each year: see, Lupo 2012, available at: http://www.cortedicassazione.it, pp. 49–68 (last consulted in June 2013).

[34] See Antonucci et al. 2011, available at: http://www.dip-statistica.uniba.it/html/annali/2011/annali_2011/15-ACDTv5.pdf (last consulted in June 2013).

The advent of a 'technical government' on 16 November 2011 has brought about a new wave of reforms, some concerning the justice system directly, others affecting it only tangentially. Among the latter, it is worth mentioning the statute aimed at liberalising the market for professional services offered by the members of all regulated professions. By virtue of this statute, the traditional payment scheme provided for lawyers (and for other professionals as well), comprehensive mandatory tariffs and fees for service, has been repealed: lawyers and clients must reach an agreement as to the fees, based upon an estimate of the legal expenses that are foreseeable according to the complexity of the case.[35] Since the statute went into force only toward the end of March 2012 (and other measures affecting attorneys' fees were adopted between July and August 2012), any comments on the ability of the latest reforms to inject competition into the market for legal services is premature. Needless to say, the Italian Bar Association has not welcomed the reforms, which had already been attempted in the past with mixed results.[36] In any event, even though it is well known that Italy has too many lawyers (approximately 230,000), to expect that the liberalisation of legal fees will solve the problems of a rapidly burgeoning legal profession (with an average of 15,000 'new entries' per year) sounds like shutting the stable door after the horse has bolted.

At present, new bills for further reforms of civil justice are progressing through Parliament. Reading these bills – which span from the establishment of new 'Family Courts' to the reform of the appellate procedure with a view to developing new grounds for having the appeal declared inadmissible when it has no reasonable prospects of success[37] – one cannot help thinking that a coherent and comprehensive vision is missing: therefore, a good measure of scepticism as to the success of the new forthcoming reforms seems in order.

[35]For a comprehensive overview of the rules affecting the legal profession that are part of the statute popularly known as the 'Grow-Italy' statute, see Colaviti et al. 2012, available at: http://www.consiglionazionaleforense.it/site/home/pubblicazioni/studi-e-ricerche/articolo7359.html (last consulted in June 2013).

[36]See Buonanno and Galizzi 2012, available at: http://www.carloalberto.org/research/working-papers/no.250.pdf (last consulted in June 2013); Silvestri 2011.

[37]It must be emphasized that, as of September 2012, the appellate procedure has been reformed according to the guidelines of the bill mentioned in the text above. The situation is paradoxical: appeals (in the proper sense, that is, the ones brought against judgments issued by courts of first instance) are no longer 'as of right', since they can be rejected *in limine* if the appellate court deems that they are devoid of reasonable prospects of success, while final appeals (that is, the ones brought to the Italian Supreme Court) are virtually 'as of right', because of a constitutional rule reading 'Appeals to the Court of Cassation in cases of violations of the law are always allowed against judgments and against measures affecting personal freedom pronounced by ordinary and special courts' (Art. 111(7) of the Italian Constitution). Needless to say, the goal of relieving the appellate courts of their heavy caseloads has been pursued at the expense of an already overburdened Supreme Court, according to a logic that defies common sense. On the reform of appellate procedure, see Caponi 2012a, available at: http://www.judicium.it (last consulted in September 2013); Caponi 2012b, available at: http://www.judicium.it (last consulted in September 2013).

12.4 Mediation

In Italy, the propensity to litigate has always been high: cultural and historical reasons have made Italians a people averse to settling their disputes through conciliation and mediation. When the gospel of ADR reached European shores, the Italian legal system embraced it, too, establishing out-of-court conciliation schemes with sector-specific statutes. Although such schemes did not prove to be very successful, it was clear from the beginning that the lawmakers had strong confidence in the virtues of ADR as the key to the resolution of the perennial problem of reducing the courts' caseloads.

Clear and convincing evidence of this belief can be found in the statute by which Italy implemented Directive 2008/52/EC of the European Parliament and of the Council on certain aspects of mediation in civil and commercial matters.[38] Originally, the statute made mediation mandatory in approximately 80 % of civil and commercial disputes, covering matters from real estate to actions for damages caused by traffic collisions, from medical negligence to defamation and from insurance contracts to transactions involving banks and financial instruments. The mandatory character of mediation meant that no lawsuits could be initiated unless the parties had unsuccessfully attempted mediation. As will be explained later on, things changed dramatically on 24 October 2012, when the Constitutional Court announced that it had found mandatory mediation in violation of the Italian Constitution by a judgment that at present (5 November 2012) has not been made public.

The attempt at (mandatory) mediation was supposed to take place before one of the mediation centres accredited by the Ministry of Justice. The procedure was informal, and developed according to the bylaws of the mediation centre; the parties could appear in person before the mediator, since legal representation was not necessary.

The main role played by the mediator was to help the parties reach an agreement: therefore, Italian mediation was, in principle, a facilitative mediation. The parties could ask the mediator to advance a proposal for the settlement of the dispute, but they were free to disregard it, even though that brought about the risk of incurring financial penalties if later on the court issued a judgment that replicated the mediator's proposal. Other financial penalties could be applied to the party who failed to appear before the mediator without good cause. Together with financial incentives, financial penalties aimed at promoting mediation.

The maximum length of the mediation procedure was 4 months. The agreement reached by the parties could be made enforceable by the court, unless it was contrary to public policy or imperative norms.

Mediation costs were modest, and were determined based upon the amount in controversy arranged into 'brackets', according to a roll issued by the Ministry of Justice.

Leaving aside the matters in which it was mandatory, in any event mediation could and still can be chosen voluntarily by the parties. It is worth mentioning that

[38] *Decreto legislativo* No. 28 of 4 March 2010. For a comment on the statute, see Colombo 2012, pp. 71–80. See also De Palo and Keller 2012: it is proper to inform the reader that Mr. De Palo is the CEO of the largest mediation centre in Italy, with franchisees in most major Italian cities.

lawyers have the duty to inform their clients about mediation and its potential advantages. Mediation can also be recommended by the court (even at the appellate level) when the nature of the dispute, the development of the case and the parties' behaviour make it advisable to attempt an out-of-court settlement: apparently, failure to comply with such recommendation does not reflect negatively on the parties.

According to the statistics offered by the Ministry of Justice,[39] between March 2011 (when the statute on mandatory mediation went into force) and March 2012, 91,690 mediations had begun: out of this global number, 77.2 % were mandatory mediations, 19.7 % voluntary mediations, and only 2.7 % were mediations recommended by the court. Parties were assisted by their lawyers in 85 % of mediations. Even though both parties appeared before the mediator in the majority of cases (65 %), the percentage of agreements reached was only 52 %. As far as the duration of the mediation procedure is concerned, the average was 61 days when the parties reached an agreement, and 75 days when the attempt was unsuccessful.

The data mentioned above are difficult to interpret, and the author, who is not enthusiastic about mediation and ADR,[40] most of all when they signal the defeat of a public justice unable to cure its own defects, prefers to limit herself to some remarks on the current situation. The introduction of mandatory mediation has been strongly opposed by lawyers, since – as mentioned above – parties can appear in front of mediators even without legal representation, and lawyers were afraid that this would undermine their role and reduce their incomes. But the statistics show that even in mediation parties still rely on legal counsel, which reveals that, in the general perception, mediation is not a problem-solving exercise the parties can conduct by themselves, but an adversarial contest, in which they think it wiser to appear with their own champions.

As mentioned above, the Constitutional Court has repealed the rules making mediation mandatory: this was announced on the Court's website, but the judgment by which the rules have been declared unconstitutional has not been published yet, neither has it been deposited, which technically means that the judgment does not even exist from a legal point of view. Since scholars of constitutional law argue over the moment from which judgments issued by the Constitutional Court become legally binding insofar as they repeal rules deemed at odds with the Constitution, the case at issue has already given rise to an interesting debate: the question at the core of this debate is whether a simple announcement issued by the Court is effective immediately.[41] It is easy to understand that the issue is bound to have important reverberations on pending cases, for instance cases in which the mediation procedure has already reached an advanced stage or the mediator has submitted to the parties a proposal for the settlement of their dispute.

To make the situation even more confused, another issue has come up. In its announcement, the Constitutional Court stated that mandatory mediation was found

[39] Statistics are available at: http://www.governo.it/backoffice/allegati/68027-7686.pdf (last consulted in June 2013).

[40] See Silvestri 2008.

[41] See extensively Cosmelli 2012, available at http://www.giurcost.org/studi/Cosmelli.pdf (last consulted in November 2013).

unconstitutional due to a violation that occurred in the legislative process by which the statute on mediation was passed. Therefore, it could be possible for the Parliament to rectify the mistake so as to 'cure' the defect that made the statute unconstitutional. Rumour has it that legislators will follow this path, even though it is impossible to predict how successful such an attempt to prevent the 'house of cards' of mandatory mediation from collapsing will be.

Whether or not one is inclined to rejoice in the restoration of the right of free access to the courts, it must be emphasised that the approach followed by the Constitutional Court is formally correct but substantially unfair. The case of mandatory mediation had been pending before the Court since April 2011: obviously, the issue of mandatory mediation was the typical 'hot potato' the Court was very reluctant to handle, fearing that a judgment repealing the statute insofar as it makes mediation mandatory would bring about an institutional crisis between the Court itself and the government which is staking a lot on the virtues of mediation as a means to reduce the backlogs of the courts. Now the Court has made up its mind, and probably the institutional crisis will be averted because the Court itself opened the door to a possible 'rehabilitation' of mandatory mediation. But one cannot help thinking that the Court could have reached the same result in a much shorter time.

On the issue of the mandatory character of Italian mediation several requests for a preliminary ruling are also pending before the European Court of Justice. In a case decided in 2010 and concerning an Italian statute making out-of-court conciliation mandatory in disputes between consumers and telephone service providers,[42] the Court stated that mandatory conciliation and mediation are consistent with European legislation insofar as they do not make it too difficult for the parties (time-wise as well as cost-wise) to exercise their right of access to the courts. Will the Court reaffirm this principle as regards the Italian statute making mediation mandatory across-the-board, and not simply for a sector-specific type of dispute? It is difficult to make any predictions.

Whether mediation (mandatory, voluntary or suggested by the court) will be able to reduce the caseloads of Italian courts is still an open question, and no answer can be reasonably expected in the short run. All the same, it seems quite naïve to believe that if people are compelled to participate in a mediation process, then that will increase by itself the chances of persuading them to settle their disputes: absent a real 'ADR culture', being forced to appear in front of a mediator will always be perceived, at best, as a waste of time and money. That seems to be the concept which surfaced in a remark made by the European Parliament in the Resolution issued in September 2011 on the implementation of Directive 2008/52/EC: commenting on the Italian situation and the choice made by the Italian legislature in favour of mandatory mediation, the Resolution reads that even though the goal of relieving the congestion of Italian courts is a legitimate one, 'nevertheless … mediation

[42] Joined Cases C-317/08, C-317/08, C-319/08 and C-320/08, *Rosalba Alassini v. Telecom Italia SpA, Filomena Califano v. Wind SpA, Lucia Anna Giorgia Iacono v. Telecom Italia SpA and Multiservice Srl v. Telecom Italia SpA* [2010]. For a commentary on the judgment, see Davies and Szyszczak 2010.

should be promoted as a viable, low-cost and quicker alternative form of justice rather than a compulsory aspect of the judicial procedure'.[43]

It has been underscored correctly that, at least for now, the statute on mediation has had only a clear result (and not necessarily a good result, one might add), that is, the birth of both a new business and a new profession.[44] As of November 2012, the records kept by the Ministry of Justice show that there are 948 accredited mediation centres and 365 institutions licensed to train professional mediators. In times of crisis, many legal professionals, unable to establish lucrative practices, have joined the mediation bandwagon in the hope of making a living by establishing themselves as mediators: unfortunately, at least for the time being, this attitude is just wishful thinking, since the supply of mediators already seems to exceed the demand.

12.5 Conclusions

The prospects for Italian civil and commercial justice do not look promising: short of a miracle, courts will remain overcrowded, and cases will drag on for many years as bad replicas of the infamous Jarndyce case depicted by Charles Dickens in his masterpiece *Bleak House*, and Italians will keep perfecting one of their favourite arts, that is, the art of complaining. Maybe this is too negative an outlook on Italy and her troubled justice system, but if the popular saying 'after you hit bottom, you have nowhere to go but up' holds true, this author, feeling that the bottom is not far away, can hope that the ascent will begin soon.

Appendix: Facts and Figures Relevant for the Powers of the Judge and the Parties in Civil Litigation

Italy

Year of Reference: 2011

Part I: General Data on the National Civil Justice System

1. Inhabitants, GDP and average gross annual salary

Number of inhabitants	60,813,326
Per capita GDP (gross domestic product) in euro or RMB	€22,964.557
Average gross annual salary in euro or RMB	€21,933.00

[43] See *European Parliament resolution of 13 September 2011 on the implementation of the directive on mediation in the Member States, its impact on mediation and its take-up by the courts*, available at: http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2011-0361+0+DOC+XML+V0//EN, at para. 10 (last consulted in June 2013).

[44] Rubino-Sammartano 2011, p. 491.

2. Total annual budget allocated to all courts €7,273,340,000

3. Does the budget of the courts include the following items?

	Yes	Amount (euro or RMB)
Annual public budget allocated to salaries	☐	N/A
Annual public budget allocated to computerisation	☐	N/A
Annual public budget allocated to court buildings	X	€128,354,000
Annual public budget allocated to training and education	☐	N/A
Annual public budget allocated to legal aid	☐	N/A
Other: Juvenile Justice	X	€126,586,000
Management of detention centers	☐	N/A

4. Is the budget allocated to the public prosecution included in the court budget?

☐ Yes
☒ No

(a) If yes, give the amount of the annual public budget allocated to the prosecution services

Legal Aid (Access to Justice)

5. Annual number of legal aid cases and annual public budget allocated to legal aid

	Number	Amount
Civil cases	N/A	N/A
Other than civil cases	N/A	N/A
Total of legal aid cases	N/A	N/A

Organisation of the court system and the public prosecution

6. Judges, non-judge staff and *Rechtspfleger*

	Total number	Sitting in civil cases
Professional judges (full time equivalent and permanent posts)	8,697	N/A
Professional judges sitting in courts on an occasional basis and paid as such	N/A	N/A
Non-professional judges (including lay-judges) who are not remunerated but who can possibly receive a defrayal of costs	7,380	N/A
Non-judge staff working in the courts (full time equivalent and permanent posts)	N/A	N/A
Rechtspfleger	N/A	N/A

The performance and workload of the courts

7. **Total number of civil cases in the courts** (litigious and non-litigious): 5,429,148 (30-06-2011)

8. **Litigious civil cases and administrative law cases in the courts**

		Litigious civil cases in general	Civil cases by category (e.g. small claims, family, etc.)		
Total number of first-instance cases	Pending cases by 1 January of the year of reference	N/A	N/A	N/A	N/A
	Pending cases by 31 December of the year of reference	N/A	N/A	N/A	N/A
	Incoming cases	N/A	N/A	N/A	N/A
	Decisions on the merits	N/A	N/A	N/A	N/A
Average length of first-instance proceedings		470	N/A	N/A	N/A

References

Antonucci L, Crocetta C, d'Ovidio FD, Toma E (2011) Valutazione dell'efficienza amministrativa del sistema giudiziario tramite Data Envelopment Analysis. Available at: http://www.dip-statistica.uniba.it/html/annali/2011/annali_2011/15-ACDTv5.pdf

Basilico G (2010) Il procedimento sommario di cognizione. Il giusto processo civile, pp 737–770

Bianco M, Napolitano G (2011) The Italian Administrative System since 1861 (October 2011). Available at: http://www.bancaditalia.it/studiricerche/convegni/atti/storico-internazionale/interventi/qse-24.pdf

Bina M (2010) Il procedimento sommario di cognizione. Rivista di diritto processuale, pp 117–133

Buonanno P, Galizzi MM (2012) Advocatus, et non Latro? Testing the Supplier-Induced Demand Hypothesis for the Italian Courts of Justice (12 April 2012). Available at: http://www.carloalberto.org/research/working-papers/no.250.pdf

Calamandrei P (1976) La Cassazione civile. In: Cappelletti M (ed) Calamandrei, P., Opere giuridiche, VI. Morano Editore, Napoli, pp 629–691

Caponi R (2012a) Contro il nuovo filtro in appello e per un filtro in cassazione nel processo civile. Available at: http://www.judicium.it

Caponi R (2012b) La riforma dell'appello civile dopo la svolta nelle commissioni parlamentari. Available at: http://www.judicium.it

Cipriani F (1997) Gli avvocati italiani e l' "esperienza fallita" (il codice processuale civile 1942). In: Cipriani F (ed) Ideologie e modelli del processo civile. ESI-Edizioni Scientifiche Italiane, Napoli, pp 103–120

Cipriani F (2003a) Il processo civile tra vecchie ideologie e nuovi slogan. Rivista di diritto processuale, pp 455–466

Cipriani F (2003b) I problemi del processo di cognizione tra passato e presente. Rivista di diritto civile I:39–70

Colaviti G, Cremonini R, Izzo S, Schillaci A (2012) Le professioni regolamentate nel decreto "Cresci-Italia". Le osservazioni dell'Ufficio Studi del Consiglio Nazionale Forense (22 marzo 2012).

Available at: http://www.consiglionazionaleforense.it/site/home/pubblicazioni/studi-e-ricerche/articolo7359.html
Colombo GF (2012) Alternative Dispute Resolution (ADR) in Italy: European inspiration and national problems. Ritsumeikan Law Rev 29:71–80
Consolo C (2011) Prime osservazioni introduttive sul d. lgs. n. 150/2011 di riordino (e relativa "semplificazione") dei riti settoriali. Il Corriere giuridico, pp 1485–1491
Cosmelli G (2012) Effetti immediati di una sentenza pubblicizzata ma non pubblicata, ovvero l'incostituzionalità della c.d. mediazione civile obbligatoria (Nota minima … al comunicato stampa della Corte costituzionale del 24 ottobre 2012). Available at: http://www.giurcost.org/studi/Cosmelli.pdf
Dalfino D (2010) Characteristics of procedure – ordinary proceedings of first instance. In: De Cristofaro M, Trocker N (eds) Civil justice in Italy. Jigakusha Publishing Corp, Tokyo, pp 66–90
Davies J, Szyszczak E (2010) ADR: effective protection of consumer rights? Eur Law Rev 345:695–706
De Palo G, Keller LR (2012) The Italian mediation explosion: lessons in Realpolitik. Negotiation J 28:181–199
European Commission for the Efficiency of Justice (CEPEJ) (2010) European judicial systems edition 2010 (data 2008): efficiency and quality of justice. Council of Europe Publishing, Strasbourg
Gerardo M, Mutarelli A (2011) Procedimento sommario di cognizione *ex* art. 702 *bis* c.p.c.: primo bilancio operativo. Available at: http://www.judicium.it
Ghirga MF (2012) Le novità sul calendario del processo: le sanzioni poreviste per il suo mancato rispetto. Rivista di diritto processuale, pp 166–187
Giorgiantonio C (2009) Civil procedure reform in Italy: concentration principle, adversarial system or case management. Legal Research Papers of the Bank of Italy, No 66 (September 2009). Available at: http://www.bancaditalia.it/pubblicazioni/quarigi/qrg66/qrg_66/volume_66.pdf
Lupo E (2012) Relazione sull'amministrazione della giustizia nell'anno 2011 (Roma, 26 gennaio 2012). Available at: http://www.cortedicassazione.it, pp 49–68
Pacilli M (2011) Brevi note sul nuovo procedimento sommario di cognizione. Rivista trimestrale di diritto e procedura civile, pp 929–939
Picardi N (2006) Le Code de Procédure civile français de 1806 et le monopole étatique de la juridiction. In: Cadiet L, Canivet G (eds) De la commémoration d'un code à l'autre: 200 ans de procédure civile en France. Litec, Paris, pp 187–196
Rubino-Sammartano M (2011) The three mediations (Light and shadow of the Italian example). J Int Arbitr 28:485–491
Silvestri E (2008) ADR Italian style: Panacea or Anathema? In: Uzelac A, Van Rhee CH (eds) Civil justice between efficiency and quality: from Ius commune to the CEPEJ. Intersentia, Antwerp/Oxford/Portland, pp 249–254
Silvestri E (2011) The legal profession in Italy: regulation v. competition? In: Uzelac A, Van Rhee CH (eds) The landscape of the legal professions in Europe and the USA: continuity and change. Intersentia, Cambridge/Antwerp/Portland, pp 145–159
Taruffo M (1980) La giustizia civile in Italia dal '700 a oggi. Il Mulino, Bologna
Tarzia G (2008) Manuale del processo del lavoro, 5th edn. Giuffrè, Milano
Van Rhee CH (2005) Introduction. In: Van Rhee CH (ed) European traditions in civil procedure. Intersentia, Antwerp/Oxford, pp 3–23
Verde G (2002) Le ideologie del processo in un recente saggio. Rivista di diritto processuale, pp 676–687

Part VI
The Netherlands

Chapter 13
The Netherlands: A No-Nonsense Approach to Civil Procedure Reform

C.H. (Remco) van Rhee and Remme Verkerk

13.1 Origins

The Dutch Code of Civil Procedure was introduced in 1838. It replaced the 1806 French *Code de procédure civile* which, due to the French occupation of the Netherlands, had become the law of the land in 1811 and had remained in force after the country's liberation in 1813. French procedural law would reign supreme in the Netherlands throughout the nineteenth century since the 1838 Dutch Code was, to a large extent, a translation of the French Code. In addition, some elements had been adopted from the 1819 procedural Code of Geneva.[1] This Code was also based on the French Code, but the general opinion in several European countries in the nineteenth century was that the Geneva Code contained important improvements when compared with its French counterpart.[2] The most important improvement that was adopted by the Dutch Code from the Geneva Code was its Article 19, which prescribed that the judge could order the parties to appear in person before him in order to attempt a settlement of the case during the proceedings. The Geneva Code (as well as the Dutch Code) had introduced this rule when it had abolished compulsory preliminary conciliation before the *juge de paix* which could be found in the French Code.

Shortly after its introduction in 1838, the new Dutch Code became the object of criticism. This is not surprising, because already during the parliamentary debates

---

Section 13.8 on mediation was written by R. Jagtenberg.

[1] Bellot 1877 (first edition 1821).

[2] See Van Rhee 2005, pp. 9–10. See also the contribution of A.W. Jongbloed (Jongbloed 2005) in the same volume, which contains an overview of developments in Dutch civil procedural law from 1838 until 2005.

C.H. (Remco) van Rhee (✉)
Maastricht University, Maastricht, Netherlands
e-mail: remco.vanrhee@maastrichtuniversity.nl

R. Verkerk
Houthoff Buruma, Rotterdam, Netherlands
e-mail: r.verkerk@houthoff.com

C.H. (Remco) van Rhee and Fu Yulin (eds.), *Civil Litigation in China and Europe*, Ius Gentium: Comparative Perspectives on Law and Justice 31,
DOI 10.1007/978-94-007-7666-1_13,

on the Code it had been pointed out that the source of many of its provisions, i.e. the French 1806 Code, was prone to defects. The lack of immediacy in civil proceedings, for example, became a matter of complaint, as well as the fact that the ordinary procedure of the Code left the initiative as regards the progress of the case to a large extent to the parties; the judge did not play a very pronounced role in the conduct of the lawsuit. However, even though complaints were voiced, it was not until the end of the nineteenth century that important changes were introduced in the Dutch Code. This occurred as a result of the so-called *Lex Hartogh* of 7 July 1896.[3] When preparing the amendments to the Code in the *Lex Hartogh*, two options were considered. The first option was to increase the judge's powers as regards the conduct of the lawsuit, that is, to phrase it in modern procedural language, to strengthen his case management powers. The second option was to take away those elements of the existing law of procedure which gave the parties the opportunity to delay the action without good reason for doing so. In the end the second option was chosen. One example of the important changes which followed was that after the statement of rejoinder further written statements of case were in principle no longer allowed. The new Act also enabled the court to declare in its decision that an appeal against an interlocutory judgment could only be brought at the same time as an appeal against the final judgment.

The Dutch Code of Civil Procedure was amended many times during the twentieth century.[4] However, fundamental reforms had to wait until 1 January 2002.

13.2 Present Situation: Outline of an Ordinary Civil Action at First Instance and the Division of Powers Between the Judge and the Parties

An ordinary adversarial first instance case in civil matters is initiated by a writ of summons, served by a bailiff, without the intervention of the court (we do not discuss the procedure commenced by petition here nor other ways of bringing an action). The writ of summons is, at the same time, the claimant's written statement of claim. The statement of claim contains information on the parties to the action, the claim and its grounds, and also specifies the defence of the opposing party – at least as far as it has become known to the claimant – and indicates the means of evidence available to the claimant in support of his allegations.[5] After the case has been entered in the court calendar (docket), the defendant has to file his statement of defence at the earliest date available in this calendar, or ask the court for a postponement to prepare his statement of defence. Apart from the actual defence, the statement of defence needs to mention the available means of evidence in support of the

[3] Hartogh and Cosman 1897. See also Jongbloed 2005, pp. 69–95.

[4] Van Nispen 1993.

[5] Art. 111 Dutch Code of Civil Procedure.

defendant's case.[6] After submission of the statement of defence, the judge orders a personal appearance of the parties and/or their respective advocates for an oral hearing unless he decides that this is of no use in the particular case at hand.[7] The judge takes the decision whether or not a personal appearance should be ordered within a period of 2 weeks after the statement of defence has been submitted. When this appearance is ordered, most Dutch courts schedule ninety minutes for the hearing.[8] This means that judges take a fair amount of time to discuss the case with the parties.

At the hearing the judge will obtain further information by putting questions to the parties regarding their factual and legal statements.[9] Subsequently, the judge will in most cases encourage the parties to reach a settlement.[10] Parties may submit evidence and the judge may ask for additional documents prior to the hearing. If the case cannot be settled, the judge will discuss with the parties the further procedural steps that need to be taken. Often, the judge will render a final judgment after the hearing without any further examination of evidence or any other procedural steps. As a result of the fact that judges are inclined to render a final judgment after the hearing, there is an incentive for the parties to be as complete as possible in their written statement of claim and statement of defence.

If the hearing does not lead to a settlement and matters of fact have not been sufficiently clarified, the judge often renders an interim judgment ordering the taking of evidence. The Netherlands has not embraced the notion of a single hearing at which all evidence is presented to the court. In the case of witness examination, for example, it is common that two separate hearings are scheduled. First, one of the parties will present witness evidence (*enquête*). Subsequently, a couple of weeks later, the other party may present (counter) evidence (*contra enquête*).[11] After the examination of evidence, the judge may set a date on which the advocates of both sides hold their oral closing pleas.[12] In the (rare) event that there has been no early personal appearance of the parties, the judge may not refuse a request of either of the parties to give an oral closing plea.

In most first instance cases, a single judge will render a (final) judgment. In complex and important cases, a judgment is often rendered by a panel of three judges. The judgment should be reasoned and address the essential arguments raised by the parties.

There are many variations from the aforementioned outline of a civil lawsuit. Many cases are undefended and disposed of by means of a default judgment.

---

[6] Art. 128 Dutch Code of Civil Procedure.

[7] Arts. 87, 88 and 131 Dutch Code of Civil Procedure.

[8] *Handleiding Regie vanaf de Conclusie van Antwoord*, 2008, para. 16, available at: www.rechtspraak.nl (consulted in March 2013).

[9] Art. 88 Dutch Code of Civil Procedure.

[10] Art. 87 Dutch Code of Civil Procedure.

[11] Art. 168 Dutch Code of Civil Procedure.

[12] Art. 134 Dutch Code of Civil Procedure.

In addition, parties may file motions, such as a motion for the discovery of documents[13] or a motion for the joinder of parties. At times, it is possible for the parties to lodge an appeal against an interim judgment.

13.3 Recent Reforms in Dutch Civil Procedure

In order to understand the procedural and institutional context in which the Dutch judge currently exercises his powers in civil actions, the present section discusses various recent reforms in Dutch civil procedure. It not only concentrates on reforms affecting the powers of the judge and the parties, but deals with other reforms as well, especially those which were introduced to increase the efficiency of civil litigation.[14]

During the last 20 years, the Dutch civil justice system has been subject to considerable reforms. The reforms were triggered by the shortcomings of the system that existed in the early 1990s. At that time, most ordinary civil cases – as Eshuis has it – underwent a 'paper trial': an exchange of written documents between the claimant, the defendant, the judge and possibly an expert, without any public hearing. The pace at which the exchange was set was not controlled vigorously, and the parties would play their cards (i.e. their statements of case) one by one, saving their best arguments and factual statements until late in the procedure. The exchange of the statements of claim, defence, reply and rejoinder usually took half a year or more. Defended cases, including those that would settle at an early stage, would on average take 525 days (median) (mean 700 days). About 10 % of cases would last longer than 4 years, whereas half a % would take more than 10 years.[15]

The reforms of the Dutch civil justice system that were introduced to change this situation not only concerned the powers of the judge and the parties, but dealt with other issues as well, especially those which addressed court structure and court organisation and aimed to increase the efficiency of civil litigation.

13.3.1 The Institutional Setting: The Organisation of the Judiciary

On 1 January 2002, a Reform Act that affected both the judicial organisation and the proceedings at first instance entered into force.[16] This led to an overhaul of the court organisation and the creation of a 'Council for the Judiciary', an independent body aimed at safeguarding the quality of the judicial system. Another significant change

[13] It should be noted that 'discovery' is not used here in an Anglo-American legal meaning.

[14] See extensively Eshuis 2007.

[15] Eshuis 2007, p. 13.

[16] Parliamentary Papers 27,181, 27,182, 26,855, 27,748 and 27,824. See Van Mierlo and Bart 2002.

was that the County Courts (*kantongerechten*) and District Courts (*rechtbanken*) were merged such that there would be only a single court of first instance. The main idea was that larger courts would allow for a more efficient allocation of resources and a greater degree of specialisation. At present, the former County Courts are considered to be the small claims division of the District Courts. In order to combat delays, a separate division, a so-called 'flying brigade' of judges, was temporarily established in order to assist individual courts that had significant backlogs.

In order to rationalise the court system, a further reduction of the number of courts was introduced. The number of District Courts, for example, has been reduced from nineteen to eleven. It is believed that these measures will enhance specialisation within the courts and therefore increase efficiency.[17]

In the meantime, significant changes to the rules on jurisdiction were introduced. Before 1999, the County Courts would handle mostly cases below 5,000 guilders (roughly €2,200). At present, the small claims division of the District Courts handles all cases in which the claim is below €25,000. As a result, a much larger number of cases is now handled by means of fairly informal and more cost- and time-efficient procedures.

The courts' budget almost doubled between 1995 and 2004. The number of people employed by the nation's District Courts increased by roughly fifty % in the same period.[18] Meanwhile, the financing of the courts changed from input-based (i.e. the courts are financed based on the number of incoming cases) to output-based (the courts are financed based on the number of cases disposed),[19] which was thought to serve as an important incentive for increasing efficiency within the courts. The system basically makes use of a table that sets standards for the amount of time that is appropriate for each 'product' that the Judiciary 'produces'. For example, one contested labour case equals 385 'standard minutes' of judge time and 275 'standard minutes' of time for the paralegal staff irrespective of the real time needed. A contested commercial case handled by the civil law section of the District Court should on average consume 940 min of judge time and 760 min of time for the paralegal staff.[20] In the end, this system implies that courts that do not meet these averages are likely to face deficits. The system was introduced between 2002 and 2005. Since 2005, this 'output'-based system of financing the courts has been fully in place.

As elsewhere, the government has promoted the use of alternative methods of dispute resolution. For years programmes have been in place to encourage the use of in- and out-of-court mediation. One recent measure in this regard is that since 1 April 2007 all courts in the Netherlands may indicate to the litigants that mediation

[17] See also in this regard Tromp et al. 2006.

[18] Civil litigation costs the taxpayer €10 per capita in 1995 and €19 per capita in 2004. See Van Erp 2006, Chapter 5.

[19] See Andersson Elffers Felix 2006, available in Dutch at: http://www.rechtspraak.nl/Organisatie/Publicaties-En-Brochures/Documents/5_Bekostiging_doelmatigheid_kwaliteit_rechtspraak.pdf (consulted in March 2013).

[20] These are 2002 figures. See *Official Journal* (Stb.) 2002, 390.

is an option in their case. For low-income groups, legal aid is available in the event they opt for mediation. The possibility of mediation is mentioned as an option at the legal aid bureaus (the so-called 'juridische loketten') where citizens can obtain legal information.

13.3.2 Reform of the Rules of Civil Procedure

As a part of the larger effort to reform the justice system, the rules that govern the civil litigation process were also thoroughly revised. One important change in the rules of civil procedure was the introduction of uniform court rules. Until the year 2000, each of the eleven ordinary courts of first instance had their own local rules that supplemented the Code of Civil Procedure. These rules *inter alia* addressed the time available for the various steps in the procedure and the conditions under which extra time would be allowed for a particular procedural step. The local court rules (and customs) were replaced by a nationwide set of rules. These uniform rules were created by a committee of judges and laid down in so-called *procesreglementen* (procedural regulations). It was hoped that these uniform rules would reduce the time necessary for handling cases in court.

As stated, on 1 January 2002 a Civil Justice Reform Act entered into force that altered the procedural rules that governed the proceedings before the courts of first instance. Most significant was that the Act aimed to curb the number of written statements of case and emphasised the personal appearance of the parties. Before the Reform Act, parties could as a matter of right file two written statements of case each. As mentioned above, it was common in the 1990s that the parties indeed filed these two written statements. Since the 2002 Reform Act, the parties are entitled to file only a single statement of case. Leave is required if parties wish to file additional statements. The law presently prescribes that the judge should in principle schedule a personal appearance of the parties after the defendant has filed his statement of defence. The Reform Act has contributed to an increase in the number of cases in which the court orders a personal appearance of the parties. In the early 1990s, such a hearing was scheduled in only 15 % of defended cases nationwide.[21] Large differences between the District Courts existed.[22] Since the early 1990s, the number of cases in which hearings are scheduled has increased. Data from cases handled by 10 out of the 19 District Courts, between the 1st of May and the 31st of August 2002, show that a personal appearance of the parties was scheduled in 60 % of all defended cases. Differences between the 10 District Courts were fairly large, ranging from 29 % to 100 %.[23] Data from the District Courts of Utrecht and

[21] Groeneveld and Klijn 2002, para. 1.1.

[22] Also see Eshuis 2007, p. 125, on differences between courts in 1994–1996 and 2003. See also Duin et al. 1990, pp. 401–407.

[23] Groeneveld and Klijn 2002, para. 1.1.

's-Hertogenbosch in 2006 and 2007 indicate that in these courts a personal appearance of the parties was scheduled in 90–95 % of all cases.[24]

Other elements of the 2002 Reform Act include:

- The introduction of an explicit duty for the court to prevent undue delay and to take steps to achieve this, either *ex officio* or on the request of a party.[25] The court is empowered to determine which procedural steps should be taken and at what time. As a result, this is not the exclusive domain of the parties anymore.
- The assumption of the legislature that the infringement of procedural rules will only result in sanctions if the interest protected by the infringed norm has actually been harmed.[26]
- A reduction in the number of interlocutory appeals by establishing that such appeals are in most cases only allowed with the explicit consent of the court by which the interlocutory ruling has been given.[27]
- A broadening of the rules on party-driven discovery of documents.[28] Currently, legislation is being proposed to further enable the parties to obtain a judicial order compelling their adversaries to produce documents.[29]

Another important development concerns the possibilities to examine evidence prior to the commencement of the action. Originally, the taking of evidence prior to the commencement of the action only served to avoid loss of information. Article 876 of the 1838 Code of Civil Procedure restricted the possibility to examine witnesses prior to litigation to exceptional cases, for example when the witness was very old or seriously ill.[30] Gradually, however, the possibilities to hear witnesses prior to litigation have been widened. A 1951 Act[31] allowed parties to request an examination of witnesses prior to litigation if this was needed to make informed decisions about settlement or about initiating a procedure. The 1988 Civil Evidence Act further widened the possibilities for the provisional examination of evidence prior to the commencement of the action or during (the early phases of) litigation. This Act also introduced provisions that enabled investigations by a court-appointed expert and a local visit to a scene of the dispute prior to the commencement of the proceedings. In recent case law, the Dutch Court of Cassation further widened the scope of pre-action examination of evidence. It held that judges must in principle

[24] Van der Linden 2008, para. 1.5.

[25] Art. 20(1) Dutch Code of Civil Procedure.

[26] Parliamentary Papers, Lower House (TK) 1999–2000, 26 855, Nos. 3 and 5.

[27] Art. 337 Dutch Code of Civil Procedure.

[28] Art. 843a Dutch Code of Civil Procedure.

[29] See http://www.internetconsultatie.nl/informatieverschaffing (consulted in March 2013). A legislative proposal is currently being debated in Parliament (Parliamentary Papers, Lower House (TK) 2011/2012, No. 33,079).

[30] See, e.g., Court of Cassation, 16 January 1928, W. 11786, *NJ* 1928, 329.

[31] Act of 18 July 1951, *Official Journal* (Stb.), 302.

grant a request for the pre-action examination of evidence.[32] A request may only be denied based on a limited number of grounds.

In order to enable parties to settle their case at an early stage with minimal involvement of the Judiciary, a special procedure (*deelgeschillenprocedure*) has been introduced by the law of 17 December 2009[33] as regards claims for damages as a result of physical injury or death.[34] One or both of the parties in such cases may ask the judge, either before or during the proceedings in court, to decide on a sub-issue that is either directly relevant or related to part of the matter that keeps the parties divided, but only if such a decision may contribute to the settling of their case out of court by way of a settlement agreement (*vaststellingsovereenkomst*).

On 27 July 2005 a Class Settlement Act entered into force. The Act enables the Court of Appeal in Amsterdam, upon a request by a claimant, to declare a negotiated settlement between some (representatives of) claimants applicable to all individuals who suffered a similar harm, except for those who explicitly opted out.[35] The Act is inspired by class actions and class settlements in the United States. It aims to enable the efficient resolution of large numbers of cases in which similar legal and factual issues are involved. The Act has led to the (efficient) resolution of a number of cases. A proposal to amend and at some points expand the Class Settlement Act was not successful.[36]

The rules on court fees have recently been simplified. In addition, (severe) sanctions have been put into place in the event litigants do not pay the fees in due time. Many cases have been dismissed as a result of a failure to pay court fees timely.[37] Currently, a substantial increase in court fees, which was envisaged before the government recently (April 2012) stepped down, has been shelved.[38] The aim was that the total revenues should double in order to make sure that from 2013 the Dutch civil justice system would be paid for by its users. In the explanatory memorandum,[39] the government justified the increases in fees by advancing that litigation should be regarded as the personal responsibility of the parties involved, that this measure fitted well into the government's programme of improving the civil justice system and that higher fees were mandatory given the need for cuts in the state budget. The proposal met fierce resistance. Many, including the Dutch Bar Association,

[32] See, for an overview of this case law, Thoe Schwartzenberg 2011, para. 44. Also see HR 16 December 2011, *LJN* BU3922 (*Cyrte Investments*).

[33] *Official Journal* (Stb.) 2010, 221; in force since 1 July 2010.

[34] Arts. 1019w-1019cc Dutch Code of Civil Procedure.

[35] Van Hooijdonk and Eijsvoogel 2009, pp. 84–87.

[36] Parliamentary Papers, Lower House (TK) 2011–2012, No. 33,126.

[37] Von Schmidt auf Altenstadt 2010, pp. 73–76.

[38] Available in Dutch at: http://www.rijksoverheid.nl/documenten-en-publicaties/regelingen/2011/04/04/wetsvoorstel-invoering-van-kostendekkende-griffierechten.html (consulted in March 2012).

[39] See pp. 1–2; Available in Dutch at: http://www.rijksoverheid.nl/documenten-en-publicaties/regelingen/2011/04/04/memorie-van-toelichting-invoering-van-kostendekkende-griffierechten.html (consulted in March 2013).

the Dutch Council for the Judiciary and the President and Procurator General at the Court of Cassation (*Hoge Raad*),[40] opposed the proposed legislation. Opponents have stressed the positive externalities of civil litigation and expressed fear that higher court fees will prevent litigants from filing their cases in court.

13.4 The Transfer of Case Management Powers from the Parties to the Judge

The 1838 Dutch Code of Civil Procedure provided the judge with only limited case management powers. As was indicated above, one of the few case management powers the judge could exercise had been taken from the Geneva Code of Civil Procedure of 1819, which allowed the judge to order the parties to appear before him to attempt a settlement of the case. For the rest, the parties – especially the so-called 'most diligent party', as the 1806 French Code of Civil Procedure has it – were left the initiative as regards the progress of the case in court. The limited powers of the judge and the far-reaching powers of the parties were completely in line with liberal ideas on the organisation of the state in the nineteenth century; the parties could freely dispose of their private rights and duties outside the court; the same was also true when they brought their case to the attention of the court.[41] Even at the end of the nineteenth century, when a fundamental reform was introduced in Dutch civil procedure in order to speed up litigation (*Lex Hartogh* of 1896, see above), the legislature did not opt for strengthening the powers of the judge to achieve this goal. The reform mainly concerned the elimination of those aspects of the existing procedural system that gave the parties the opportunity to delay the action.

Although afterwards attempts were made to increase the case management powers of the judge – in line with developments abroad, notably in Austria – none of these attempts were successful. A revolutionary draft Code of Civil Procedure of 1920 would have meant a radical change, but it never made it to the statute book.[42]

Radical reforms were only introduced in the early twenty-first century. As described above, a (court-driven) personal appearance of the parties is currently scheduled in most (disputed) cases. Parties are entitled to file fewer written statements than before. At a personal appearance the judge actively obtains information by putting questions to the parties. Judges also promote settlements during that hearing. After the hearing, the judge may render (a summary) judgment. Since the parties do not know whether the judge will close the hearing and issue a judgment after the personal appearance, they both have an interest in providing detailed factual statements and legal arguments in their first written statement of case. After all,

[40] Available in Dutch at: http://www.rechtspraak.nl/Organisatie/Hoge-Raad/OverDeHogeRaad/publicaties/Documents/Griffierechten.pdf (consulted in March 2013).

[41] Verkerk 2005, pp. 281–290.

[42] See Van Rhee 2011, pp. 2031–2051.

they may not have the opportunity to file additional written statements at a later point in time. At the end of the early oral hearing, the judge discusses the further procedural steps to be taken with the parties. His case management powers are again very pronounced in this stage, since it is the judge who ultimately decides on the further course of the action.

The present model of litigation may be qualified as moderately adversarial.[43] The parties play a leading role where they determine whether an action will be brought and what the subject matter of it will be. They may agree to terminate the action before judgment. However, the parties may not withhold information relevant for the action, and, although they determine the subject matter of the action, they have a duty to submit truthfully all relevant facts.[44] The powers of the judge are limited in this respect. He may not rule on claims that have not been brought before him, or adjudge more than has been claimed. At the same time, he must make sure that he rules on all aspects of the case as determined by the parties.[45] The judge may not introduce additional facts on his own motion, but must limit himself to the facts that have been adduced by the parties.[46] Facts that have been introduced by one party and that have not been denied by the other party must be accepted by the judge as true; he may not require proof of such facts.[47]

Although the powers of the parties are large as regards the above aspects of the case, the Dutch judge has extended powers as regards procedural matters. It is, for example, the judge's task to guard against unreasonable delay in litigation. He may take the necessary measures to prevent such delay.[48] He has to make sure that the action is conducted in an orderly manner and may deny further postponements of the submission of statements of case.[49] In all stages of the action, the judge may order the parties to provide further explanations of their respective positions or to submit documents related to the case.[50] *Ex officio*, he may order the parties to prove their respective statements as far as the facts advanced in them are contested, or order an appearance of the parties in court, a local inspection or an expert report. The rule *iura novit coria* (or *ius curia novit*) applies throughout civil litigation.[51]

As can be seen from the above, various powers that were in the past within the domain of the parties are currently firmly in the hands of the court. As opposed to the nineteenth and early twentieth centuries, the precise division of powers between the court, the litigants and their attorneys is no longer a matter of fierce ideological debate. The primary focus of government policy is to ensure access to justice, litigant

[43] Verkerk 2005, pp. 281–290; Hugenholtz and Heemskerk 2009, Section 5(5).

[44] Art. 21 Dutch Code of Civil Procedure.

[45] Art. 23 Dutch Code of Civil Procedure.

[46] Art. 24 Dutch Code of Civil Procedure.

[47] Art. 149(1) Dutch Code of Civil Procedure.

[48] Art. 20(1) Dutch Code of Civil Procedure.

[49] Art. 133 Dutch Code of Civil Procedure.

[50] Art. 22 Dutch Code of Civil Procedure.

[51] Art. 25 Dutch Code of Civil Procedure.

satisfaction, swift procedures and low costs. Increasingly, it is believed that parties, judges and lawyers are jointly responsible for achieving those goals. The 2002 Reform Act stressed the parties' right to be heard. In 2006, a government-appointed committee presented a report on the fundamentals of the civil justice system. The authors stress that parties, lawyers and the judge should cooperate and are jointly responsible for the proceeding.[52] The transfer of powers from the parties and their lawyers to the court was justified by the need for more cooperation and efficiency in litigation and the widespread belief that civil litigation is not merely a private enterprise of the litigants.

13.5 Effects of the Reforms: Efficiency, Quality and Costs

It is difficult to appraise the reform measures that have been implemented since 1 January 2002. Nevertheless, it is possible to draw some conclusions as to the success of these measures. Some of the most relevant (empirical) observations regarding time-efficiency, costs and quality are discussed below.

The new procedure that was introduced in 2002 aimed at a friendly settlement of cases during the personal appearance of the parties in court after the submission of the statement of defence. If such a settlement could not be reached, the aim was an efficient handling of cases within a short time frame. It was thought that a friendly settlement or the efficient handling of cases within a short time frame would be promoted by the fact that the parties had to provide all necessary information in their statements of claim and defence, respectively. Research has shown that indeed the new procedure produced some of the expected results.

Data based on cases concluded between 1994 and 1996 already showed that cases in which a personal appearance of the parties was ordered were resolved considerably more quickly.[53] More recent data based on 150 personal appearances before the District Courts of Utrecht and 's-Hertogenbosch in 2006 and 2007 show that in 32 % of all cases a settlement was indeed reached. In an additional 60 % of cases, the judge rendered a judgment after the personal appearance of the parties, whereas only in the remaining 8 % of cases additional steps had to be taken, such as a continuation of the hearing at a later point in time or the exchange of additional statements of case.[54] Recent research has confirmed these findings. It seems, however, that personal appearances do not cause parties to settle more frequently but do cause the parties to settle at an earlier point in time.[55]

The median time to disposition decreased since the 2002 Reform Act. Between 1994 and 1996, the median time in defended cases was 525 days; in 2003 it was

[52] Asser et al. 2006, Chapter 5.

[53] Eshuis 1998, p. 92.

[54] Van der Linden 2008, para. 3.7.

[55] Eshuis 2007, pp. 214–216.

336 days and in 2005 it was 294 days.[56] Courts that used personal appearances more frequently showed stronger declines in the median time to disposition.[57]

In 2010, the number of cases filed at the small claims divisions of the District Courts (i.e. the former County Courts) was approximately 930,000 (25 % of these were family law cases). At the civil law division the number of cases filed was approximately 260,000, whereas on appeal around 17,000 civil cases were introduced.[58] In commercial cases filed at the small claims division, default judgments were rendered on average 1 week after the defendant failed to defend his case. If a defence was introduced, the average duration of the case was 17 weeks. Undefended commercial cases brought before the civil law division lasted on average 6 weeks. Contested cases lasted on average 59 weeks. On appeal, commercial cases lasted on average 65 weeks.[59]

Costs for the courts were €993 million in 2010. Of this, €960 million was directly paid to the Council for the Judiciary. This amounts to €61 per capita. Of every €100 earned in the Netherlands, 17 cents were spent on the Judiciary. Court fees cover 20 % of the courts' budget.[60]

An extensive report published in 2007 showed that the cost efficiency measured in 'standard minutes' increased between 2001 and 2005. Whether this implies that the court system indeed became much more efficient is unclear; the new system of financing the courts is vulnerable to manipulation.[61] Surveys showed that a large proportion of the judges who were interviewed believed that efficiency played a greater role in the Judiciary than before due to the new system of output-based financing of the courts discussed above. A large majority of judges believed they had sufficient time to handle standard cases. Roughly half the judges, however, believed they had insufficient time to handle special/exceptional cases. On average, judges were of the opinion that the quality of their work had remained unchanged. Judges did experience a tension between efficiency, on the one hand, and quality, on the other.[62]

---

[56] Van Erp et al. 2007, p. 50.

[57] Eshuis 2007, Table 41, p. 211.

[58] *Rechtbanken: afgehandelde civiele en bestuurszaken, 2000–2010*, available at: http://www.rechtspraak.nl/Actualiteiten/Persinformatie/Documents/Rechtbanken-%20afgehandelde%20civiele%20en%20bestuurszaken.pdf (consulted in March 2013), and *Appelcolleges: afgehandelde zaken, 2000–2010*, available at: http://www.rechtspraak.nl/Actualiteiten/Persinformatie/Documents/Appelcolleges-%20afgehandelde%20zaken.pdf (consulted in March 2013). See also Eshuis et al. 2011, Chapter 5.

[59] *Hoe lang duurde de afhandeling van zaken in de afgelopen jaren?*, available at: http://www.rechtspraak.nl/Actualiteiten/Persinformatie/Documents/Rechtspraak-%20doorlooptijden%202005–2010.pdf (consulted in March 2013).

[60] *Wat kostte de Rechtspraak in de jaren 2000–2010?*, available at: http://www.rechtspraak.nl/Actualiteiten/Persinformatie/Documents/Rechtspraak-%20kosten%202000-2010.pdf (consulted in March 2013).

[61] Boone et al. 2007, Chapter 5. On the cost efficiency of the justice system, see also Van der Torre et al. 2007.

[62] Boone et al. 2007, Chapter 5, p. 172.

Since 2002, a nationwide system of quality controls has been introduced by the Council for the Judiciary. A fairly extensive quality programme is currently in place. The programme includes regular litigant satisfaction surveys (see below), measures to improve court management and extensive quality audits of individual courts once every 4 years. This national programme aims to improve and measure various aspects of 'quality'. Rutten-Van Deursen reviewed much of the work done by the Council for the Judiciary in this respect. Her findings were fairly positive. She concludes that the Council for the Judiciary has in many ways made a positive contribution to improving the quality of the judicial system.[63]

13.6 Failure of Reform Measures, Problems Caused and Reform Proposals for the Future

Although the reforms have led to some clear improvements of the justice system, there have been some drawbacks of the measures described above. It seems that the replacement of local court rules governing *inter alia* the length of postponements by a uniform, national set of rules has, by itself, not resulted in a reduction of the number and length of postponements that are being granted. In addition, there is survey evidence available on the effects of the new system of financing the courts. One survey reveals that judges perceived much more work pressure in 2008 than they did in 2003.[64]

More extensive written statements of case, oral court hearings and the pre-action examination of evidence have emphasised the significance of the early stages in the litigation process. Although such was not intended by the legislature, as a result of this there seems to be a decline in the proportion of cases in which witnesses are heard at evidentiary hearings. A study by Ashmann revealed that the District Court of Rotterdam in 2007 and 2008 rendered significantly fewer interim judgments ordering the examination of evidence (*evidence orders*) than a decade earlier.[65] Some have criticised the tendency perceived in legal practice to dispose of cases without examining evidence as it hampers the pursuit of truth.[66]

Although an increase in judicial case management powers may theoretically give rise to problems as regards, for example, the impartiality of the judge since he may become too much involved in particular lawsuits, such problems have not become evident. This is not surprising since under the new Dutch regime the case management powers of the judge have mainly been increased as regards procedural issues (conduct of the lawsuit). The judge has not been given far-reaching additional

[63] Rutten-van Deurzen 2010, available online with an English summary at: http://arno.uvt.nl/show.cgi?fid=113027 (consulted in April 2013).

[64] Weimar 2008.

[65] Ahsmann 2010, pp. 13–27 and 23.

[66] De Bock 2011, p. 240.

powers as regards the content of the case, although it must be admitted that his powers to order the parties to supply additional information have been increased.

Here it should also be mentioned that a Government Committee consisting of the professors Asser, Groen and Vranken, appointed to investigate further necessary reforms in Dutch civil procedure, is of the opinion that some problems remain in the current system.[67] The Committee has made various recommendations regarding the role of the litigants and the court in civil litigation. Parties should, according to the Committee, 'put their cards face up on the table'.[68] The duty of parties to provide information goes beyond the duty to support and provide evidence for their own statements.[69] On the basis of these general principles, the Committee proposes to make the discovery of documents more widely available.[70] They advise introducing discovery rules like those in the English legal system.[71]

Another tenet of the proposals of Asser, Groen and Vranken is that they emphasise the role of the court. They argue that a judge should not remain passive during the process of fact-finding. The authors clearly refute a sporting theory of justice and argue that the autonomy of parties can no longer be the guiding principle of Dutch civil procedural law.[72] Asser, Groen and Vranken wish to introduce further forms of case management, *inter alia* by further strengthening the role of the personal appearance of the parties.[73] Most revolutionary is their suggestion that deviates from the adversary principle. They suggest that the judge should be allowed to allege facts *ex officio*. In their final report they argue that, although the parties should allege facts upon which they base their claim, request or defence, the judge should be entitled to investigate also undisputed statements of fact. The Committee favours the introduction of a new provision that empowers the judge to adduce matters of fact.[74] Of course, the Committee stresses that the *audi et alteram partem* principle should always be safeguarded.

In 2007, the Minister of Justice gave his reaction to their findings and recommendations. Interestingly, the Minister of Justice is of the opinion that the judge should act with restraint in exercising *ex officio* powers in order to guarantee the judge's impartiality. The government also warns that a judge who has *ex officio* powers to make sure that all facts and legal arguments are introduced in the case, may, as a consequence, be held responsible for not making use of these powers. The possibility to act *ex officio* might turn into something similar to a 'Belehrungspflicht'

---

[67] Asser et al. 2003, 2006.

[68] Asser et al. 2003, p. 80, 2006, p. 46.

[69] Asser et al. 2006, p. 73: '… dat partijen informatieplichten jegens elkaar hebben die verder gaan dan het onderbouwen en bewijzen van de eigen stellingen'.

[70] *Ibidem*, Section 6.5.3.2.

[71] *Ibidem*, p. 74.

[72] *Ibidem*, p. 49: '… in dit verband hebben wij afstand genomen van het begrip "partij-autonomie" en geconcludeerd dat dit niet meer als richtinggevend beginsel kan dienen'.

[73] *Ibidem*, Section 7.1.2.

[74] *Ibidem*, p. 46 and Asser et al. 2003, p. 81.

(duty for the judge to inform the parties about the various aspects of their case) which, according to the government, should be avoided.

The Minister initiated a programme for legislative action, which could in time lead to a revision of (parts of) the Code of Civil Procedure.[75] As discussed above, a proposal to redraft the rules on the discovery of documents and a proposal to amend the Collective Settlement Act have been launched. Several of the Committee's suggestions have, however, not yet led to the introduction of legislation.

13.7 Litigant Satisfaction

The litigant satisfaction evaluations that are currently being conducted show that on average litigants and legal professionals are satisfied with the manner in which the Dutch civil justice system functions.[76] Of the professionals, 73 % are generally satisfied. As regards the litigants, the relevant figure is 81 %. Less satisfaction exists as regards the length of time proceedings take: of the professionals only 46 % are satisfied in this respect, whereas only 55 % of the litigants are satisfied.[77]

It is furthermore interesting to note that empirical studies have shown that the introduction of the personal appearance of the parties in the court after the statement of defence has had a positive effect on the litigants' perception of the fairness of the legal process (before this reform, many cases in the Netherlands only gave rise to a 'paper trial').[78]

Large scale litigant satisfaction surveys were not common until quite recently. A good historical comparison between litigant satisfaction before and after the reforms is not possible.

13.8 Mediation

In the Netherlands, during the past 20 years mediation – under the guidance of a professional mediator – has become established as one option for settling a legal dispute, next to pursuing a case through the courts. It is important to underscore the *professional* character of mediation here, as this modern mediation is to be distinguished from *traditional* mediation practices. Mediation is a method whereby a neutral helps the disputants to find a mutually acceptable solution to their dispute.

---

[75] *Visie op het civiele proces: reactie fundamentele herbezinning burgerlijk procesrecht*, available at: http://www.rijksoverheid.nl/documenten-en-publicaties/kamerstukken/2007/02/05/reactie-fundamentele-herbezinning-burgerlijk-procesrecht-7026.html (consulted in March 2013), p. 11 *et seq.*

[76] Prisma 2004, 2006. See also Prisma 2002.

[77] *Klantwaarderingsonderzoek (KWO),* available at: http://www.rechtspraak.nl/Actualiteiten/Persinformatie/Documents/Rechtspraak-%20klantwaarderingsonderzoek.pdf (consulted in March 2013).

[78] Van der Linden 2010; Eshuis 2009, Section 7.1, Tables 20, 84 and 88, and Verkerk 2010, Chapter 6.2.

Traditional practices encompass a variety of agents mediating as a side-activity, using their intuition, experience of life, or even authority to broker settlements. Judges in the Netherlands traditionally constitute one such category of agents, using their authority, even to sometimes push litigants who have appeared before them into a settlement. This practice of judicial mediation, which followed unpredictable patterns depending on style and preferences of individual judges, still exists today, but has become a bit more standardised since the 2002 revision of the Code of Civil Procedure.[79] Perhaps more importantly, such judicial mediation is not referred to as 'mediation' anymore, but as (*gerechtelijk*) *schikken* – settling under the supervision of a judge – whereas the concept of 'mediation' has come to be reserved for the carefully structured processes that trained and certified mediators will go through together with disputants.

A judge in the Netherlands today has the option to either attempt to reconcile the litigants (hence: *schikken*) himself or to suggest litigants to turn to an external certified mediator (court-referred mediation) or, obviously, to render judgment.

Is there a place for the second judicial option (referring to external mediators) if the judge himself can also direct parties to settle? Modern mediation appears to be a typical American invention, after all. The concept of modern mediation originated in the USA, where researchers at Harvard established in the 1970s that negotiation will be more effective if parties focus on their underlying interests, instead of taking up positions. A new breed of mediators then sought to impart such evidence-based negotiation skills on disputants who had ended up in a stalemate. Mediation would thus 'empower' disputants. The new approach gained popularity in family disputes and commercial disputes particularly, and courts started to advise and gradually enjoin litigants to try mediation first: seemingly a win-win strategy for disputants and the Judiciary, or at least the treasury, alike.

Despite the continental-European tradition of a fairly active judge, this phenomenon of 'court-annexed mediation' caught on in Europe in the 1990s, together with the enthusiasm for being trained as a mediator. Ambivalent motives underlay this development: on the one hand, the autonomy of litigants seems better protected in modern mediation; but on the other hand, financial gains for the treasury are feasible through what is essentially a privatisation of dispute resolution.

Many European jurisdictions started out legislating on (court-referred) mediation, hoping a regulatory framework would somehow stimulate the actual use of mediation. The Netherlands constitute a remarkable contrast, as in this country court-referred mediation was introduced bottom-up. First, large-scale experimentation with judicial referrals to mediation took place, under supervision of the Ministry of Justice, and with day-to-day project management being located within the Judiciary itself. Qualified mediators needed for these experiments were recruited from the newly

[79]The court is allowed to order a personal appearance of the parties to obtain further particulars and/or to attempt reconciling them after the statement of defence has been submitted (*comparitie na antwoord*); research findings suggest that in approximately 70 % of all procedures, courts of first instance will order such a *comparitie*, though not always exclusively to attempt a settlement. Moreover, there are as yet no set judicial approaches towards reconciliation, though patterns have been charted out through recent research: Van der Linden 2008.

created umbrella organisation for mediators, the Netherlands Mediation Institute (NMI). An effective public-private partnership emerged. Judges received condensed training enabling them to recognise the prospects and pitfalls of mediation. In this way, the difference between modern mediation and supervising settlements in court (*schikken*) became increasingly clear. For one thing, unlike a judge, an external mediator may hear disputants separately (caucus) and probe deeper to chart out even conflict factors that have no relevance in law at all.

The outcomes of the nationwide experiments were so promising that the Ministry decided to have mediation liaison officers introduced in virtually all courts by 2007. Detailed monitoring of referrals, and of the views held by judges, parties and their lawyers, has continued until recently, and a report with the major (statistical) findings over the past decade has been published (in English) by the Netherlands Council for the Judiciary online, where it can be downloaded.[80]

In 2009, NMI mediators handled about 40,000 mediations in all, including those referred to them by the courts. As a percentage of all cases submitted to the Dutch courts, however, only two % were settled through external mediation. As demonstrated in the report referred to above, there may be positive secondary effects on the demand for in-court adjudication, coined 'the shadow of referral.'

An intriguing aspect of mediation in the Netherlands is that the government has consistently opposed regulation. Regulation was considered detrimental to the flexibility of mediation. Besides, the actual use of mediation in the Netherlands was (and is) much higher than in most of the neighbouring countries where detailed regulation *has* taken place. Up to the present time, there are just the in-house rules and model contracts of the NMI; disputants who decide to attempt mediation under the guidance of an NMI-registered mediator will sign a mediation agreement at the outset, when they will commit themselves to the choice of mediator, to keep all matters discussed confidential and to use their best endeavours to negotiate a solution. NMI mediators are, moreover, subject to Rules of Professional Conduct that special Disciplinary Review Boards will use in construing the legal relationship towards disputants in the event of complaints.[81]

Quite a number of complaints have been dealt with to date, and in the official database of the Dutch courts, today, over 800 hits will be produced using the key 'mediation'. This does not mean that mediation was at the heart of the dispute in all these cases; yet some judgments have addressed fundamental issues that have arisen in regard to mediation. One example is the issue of whether the court, in ascertaining the truth in the continental-European tradition, can override contractually agreed secrecy in a case where mediation has been attempted but failed. The Dutch Supreme Court held in 2009 that such overriding is indeed allowed, depending on certain parameters.[82]

---

[80] Jagtenberg et al. 2009, available at: www.rechtspraak.nl/English/publications (consulted in June 2013).

[81] The most recent versions of the NMI in-house rules and models can be consulted online at: www.nmi-mediation.nl/english (consulted in June 2013).

[82] Hoge Raad, 10 April 2009, *LJN* BG9470.

Despite the abhorrence of regulation, the Netherlands have now introduced some (scanty) provisions on mediation in the Civil Code and in the Code of Civil Procedure, so as to implement domestically the 2008 EU Directive on Mediation in Civil and Commercial Matters.[83] One of the provisions in the EU Directive precisely concerns a professional privilege for mediators, which the Dutch legislator unwillingly has to introduce now. As part of a recent 'innovation' package to enhance efficiency, the Minister has announced he will seek to secure professional quality requirements that (privileged) mediators will have to meet. Other aspects that will now be provided for in law as required by the EU Directive are that mediation halts the expiration of limitation and prescription rules, and an extension of the possibilities for making mediated settlement agreements enforceable. Finally, judges may advise mediation in all cases, but in the end the litigants decide. This is in line with the Dutch research outcomes, and the philosophy of mediation, that the decision for litigants to try mediation may be informed, but must remain voluntary.

13.9 Relevance of the Dutch Reforms for Other Jurisdictions

The Dutch experience shows that reforming a civil justice system is not merely a matter of adjusting the rules of civil procedure. Changes in the rules went hand in hand with other changes, such as an adjustment of the number of court staff, the introduction of 'flying brigades' to reduce the backlog of cases, and changes in the manner in which the courts are financed (e.g. from input-based to output-based) and mediation. In order to assess the effects of (different aspects) of the reform programme it is of great importance that the quality of the administration of justice is measured and monitored; litigant satisfaction evaluations, for example, should be conducted on a regular basis. In the Netherlands much more attention than before is directed to gathering data and to conducting empirical research. We believe empirical data and research are valuable means to assess and improve the quality of the civil justice system.

As regards the rules themselves, there seems to be consensus that the judge should have sufficient powers to control the progress of cases and that parties should be encouraged to adduce the facts and to identify relevant evidence at an early stage. Oral court hearings at an early point in time, in which the parties themselves should participate, have shown to be of great importance in resolving cases in a quick and satisfactory manner. As regards mediation, the Dutch approach is that too much regulation will reduce the significance of this type of dispute resolution. This is, however, not in line with the present European trend in this area.

[83] Act of 15 November 2012 implementing the EU Mediation Directive, Stbl. 2012/570. This 'thin' piece of implementing legislation has been followed, however, by an initiative for a private member Bill (MP Mr. Ard van der Steur) that seeks to regulate mediation, and notably the profession of mediator, in far greater detail. This Bill is currently being discussed in Parliament.

Appendix: Facts and Figures Relevant for the Powers of the Judge and the Parties in Civil Litigation

Netherlands

Year of Reference: 2008

Part I: General Data on the National Civil Justice System

1. Inhabitants, GDP and average gross annual salary

Number of inhabitants	16,405,399[84]
Per capita GDP (gross domestic product)	€36,322
Average gross annual salary	€49,200

2. Total annual budget allocated to all courts €889,208,000

3. Does the budget of the courts include the following items?

	Yes	Amount
Annual public budget allocated to salaries	☒	€620,748,000
Annual public budget allocated to computerisation	☒	€69,185,000
Annual public budget allocated to court buildings	☒	€104,933,000
Annual public budget allocated to training and education	☒	€40,535,000
Annual public budget allocated to legal aid	☒	€419,248,000
Other (please specify)	☒	€37,251,000

4. Is the budget allocated to the public prosecution included in the court budget?

☐ Yes
☒ No

(a) If yes, give the amount of the annual public budget allocated to the prosecution services

Legal Aid (Access to Justice)

5. Annual number of legal aid cases and annual public budget allocated to legal aid

	Number	Amount
Civil cases	Other than Criminal: 249,182	Other than Criminal: €262,204,000
Other than civil cases	Criminal cases: 158,054	Criminal: €157,044,000
Total of legal aid cases	407,236	€419,248,000

[84] All data are based on the CEPEJ report 2010, 2008 data, http://www.coe.int/t/dghl/cooperation/cepej/evaluation/2010/2010_Netherlands.pdf. (consulted in July 2013), unless stated otherwise

Organisation of the court system and the public prosecution

6. Judges, non-judge staff and *Rechtspfleger*

	Total number	Sitting in civil cases
Professional judges (full time equivalent and permanent posts)	2,153	N/A
Professional judges sitting in courts on an occasional basis and paid as such	900	N/A
Non-professional judges (including lay-judges) who are not remunerated but who can possibly receive a defrayal of costs	0	N/A
Non-judge staff working in the courts (full time equivalent and permanent posts)	5,129	N/A
Rechtspfleger	0	0

The performance and workload of the courts

7. Total number of civil cases in the courts (litigious and non-litigious): ca. 1,300,000

8. Litigious civil cases and administrative law cases in the courts

		Litigious civil cases in general	Civil cases by category (e.g. small claims, family, etc.)		
Total number of first-instance cases	Pending cases by 1 January of the year of reference	N/A	N/A	N/A	N/A
	Pending cases by 31 December of the year of reference	N/A	N/A	N/A	N/A
	Incoming cases	N/A	Small claims division: 930,000[85]	Civil/Commercial division: 260,000[86]	N/A
	Decisions on the merits	Litigious cases resolved: 230,000 Non-litigious cases resolved: 943,000	N/A	N/A	N/A

(continued)

[85] *Rechtbanken: afgehandelde civiele en bestuurszaken, 2000–2010*, available at http://www.rechtspraak.nl/Actualiteiten/Persinformatie/Documents/Rechtbanken-%20afgehandelde%20civiele%20en%20bestuurszaken.pdf (consulted in March 2013). See also Eshuis et al. 2011, Chapter 5.

[86] *Ibidem.*

(continued)

	Litigious civil cases in general	Civil cases by category (e.g. small claims, family, etc.)		
Average length of first-instance proceedings	N/A	Small claims division, undefended cases: 6 weeks Defended cases: 17 weeks.[87]	Commercial division, undefended cases: 6 weeks Defended cases: 59 weeks.[88]	N/A

References

Ahsmann MJAM (2010) Bewijs: verschuiving van "bewijzen" naar "stellen'. In: Ahsmann MJAM et al (eds) Bewijs. Boom Juridische uitgevers, Den Haag, pp 13–27

Asser WDH, Groen HA, Vranken JBM, (in co-operation with Tzankova IN) (2003) Een nieuwe balans. Interimrapport Fundamentele herbezinning Nederlands burgerlijk procesrecht. Den Haag, Boom Juridische uitgevers

Asser WDH, Groen HA, Vranken JBM, (in co-operation with Tzankova IN) (2006) Uitgebalanceerd. Eindrapport Fundamentele herbezinning Nederlands burgerlijk procesrecht. Den Haag, Boom Juridische uitgevers

Bellot PF (ed) (1877) Loi sur la procédure civile du canton de Genève avec l'exposé des motifs par feu P.F. Bellot, 4th edn. A. Cherbuliez et Cie/Sandoz et Fischbacher, Geneva/Paris

Boone M et al (2007) Financieren en verantwoorden. Boom Juridische uitgevers, Den Haag

De Bock RH (2011) Tussen waarheid en onzekerheid. Over het vaststellen van feiten in de civiele procedure. Deventer, Kluwer

Eshuis RJJ (1998) Een kwestie van tijd, Onderzoek en Beleid 171. WODC, Den Haag

Eshuis RJJ (2007) Het recht in betere tijden, Onderzoek en Beleid 254. Boom Juridische uitgevers, Meppel

Eshuis RJJ (2009) De daad bij het woord. Het naleven van rechterlijke uitspraken en schikkingsafspraken, Research Memoranda 1. Raad voor de Rechtspraak, Den Haag

Eshuis RJJ et al (2011) Rechtspleging civiel en bestuur 2010: ontwikkelingen en samenhangen. Boom Juridische uitgevers, Den Haag

Felix AE (2006) Bekostiging, doelmatigheid, kwaliteit rechtspraak. Verslag symposium bekostiging Commissie Deetman. Available at: http://www.rechtspraak.nl/Organisatie/Publicaties-En-Brochures/Documents/5_Bekostiging_doelmatigheid _kwaliteit_rechtspraak.pdf

Groeneveld JP, Klijn A (2002) Nieuwe Burgerlijke Rechtsvordering. NIPO, Amsterdam

Hartogh AFK, Cosman CA (1897) De wet van 7 juli 1896 (Staatsblad Nº 103) tot wijziging van het Wetboek van Burgerlijke Regtsvordering, toegelicht door …. Gebroeders Belinfante, Den Haag

Hugenholtz W, Heemskerk WH (2009) Hoofdlijnen van Nederlands Burgerlijk Proces-recht. Elsevier Juridisch, Amsterdam

[87] *Ibidem.*

[88] *Ibidem.*

Jagtenberg R, de Roo R, Pel M, Combrink L. (2009) Customized conflict resolution: court-connected mediation in the Netherlands 1999–2009. Available at: www.rechtspraak.nl/English/publications

Jongbloed AW (2005) The Netherlands 1838–2005. In: Van Rhee CH (ed) European traditions in civil procedure. Intersentia, Antwerp, pp 69–95

Prisma (2002) Open voor publiek. Klantwaarderingsonderzoek in zes rechtbanken. Prisma, Amersfoort

Prisma (2004) Een ogenblik geduld alstublieft … Analyse van klantwaarderingsonderzoeken bij de gerechten, 2001–2004. Prisma, Amersfoort

Prisma (2006) De zaken op orde. Klantwaarderingsonderzoek in tien rechtbanken. Prisma, Amersfoort

Rutten-van Deurzen WMCJ (2010) Kwaliteit van rechtspleging. Wolf Legal Publishers, Nijmegen

Thoe Schwartzenberg HWB (2011) Civiel bewijsrecht voor de rechtspraktijk. Maklu, Apeldoorn

Tromp JWM et al (eds) (2006) Concentratie en specialisatie van rechtspraak: noodzaak of overbodig? Kluwer, Deventer

Van der Linden J (2008) Zitten, luisteren en schikken, Research Memoranda 5(4). Raad voor de Rechtspraak, Den Haag

Van der Linden J (2010) De civiele zitting centraal: informeren, afstemmen en schikken. Kluwer, Deventer

Van der Torre A et al (2007) Rechtspraak: productiviteit in perspectief. SCP/Raad voor de Rechtspraak, Den Haag

Van Erp JG (2006) Kwantitatieve ontwikkelingen rechtspraak 2000–2005, WODC Cahier 2006–10. WODC, Den Haag

Van Erp JG et al (2007) Geschilprocedures en rechtspraak in cijfers 2005, WODC Cahier 2007–8. WODC, Den Haag

Van Hooijdonk M, Eijsvoogel P (2009) Litigation in the Netherlands. Wolters Kluwer, The Hague

Van Mierlo AIM, Bart FM (2002) Parlementaire Geschiedenis Herziening van het Burgerlijk Procesrecht voor Burgerlijke Zaken, in het bijzonder de Wijze van Procederen in Eerste Aanleg. Kluwer, Deventer

Van Nispen CJJC (1993) De terloopse hercodificatie van ons burgerlijk procesrecht. Kluwer, Deventer

Van Rhee CH (2005) Introduction. In: Van Rhee CH (ed) European traditions in civil procedure. Intersentia, Antwerp/Oxford, pp 3–23

Van Rhee CH (2011) An unsuccessful attempt to modernise civil procedure in the Netherlands in the early twentieth century. In: Aurea Praxis, Aurea Theoria, FS T. Ereciński. LexisNexis, Warsaw, pp 2031–2051

Verkerk RR (2005) Powers of the judge: the Netherlands. In: Van Rhee CH (ed) European traditions in civil procedure. Intersentia, Antwerp/Oxford, pp 281–290

Verkerk RR (2010) Fact-finding in civil litigation. Intersentia, Antwerp

Von Schmidt auf Altenstadt PJM (2010) Heffing aan de poort. In: Tijdschrift voor Civiele Rechtspleging, pp 73–76

Weimar AM (2008) Rechters, Raadsheren en prestatiegerichte bekostiging. In: Trema, pp 384–389

Chapter 14
Mediation: A Desirable Case Management Tool for the Courts?

Rob Jagtenberg

In the present book many contributors have touched upon mediation as a case management option, as part of more encompassing overviews of procedural law techniques in their respective jurisdictions. In this contribution, a quarter turn rotation will be made: the focus will be primarily on mediation, but with reference to several countries' experiences. This approach, while building on legal and empirical data, invites a wider perspective for reflecting critically on what we, as procedural law experts, really do know and do *not* know, in particular about the 'demand' side of – what could be termed – the 'judicial services market'. What do litigants opt for, and why? When is the litigant satisfied? But also: When should society be satisfied? These are important and far-reaching questions. The answers to these questions may be used as arguments in those places (certainly growing in number) where policy makers are pressuring the courts to pressure litigants into mediation.

14.1 Background of Data Collection

This contribution relies on empirical and legal data pertaining to various European Union Member States and to the author's home jurisdiction, the Netherlands, in particular.

Although the Netherlands are a small jurisdiction, there are good reasons to refer to some Dutch data just the same: the country not only boasts the legal capital of the world (The Hague), but also has a judicial system that has been characterised as highly pragmatic and efficient. More important is the internationally acclaimed approach that the Netherlands Ministry of Justice has adopted in regard to our subject: mediation as a case management tool for the courts. About 10 years ago, the Ministry decided to engage the Judiciary and academic researchers in a nationwide

R. Jagtenberg (✉)
Erasmus University, Rotterdam, Netherlands
e-mail: jagtenberg@law.eur.nl

C.H. (Remco) van Rhee and Fu Yulin (eds.), *Civil Litigation in China and Europe*, Ius Gentium: Comparative Perspectives on Law and Justice 31,
DOI 10.1007/978-94-007-7666-1_14,

experiment on the referral of litigants by judges to external mediators. This experiment, under the guidance of a dedicated senior judge, generated a large amount of data on how litigants and their lawyers felt about mediating instead of litigating their case.[1] In addition, the Ministry commissioned research into the practice of court-referred mediation in *neighbouring* European Member States to see whether the Dutch policy makers could learn from (and improve on) other countries' experiences.[2] These are perhaps the bonuses of being a small jurisdiction: it stimulates interest in what one's big neighbours are doing, and it makes it easier to organise projects on a nationwide scale.

14.2 The Complete Landscape of Conflict Strategies

Before discussing some of the findings and their relevance to case management in more detail, the reader is invited to take a few steps back, to gain a panoramic overview of the full array of human conflict strategies. Behavioural scientists have proposed that the human response to a conflict situation developed out of the primitive choice between 'fight' or 'flight'. Flight has become distinguished into 'avoiding' (negating) or 'yielding' (giving in) behaviour. The remaining options are known as 'solving' and 'confronting' strategies.[3] Solving implies that the parties discuss together the real causes of their problem and try to negotiate a mutually acceptable solution. Confronting means that one tries to get one's way one-sidedly, overriding one's opponent: this strategy encompasses litigation as a mild variety, and the use of brute force as a remnant of 'fight'.

A peculiar hallmark of using the law (whether that is as an enforcement agent or as an addressee invoking the law before a court) is that law provides authority where it is assumed to reflect the interests of the biggest part of society. In that sense, the law may constrain powerful entities that would otherwise be capable of forcing their interests through.

The focus of this contribution is on mediation and litigation. There is a linear relationship between negotiation, mediation, arbitration and litigation in that these methods imply an ever decreasing amount of control on the part of disputants. At negotiation, there is full party autonomy. It is the primary tool for a 'solving' strategy. Negotiation usually implies we must give up something in order to get something else in return. Mediation refers to a process of negotiation but this time under the guidance of a neutral, the mediator. In arbitration and litigation a rule is applied and imposed, but in arbitration the parties enjoy some freedom to select the arbitrator and/or to co-determine procedure.

[1] Jagtenberg et al. 2011, pp. 7–65.

[2] De Roo and Jagtenberg 2005, pp. 179–189.

[3] Pruitt 1983, pp. 167–194.

What is the relevance of discussing these wider conflict strategies? It is important to realise that for disputants, litigation is often only an option of last resort. This appears, for instance, from a survey conducted in the Netherlands between 1998 and 2003. In the survey a large sample of private citizens were asked what their course of action had been to handle legal disputes they had confronted.[4] Less than 4 % indicated they had ended up in a court of law. An equally small percentage had submitted their dispute to some informal, quasi-judicial agency, of which there are many in the Netherlands. But the overwhelming majority had either negotiated a solution (45 %) or just lumped their case (47 %), the latter meaning they resorted to avoiding or yielding behaviour. And this was in disputes with a clear legal dimension.

Comparable figures can be distilled from the small number of surveys that are available from the UK and the USA.[5] We may cautiously assume, therefore, that the figures for these respective strategies will not differ fundamentally across the world. Since about half of all private citizens will opt for lumping their case, even if the law might be on their side, this option is apparently very important and ought to be included in any model assessing trends in the caseloads of courts. This aspect will be revisited towards the end of this contribution.

14.3 From Generic Mediation to Modern Court-Referred Mediation

First, a few remarks must be made about the varieties of mediation, and the kind of mediation that the European data in this contribution relate to. Elsewhere in this book, contributors discuss (1) mediation by the judge handling the case, (2) mediation by a specially designated judge, different from the judge handling the case, and (3) mediation by professional mediators, practising outside the courts and usually registered with a private mediation entity, to whom courts may refer litigants.

Mediation as a generic process has been with us for ages and has been practised traditionally by a wide variety of people, usually as a side activity. This traditional mediation is still practised today by lower court judges in continental Europe, although with regard to the practice of such judges, changes over time have been recorded as well as differences between them individually – for it is up to the judge to use his statutory mediatory powers extensively or just marginally.[6] I will not dwell on these traditional mediatory practices of (some) judges here, since a judge assuming a mediatory role will still have to study files and entertain hearings.

[4] Van Velthoven and Ter Voert 2004. A 2009 update of this survey is available at www.en.wodc.nl (last consulted in May 2013).

[5] Genn 1999.

[6] For empirical data on Dutch judges, see Van der Linden 2008.

The theme of this book is ‘case management’, the idea being that case management relieves the caseloads of the courts. Then, the varieties of modern mediation, practised by professional neutrals registered with a private entity, may be more promising. These mediators will have mastered a body of professional mediator knowledge. If a judge can refer a case to such an external mediator altogether, that may save him time and work. The judge does not need to change hats, but simply refers the litigants to another door in the court building: hence the designation ‘multi-door courthouse’, as opposed to the ‘multi-hat court judge’.[7]

The body of knowledge of professional mediators has been accumulated through research, initially conducted at Harvard. That knowledge is modest in size, yet very pertinent to what lawyers, judges and legal academics do. Harvard negotiation theory predicts that opportunities for really resolving a conflict will improve if disputants are willing to abandon their legal positions and disclose their real underlying interests. Then, a search may start to see whether their interests cannot both be served at the same time through a so-called ‘win-win’ solution. The parties in a dispute will often have become very emotional and convinced that a court will fully sympathise with them. It has been demonstrated that in court cases *both* parties estimate their chance of winning at around 80 %. In order to restore the dynamics in a stalemate ensuing from such unrealistic expectations, it is helpful to make the parties think over quietly what their best alternative to a negotiated agreement (‘batna’) really is.

The research at Harvard inspired the belief that those familiar with the techniques could – as *mediators* – try to instil the more effective *negotiation* skills in disputants who both had locked themselves up in their legal positions and got stuck. The early advocates of mediation envisaged a universal, structured process unfolding according to the Harvard principles, and a new profession of mediators who would be able to resolve basically all types of disputes in any domain. Hence the name of the initial (American) professional association of mediators: SPIDR – Society of Professionals in Dispute Resolution.

The first generation of these mediators then established entities providing their services. Many such providers also adopted internal codes of ethics and regulations offering minimum standards for the mediation process. One basic tenet is that the mediator must be *impartial* and must disclose any conflicts of interest. Another basic tenet is voluntariness. Although the presence of a mediator makes mediation less non-committal than direct negotiations, mediation is still understood as a *voluntary* process, at least in regard to reaching an agreement – a mediator should not force a party into a settlement. And, the entire process of negotiating under the guidance of the mediator is to be kept *confidential* by all persons involved. This is important in the event that disputants have been frank and disclosed their real interests and made concessions at the mediation table, whereupon the mediation nevertheless fails. It would be detrimental if the case then ended up in court and one party referred to the concessions that the other party had actually been willing to make.

[7] Jagtenberg et al. 2011, p. 8.

This latter party would then be penalised for his frankness, whereas frankness is necessary for getting deadlocked negotiations back on track.

Frankness may be encouraged by the mediator through side meetings with each disputant separately (caucus). At this point, it should have become clear that such a professional mediator may dig much deeper than a mediating judge ever would be able to.

Diverse motives underlie the mediation (or wider – ADR) movement. Among the more idealistic motives are *empowerment* of the parties, turning the parties into more effective negotiators themselves; and the procurement of qualitatively *better solutions*, based on the parties' real interests. And as research points out, the parties that have participated in a mediation often indicate they are indeed satisfied with the end result. Among the more cynical motives that soon surfaced are, for business, to economise on lawyer expenses; and for the Treasury, to privatise dispute resolution as a means to economise on court budgets.

This takes us to the logical next step: the Treasury's interest particularly resulted in a marriage between mediation and the courts – the phenomenon of court-referred mediation. In their efforts to promote the development of court-referred schemes to relieve pressure on court budgets, governments were supported by the new professional mediators, who themselves became an interest group pushing to make reference to mediation mandatory so as to secure an influx of cases. But officially the mediators' argument was that mandatory referral would enable more people to become acquainted at least with the advantages of mediation.

14.4 Court-Referred Mediation in the Netherlands; How Judges and Lawyers Reacted

The Netherlands started their nationwide experiment with court-referred mediation in 2000, and the main experiment ran until 2003. The experiment was based on an extensive public-private cooperation scheme involving the newly created national umbrella organisation for mediators, the Netherlands Mediation Institute (NMI), to provide mediators qualified to do the job upon referral by the participating courts. The growing number of litigants who switched to mediation during the experiment convinced the Ministry henceforth to make the services of external mediators permanently available at every court in the country.[8] How did the established legal professionals react to all this? The Judiciary was initially distrustful, fearing that external mediation would be used as a pretext to economise drastically. This fear was taken away, however, once the Dutch government decided that referral by a court should always retain a voluntary character; moreover, from within the Judiciary brief training courses were offered to highlight the limits as well as the

[8] As from 2007, all courts except the Supreme Court have a mediation bureau available, the services of which one is alerted to on every court's website.

possible added value of external mediation next to judicial mediation and adjudication. The concept of 'customised conflict resolution' became accepted to indicate that from now on judges would have to assess which option would be preferable in view of the case and party characteristics, although for a referral to mediation the parties' cooperation would be required. Attorneys-at-law mostly reacted in an entrepreneurial fashion: '… if there is a need among clients for mediation, we should advertise we are in that, too.' And there are lawyers, and judges, who have become genuinely convinced that a focus on interests will produce better outcomes.

The years of the experiment are behind us now, so today in the Netherlands and in neighbouring EU countries what percentage of cases entering the courts is eventually referred to mediation and successfully mediated? And, is court-referred mediation really providing such a major alternative as in the USA, where the classic trial is said to have nearly *vanished* as a consequence of the upsurge in court-referred mediation?[9] In the Netherlands currently about 2 % of all cases handled by the courts (including default judgments) are referred to mediation, a majority of these resulting in a mediated settlement. Is this not a very small percentage? The answer is 'yes' *and* 'no' as will be explained further below.

14.5 Court-Referred Mediation Across Europe; The Issue of Compulsion

Let us first have a closer look at the comparative European survey that was commissioned by the Netherlands Ministry of Justice in 2003. The outcomes have been summarised in Table 14.1.

Various specific court-referred mediation schemes in Europe were compared (depending on the availability of data). The key questions were: (1) How many cases were referred as a percentage of pending cases? and (2) Of that percentage of referred cases, how many cases were finally settled? A crucial element is the mode of referral. We found four varieties of referral, starting at strictly voluntary, but reflecting a steady increase of compulsion:

1. Parties themselves propose mediation;
2a. The judge floats the option, in a wholly non-committal fashion;
2b. The judge floats the option, accompanied by explanation, geared to the parties;
3a. The judge states his preference, the parties may refuse without sanction;
3b. The judge states his preference, sanction will be imposed upon the parties' refusal or sabotage;
4. Access to court is denied if the parties cannot provide evidence that mediation has first been attempted.

[9] Galanter 2004.

Table 14.1 The 'success' of court-referred mediation schemes

Mediation programme	Variation	Cases referred as %	Cases settled as % of cases pending of cases referred
Médiation judiciaire	2a	2%	57%
Conciliation judiciaire	1,2a	Unknown	47%
Conseil de Prud'hommes	4	100%	13%
15a EGZPO			
Nordrhein-Westfalen	4	100%	35%
Forlikslader	4	100%	4%
Rettsmekling	2a/b	14%	80%
Central London country court	2a/b	5%	62%
Commercial court	3a/b	50%	50%
Court of appeal	2a/b	2%	52%
ACAS	2b	67%	64%

Slightly simplifying, one could conclude: the more voluntary the referral is, the *fewer* the initially referred cases will be, but of those cases actually referred, the percentage of cases eventually settled will be *higher*. This outcome is not surprising, for if the parties already mutually agree that they should give mediation a try, they apparently share a basic desire to find a solution.

Now a question that is key to the issue of case management presents itself for an answer: On the basis of these outcomes, can we say that more compulsion will bring relief to the courts? The answer is clearly no, one cannot draw such a straightforward conclusion from these figures. And besides the modes of referral we found in the comparative EU survey other factors that are co-determinant of the success of the more voluntary varieties of mediation. For example, if private parties have to pay the costs of mediation themselves, that is generally a disincentive to agree to try it, except for business entities.

And what role is there (if any) for the characteristics of the case or indeed of the parties that bring the case? It turned out that in none of the European referral schemes surveyed had it been possible to develop hard and fast rules about case (and party) characteristics that ought to trigger a referral, except perhaps that an unequal power balance between the parties was regarded as a counter-indicator, i.e. a reason for a judge *not* to refer the case to mediation.[10] Again, that seems to make sense, since mediation is essentially about negotiation: about giving something to receive something else in return. But what if one of the parties does not have the resources to give anything at all?

So it cannot be concluded that more compulsory referral will result in fewer cases for the courts. Yet, it appears that policy makers disregard this research outcome. A clear trend (with the economic crisis proceeding) has emerged across the EU to regulate mediation, and in particular to make the referral to mediation more

[10]De Roo and Jagtenberg 2005, p. 183.

compulsory. There are in this respect still major differences though between distinct Member States. Until recently, Italy represented one extreme as the legislator there had made referral to mediation mandatory for nearly all types of civil procedure. The statute mandating such referral was however declared unconstitutional by the Italian Constitutional Court, in a verdict of 6 December 2012.[11] The Netherlands stand out as the other extreme. Here the legislator abhors regulating anything, as the flexibility of mediation is perceived as its major asset. It was found more important to stimulate the actual use of mediation by making it known through the experiments, and to see how it would develop next.

In 2008, the EU issued its Directive on mediation in civil and commercial matters. The Directive aims to regulate at least some aspects of procedural law and to facilitate the use of mediation in cross-border cases (such as privilege for the mediator, suspending limitation and prescription periods during mediation, and opportunities to make mediated settlements enforceable). In so doing, the Directive takes a middle-of-the-road approach towards the voluntary or mandatory submission of disputes to mediation.[12] But meanwhile the Court of Justice of the EU has adopted more robust views, notably as opined by Advocate-General Kokott in the *Alassini* case, where it was held that making referral mandatory (as an Italian decree had done in the case under review) would only make mediation 'more effective.'[13]

One may wonder whether the original ideals of mediation are not being corrupted here due to ulterior budgetary motives.

14.6 A Bird's-Eye View of the Take Up of Mediation – Who Is in Charge?

Another ideal was the universally competent professional mediator, as borne out by the early association SPIDR. Has this ideal become reality? A summary overview of developments in different legal dispute areas shows that almost everywhere in the EU and the USA specialised, well-established (legal) professionals have captured the biggest share of the market for mediation services.[14] In family disputes, specialised divorce lawyers command the biggest part of mediations, sometimes together with psychotherapists and social counsellors. On the whole, mediation in this particular area is thriving. In commercial disputes, lawyers from the major corporate law firms who have registered with a few specialised mediation providers appear to be dominating this market in a growing alliance with vested commercial arbitrators and arbitration centres. In the commercial area, the take up of mediation seems reasonable though not as impressive as in family disputes. More problematic are the

[11] Silvestri and Jagtenberg 2013, p. 33.

[12] Compare Art. 5(2) and paras. 5 and 13 of the preamble, Mediation Directive 2008/52/EC.

[13] ECJ 18 March 2010, *Rosalba Alassini v. Telecom Italia SpA*, C-317/08.

[14] De Roo and Jagtenberg 2011.

areas of consumer disputes and employment disputes. Obviously, these areas are characterised by unequal power relations (a one-shotter versus a repeat player), whereas in the preceding areas the relations are – generally speaking – more in equilibrium (one-shotter against one-shotter or repeat player against repeat player). In the consumer area, recent surveys found that out-of-court settlement is not evenly encouraged – let alone achieved – in different EU Member States.[15]

The EU is now contemplating giving the out-of-court settlement of consumer complaints (either through mediation or through straightforward decision-making) a boost, through its Directive 2013/11/EU on consumer ADR, whereby – remarkably – a format is introduced not merely for cross-border (European) disputes but for purely domestic consumer disputes as well. In this area, established producer and consumer organisations are bound to play a defining role by staffing the settlement institutions through their representatives, chaired by a legally qualified neutral. In the employment dispute area, the politically most sensitive of all areas, EU initiatives are proceeding very slowly; here, national traditions in the Member States have in years past often brought about characteristic settlement institutions. These institutions are mostly staffed by representatives from employer associations and trade unions, but in some countries full-time government-paid mediators operate, though they are usually particularly skilled in labour relations.[16] Finally, there is the administrative domain. This again is a domain characterised by unequal power relations: here, the largest party (with the deepest pockets) is the government. In this area, mostly *internal* complaint handling and mediation schemes have sprung up, staffed by another established group of professionals, the in-house government lawyers.

The latter finding corresponds to the outcome of an NMI conference where key officers from large multinational enterprises were asked how they felt about entrusting their disputes to an independent, outside mediator. These large enterprises appeared to require, as a *condicio sine qua non*, that a mediator should be fully acquainted with the corporate culture and priorities of the business. In other words: an internal mediator is strongly preferred, and where such a mediator is not available, a strong reluctance remains to engage in mediation at all.[17]

This pattern can be observed throughout the Western world, and an American scholar has summarised it this way: 'The more powerful an entity, the more successful it will be in imposing ADR schemes designed by itself.'[18]

The ideal of a stand-alone, independent professional thus already seems to find itself under pressure.

Are power imbalances thus reinforced? Or are solutions conceivable? Courts can hold one-shotters not to be bound by standard clauses prescribing ADR. Indeed, interesting case law is now developing across Europe where courts are seized to endorse previously 'agreed' mediation. Courts do seem to distinguish between

[15] Hodges et al. 2012.

[16] De Roo and Jagtenberg 1994.

[17] Jagtenberg and De Roo 2009, p. 53.

[18] Landsman 2005.

repeat player cases and cases involving one-shotters. This is a very provisional conclusion, however, mainly based on Dutch law.[19] It would be intriguing to see whether the principles guiding Dutch case law resonate in other jurisdictions; but that would justify a research project in itself.

14.7 Intermediate Conclusion

Summing up thus far: What has become of the idea of modern mediation? Certainly it is being used, and to the satisfaction of the parties in some areas, family law being the most impressive. But both mediators and large players have their distinct interests. Inequality of the parties may be a counter-indication, and sits uneasy with the growing pressure towards mandatory referral, which has not proven itself yet as an effective cost-saving device, anyway. Most striking in all this, to the present author at least, is the lack of any evidence-based framework for fundamentally assessing different conflict strategies. What are the likely major ingredients and pitfalls to reckon with in such a framework – if it is ever to be constructed?

14.8 How to Assess Different Conflict Strategies Accurately?

It is submitted that there are a number of 'quantitative' and a number of 'qualitative' aspects to take into account.

First some quantitative aspects. The overview of the strategies devised by behavioural scientists and the Dutch survey inquiring into people's course of action, both mentioned at the outset of this contribution, have already revealed that disputants have to make choices all the time, before they even get to court. This process is also known as the transformation of disputes, schematised as a pyramid, an iceberg or a river delta. This transformation pyramid in turn reveals the distorted perspective through which lawyers tend to look at their world. If something changes halfway in the parties' awareness of rights that may have become relevant, this will open the floodgates to fresh cases pushing their way up towards the top. This illustrates at the same time the vulnerability of the judges at that tiny top. Conversely, the pyramid model illustrates the bias of policy makers in the ministries of justice, who are entirely focused on the issue of how to signpost a very small group away from the courtroom to a mediation conference room, i.e. the small group of intending litigants who have made a number of choices underway and have now finally reached the courts. But then, ministerial policy makers will argue they simply do not have a mandate for addressing the lower regions of the dispute pyramid.

[19] Jagtenberg and De Roo 2012.

A second distortion of perspective logically follows the previous observation and concerns the effects of the cases that are actually referred to mediation by the courts. In the Netherlands it was found that just 2 % of all pending court cases were thus referred. Again that may not seem much. But then again, cases reach mediation in various ways. Once courts at the top begin the practice of alerting litigants to mediation as an option, a lawyer will know he should prepare a response, both for his client and for the judge floating the option. A lawyer then might just as well propose mediation himself. Indeed, a pattern seems to be emerging where disputants now turn directly to a mediator at the instigation of their lawyers. We have termed this process 'the shadow of referral'.[20] This process also materialises through a steady proliferation of mediation clauses in all types of contracts.

A third quantitative issue is what may be termed the 'efficiency paradox'. The ratio between the production of court cases (usually measured both in volume and in processing time) and resources invested (mostly measured in the number of judges and auxiliary positions) gives us the productive efficiency of the courts. It is an aspect monitored regularly now under the auspices of the European Commission for the Promotion of the Efficiency of Justice (CEPEJ) for all Council of Europe Member States. The present author and his colleagues investigated productive efficiency on a smaller scale, comparing ten jurisdictions, but more in detail, some years ago at the instigation of the Netherlands Council for the Judiciary.[21] What was the outcome? It was found that for example Poland did much better than the Netherlands in terms of judgments produced with a given number of judges. But Poland appeared to have almost no mediation or other out-of-court settlement (ADR) mechanisms. Is the said outcome logical then? Yes it is, as a country with many ADR mechanisms (including court-referred mediation) may likely filter out the simple cases and keep the complex cases for its judges; but these will take longer to proceed. So in the end, the court needs more time to produce fewer judgments. By contrast, in the 'non-ADR countries', the simple cases that are retained by the courts easily push up total output figures and give the impression of great efficiency. This is an example of how deceptive the very concept of productive efficiency may be.

As a next step, some qualitative aspects are selected for a closer inspection.

First of all, policy makers arguing in favour of mandatory referral love to highlight frivolous cases that obviously do not 'belong' in a court. But how about the cases that *do* 'belong' in court but never got there? And perhaps never got there because the litigants were persuaded to drop a potentially interesting legal argument for a private settlement negotiated somewhere in a conference room. This aspect should also be borne in mind by the legislator: Are we sufficiently aware of the danger that compulsion may prevent issues from coming out into the open that would better have been made public? Every law, every statute, needs the parties to invoke it in order to have it enforced and to make the law a living thing.

[20] Jagtenberg et al. 2011 p. 18.

[21] Blank et al. 2004.

And then, perhaps the most fundamental qualitative issue: Is mediation not generally preferable to litigation, as litigation is 'disruptive for society'? Many philosophers and other scholars have propagated this view. Yet other scholars have argued the other way round, i.e. that mediation, or rather the settlement of legal disputes in private, is disruptive for society.[22]

In the present author's opinion, both methods have merits of their own, and both methods can help to reinforce the social texture of society. But the problem is that much depends on what is at stake and for whom in any concrete case at hand. And this takes us to a further important question: What standard of evaluation is one to use for allocating a case to private mediation or public adjudication? Is the standard how parties feel themselves, that is, their private customer satisfaction, and their truth? Or should the Treasury, as the taxpayers' watchdog in a country, be the standard? Is there not a risk, though, that as an agent of the public financiers the Treasury itself will be susceptible to fulfilling the prophecy of the principal/agent dilemma, with the relentless hunt for short-term productive efficiency constituting a case in point?[23] Or should society as a whole, with its great diversity of interests and interest groups, that nevertheless do make a society what it is, provide the standard?

The (even global) ramifications involved in these questions could best be illustrated through a fictitious case.

14.9 A (Not Entirely) Fictitious Case

As is well known, Goldman Sachs is one of the world's largest and most influential investment banks. Arguably, it is also the bank where the toxic derivatives were designed that would then be traded the world over and ignite the financial crisis, with the consequential damage currently estimated to be in the range of 3 to 25 trillion US dollars. Now, suppose a senior employee with Goldman Sachs, well aware of the risks involved, decided to bring the danger inherent in this defective financial product out into the open during its first-tier transfer to another bank. Taking the behavioural scientists' scheme as a reference point, the employee could still decide to yield, or to avoid a dispute, by doing nothing and looking away, thus securing his own job and future career. If he set out on a confrontational course, he would probably leak his inside knowledge to the press. That brave act of whistle-blowing might bring him the sympathy of many citizens, but not of his employer, and likely not of any law court either: he would get sacked immediately and would probably be unable to challenge his termination in law. A more sophisticated

[22]Manning 1977 and Fiss 1984 represent the American spokesmen of these two opposite schools; I will resist the temptation to discuss how topical the teachings of Confucius are in respect of this subject.

[23]The principal/agent dilemma, whereby agents will be incentivised to set their own agenda as their principal will self-censor their control, has been further developed by *inter alia* Eisenhardt 1989.

approach might be for the employee to agree with an ally in the purchasing bank that the necessary information will be provided to that bank, whereupon the purchasing bank will sue Goldman Sachs for fraudulent misrepresentation in court. That strategy would also take the case out into the open, and would be less risky for our employee, although it would not be entirely without risks either. The same employee might also consider a solving strategy, meaning he would opt for negotiating his knowledge in exchange for something else in return. What would that something else be? The bank's withdrawing its defective product still would be the ideal stake, but one unlikely to be realised. More likely, the stake would be strictly private, i.e. a very large sum of money enabling the employee to take early retirement in the Bahamas, although – as part of the deal – he would be bound to secrecy for the remainder of his life. To get the negotiations started, he would need to bring a complaint internally, and keep his poker face on with his CEO.

It is intriguing to consider seriously what we ourselves would do in this situation. What we would do for instance as a judge, confronting the sophisticated lawsuit for fraudulent misrepresentation, with the underlying aim to bring the matter out into the open. Would one refer such a case to the seclusion of a private conference room, to be mediated and settled amicably between two financial entities that would presumably want, after all is said and done, to continue doing business with each other (surely a strong indicator for mediation)? How would the referring judge be made aware of the potential ramifications of this lawsuit, for society at large, and eventually for the whole world? Does the judge have the time to really look through the case well, before taking a potentially far-reaching decision: that is, negotiate a solution in private, or hand down a judgment and thereby publicise the case? Or will the judge be under too much pressure by policy makers to push the parties into private settlement? Whose interests should offer guidance here? And what would we do as a mediator? Take the case, or resign?[24]

One could argue that this is a truly exceptional example, representing exceptional social costs. But at closer inspection, that argument does not really hold true, at least not for our purpose of assessing private settlement as a case management tool. For in real life there will be many more such disputes although the amount of the social costs involved will admittedly be smaller for each of these cases individually. In the end, however, that does not make a difference. Put succinctly: one case times one trillion of social costs, equals one thousand cases times one billion of social costs, or for that matter, one million cases times (only) one million of social costs. A judge who was given sufficient time to look at such a case seriously might decide to keep it and to render judgment, and thus to apply the law in such a way as to prevent gargantuan damage from materialising in his own country, and in other countries as well.[25]

[24] Under many mediator ethical codes, a mediator would have to resign if confronted during the negotiations with serious crimes, or at least blatant violations of mandatory law. Although bringing the defective products into circulation is definitely to be regarded as unethical, and from a contract law perspective possibly voidable, its inconsistency with the law is not obvious at the outset.

[25] Makinwa 2012.

There is a cynical snag in this example, though, where in (American) reality employees in the financial sector would most likely be prevented from submitting a case to the courts anyway, as they will be subject to compulsory arbitration schemes.

14.10 Conclusion

Is there any firm conclusion to be drawn at all, following this exposé of quantitative and qualitative complications? What we have seen is that there are problems of measurement, such as the problems in measuring the net contribution of (mandated) mediation to bringing relief to the court (budgets). And there are problems in deciding on the (qualitative) appropriateness of mediation, or conversely, of in-court adjudication. We cannot just say which option is best, unless and until we can specify the possible costs and returns for all those (even outside the court building) that may be affected. Still, one firm conclusion seems justified: the comparison, forced through the mediation/ADR debate, between 'negotiating private solutions' and 'applying binding rules publicly' constitutes an intellectual challenge to legal academia, one akin to the comparison between different legal cultures such as 'East' and 'West' – the two of which *do* meet occasionally with success, such as at the Beijing case management conference that gave rise to the present book.

References

Blank J, Van der Ende M, Van Hulst B, Jagtenberg R (2004) Bench marking in an international perspective – an international comparison of the mechanisms and performance of the judiciary system. ECORYS Research, Rotterdam, No. 3

De Roo AJ, Jagtenberg RW (1994) Settling labour disputes in Europe. Kluwer Law & Taxation, Deventer/Boston

De Roo AJ, Jagtenberg RW (2005) ADR in the European Union: provisional assessment of comparative research in progress. In: Cadiet L, Clay T, Jeuland E (eds) Médiation et arbitrage – alternative à la justice ou justice alternative? Litec, Paris, pp 179–189

De Roo AJ, Jagtenberg RW (2011) Professional(s as) mediators: emerging markets and the quality of legal protection. In: Uzelac A, Van Rhee CH (eds) The landscape of the legal professions in Europe and the USA: continuity and change. Intersentia, Cambridge/Antwerp, pp 235–254

Eisenhardt K (1989) Agency theory: an assessment and review. Acad Manag Rev 14:57–74

Fiss OM (1984) Against settlement. Yale Law J 93:1073–1090

Galanter M (2004) The vanishing trial: an examination of trials and related matters in federal and state courts. J Empir Leg Stud 1(3):459–570

Genn H (1999) Paths to justice – what people do and think about going to law. Hart Publishing, Oxford

Hodges C, Benohr I, Creutzfeldt-Banda N (2012) Consumer ADR in Europe. Hart Publishing, Oxford

Jagtenberg RW, De Roo AJ (2009) Arbeid en Integrated Conflict Management Systems: Opbrengsten, Weerstanden en Intenties. TMD 13(3):43–66

Jagtenberg RW, De Roo AJ (2012) Quo Vadis Mediation? In: Meijer GJ, Storm P, Timmerman V (eds) Piet Sanders, een Honderdjarige Vernieuwer. Boom Juridische uitgevers, Den Haag, pp 313–318

Jagtenberg RW, De Roo AJ, Pel M, Combrink-Kuiters LC (2011) Customized conflict resolution – Court-connected mediation in the Netherlands, 1999–2009. The judiciary quarterly, special issue, SDU publishers, The Hague (The Netherlands) pp 7–65

Landsman S (2005) ADR and the cost of compulsion. Stanf Law Rev 57:1573–1630

Makinwa A (2012) Private remedies for corruption – towards an international framework. Eleven Publishers, The Hague

Manning B (1977) Hyperlexis, our national disease. Northwest Univ Law Rev 71(6):767–782

Pruitt DG (1983) Strategic choice in negotiation. Am Behav Sci 27:167–194

Silvestri E, Jagtenberg RW (2013) Juggling a red hot potato: Italy, the EU, and mandatory mediation. Nederlands-Vlaams Tijdschrift voor Mediation en Conflictmanagement TMD 17(1): 29–45

Van der Linden J (2008) Zitten, luisteren en schikken, Research memorandum no. 5. Raad voor de Rechtspraak, Den Haag

Van Velthoven BCJ, Ter Voert M (2004) Geschilbeslechtingsdelta 2003. Boom Juridische uitgevers, Den Haag

Part VII
Romania

Chapter 15
Romania: Procedural Reforms: Plus Ça Change, Plus C'est La Meme Chose

Serban S. Vacarelu and Adela O. Ognean

15.1 Historical Background of Romanian Civil Procedure[1]

Modern Romanian civil procedure finds its roots in the Code of Civil Procedure of 1865, which was enacted on 9 September 1865 and entered into force on 1 December 1865. The Code was largely a product of French inspiration, being based on the 1842 version of the French Code of Civil Procedure of 1806 and the Code of Civil Procedure of the Geneva canton of 1819 (itself a version of the French 1806 Code).[2] Consistent with the liberal spirit of the French Code, the Romanian Code envisaged a relatively passive role for the judge, leaving the parties much autonomy and control over the litigation. The role of the judge was primarily devoted to presiding over the debates in a non-interventionist manner.[3] Nonetheless, the judge was allowed to ask for clarification of arguments and factual points raised by the parties, and could ask for additional evidence if considered necessary to ascertain the truth.[4]

The various amendments to the Romanian Code have gradually expanded the role of the judge toward a more active role in litigation. Thus, a procedural law reform of 1900 provided the judge with the ability to raise *ex officio* certain exceptions and matters of public order and put them for discussion before the parties.[5] The judge could not raise *ex officio* affirmative defences that were considered to protect private interests (i.e. prescription, *res iudicata*).[6] However, these limitations

[1] Much of the historical part is derived from Văcărelu 2012.

[2] Alexe 2008, p. 393; Leş 2010, p. 22.

[3] Alexe 2008, p. 394.

[4] *Ibidem.*

[5] Alexe 2008, p. 399.

[6] Mironescu 1901, p. 12; Alexe 2008, p. 399.

S.S. Vacarelu (✉) • A.O. Ognean
Maastricht University, Maastricht, Netherlands
e-mail: serban.vacarelu@maastrichtuniversity.nl; adela.ognean@maastrichtuniversity.nl

C.H. (Remco) van Rhee and Fu Yulin (eds.), *Civil Litigation in China and Europe*, Ius Gentium: Comparative Perspectives on Law and Justice 31,
DOI 10.1007/978-94-007-7666-1_15, © Springer Science+Business Media Dordrecht 2014

were subsequently eliminated by a law of 1908, which provided for the judge's duty to raise *ex officio* any affirmative defence deemed necessary for the efficient administration of justice and to put it for discussion before the parties.[7]

Several laws on the acceleration of justice (most notably in 1925, 1929 and 1943) further expanded the active role of the judge by taking away from the parties the control over the pace of the litigation and presentation of evidence. These changes were justified in the name of efficiency and greater need for expediency in litigation.

The Communist regime (1945–1989) brought a reform on the organisation of the Judiciary[8] and some significant changes in the field of civil procedure. Thus, the appeal procedure and the courts of appeal were abolished altogether;[9] the review by cassation procedure (*casare cu trimitere*) was supplemented with the review by revision procedure (*casare cu reţinere*),[10] whereby the reviewing court would keep the case and issue a modified judgment on the merits by itself, rather than quash the judgment and send it back to the lower court for reconsideration; the public prosecutor received powers of intervention and in some cases of mandatory participation in civil proceedings, being also able to seek supervisory review of judgments;[11] the General Prosecutor was given powers of supervision over the courts and control of any case of record, being able to initiate a special type of 'extraordinary' review, initially named 'review in surveillance' and later 'review in annulment',[12] which could be exercised even against otherwise final and definitive judgments; the High Court of Cassation and Justice became known as the Supreme Court (1948–1952) and later as the Supreme Tribunal (1952–1991). It should be noted that apart from a few other relatively minor changes, the previous Code of Civil Procedure of 1865 (as subsequently amended) was retained by and large in its original form.[13]

During Communism, the active role of the judge was strengthened and received new ideological justifications. Significant in this regard are provisions referring to the right of the president of the panel 'to ask questions of the parties or debate any issues of fact or law that may lead to a resolution of the case, even if they were not provided in the petition or in the answer. He could order [any] evidence he deemed necessary, even if the parties were opposed'.[14] Moreover, '[j]udges have the duty to strive by all available legal means to discover the truth and to prevent any mistake in the ascertainment of the facts; they will give the parties active support in the

[7] Alexe 2008, p. 401.

[8] Initiated by Law 341 of 1947.

[9] Law 5 of 1952.

[10] Decree 471 of 1957.

[11] Decree 38 of 1959.

[12] See e.g. Decree 470 of 1958. See also Spinei 2011, p. 42.

[13] The Code was subject to a formal renumbering under Law 18 of 1948. By contrast, the Code of Criminal Procedure, also adopted in the mid-nineteenth century, was abrogated and replaced in 1968 by an entirely new code.

[14] Art. 129 of the Romanian Code of Civil Procedure (1952).

protection of their rights and interests. They will decide only as to the issues that form the object of the litigation'.[15]

Legal commentators at the time regarded the active role of the judge as an 'innovation' and 'a new principle of Socialist procedural law' aimed at 'bringing justice close to the people',[16] and as a guarantee of due process. In line with Soviet doctrine, the commentators were keen to emphasise the duty of the judge to ascertain the 'objective' truth, as opposed to the 'formal' truth.[17] The latter was regarded as a characteristic of the civil procedure of the bourgeoisie, whereby the judge was not sufficiently active to be able to ascertain the facts of the case and, consequently, had no choice but to enter a decision which was often contrary to his own beliefs.[18] By contrast, the virtues of the objective truth were heralded as the only way to achieve social justice, taking into account the supremacy of the public interest in litigation.

After the fall of Communism in 1989, Romanian civil procedure and the court system were reformed again, with various amendments adopted almost every year. Arguably, the tendency was to revert back to the procedure in place before 1948. The courts of appeal and the appeal procedure were reintroduced, the review in annulment procedure was eventually repealed and the highest court was renamed the Supreme Court of Justice under the new 1991 Constitution, and following a 2003 constitutional amendment the Court was re-designated as the High Court of Cassation and Justice as it was originally known under the Code of Civil Procedure of 1865. The active role of the judge was maintained, although it varied in the degree of application at times. In this regard, an interesting debate arose immediately after the 1989 Revolution on whether the principle of the active role of the judge should be maintained. Some legal commentators regarded the active role as a Communist principle and advocated in favour of a retreat from its application. However, these views were quickly dismissed by the more established academics, who pointed out the tendency in other countries toward an enlargement of the role of the judge in civil litigation.[19]

Recently, Romania introduced a new major procedural reform. The project of a New Code of Civil Procedure (hereinafter 'NCPC') was adopted by the government in February 2009 and by the parliament in July 2010.[20] After having been delayed several times,[21] the NCPC has finally entered into force on 15 February 2013.[22]

---

[15] Excerpts from Art. 130 of the Romanian Code of Civil Procedure (1952).

[16] See Porumb 1960, p. 9; Alexe 2008, p. 411.

[17] See Alexe 2008, p. 414 *et seq.* and authorities cited therein.

[18] *Ibidem*.

[19] See Ciobanu 1997, p. 132.

[20] Law 134 of 2010.

[21] On 25 January 2012, the Ministry of Justice announced that the NCPC would formally become effective on 1 June 2012. That date was subsequently changed several times.

[22] See Emergency Governmental Decree OUG No. 4 of 2013. However, the entry into force of some specific provisions of the NCPC has been postponed. For logistical reasons, several provisions related to the investigation of the case, the preparation of the case-file for appeal and further review have been delayed until 1 January 2016, and certain provisions related to the mediation procedure until 1 August 2013. See Law 2 of 2013.

Since the NCPC has not been tested in practice at the time of this writing, the present paper will mainly refer to the current civil procedural system under the Romanian Code of Civil Procedure (2012) (hereinafter 'CCP') and will provide guidelines on the important changes under the NCPC.

15.2 Court Structure

The current court structure in Romania is provided by Law No. 304 of 2004 and its subsequent amendments. Romanian courts are organised into a strict four-level hierarchy. It is composed of local courts (*judecătorii*), district courts or tribunals (*tribunale*), courts of appeal (*curţi de apel*) and a High Court of Cassation and Justice (*Înalta Curte de Casaţie şi Justiţie*). All courts are courts of general jurisdiction and operate under the principle of unity of jurisdiction, meaning that they are competent to decide both criminal and civil cases. Of course, as a functional matter, judges in the courts work in specialised divisions or panels dealing with criminal, civil, administrative and commercial matters, and so forth. After the fall of Communism and until 2004 there were no specialised courts in Romania. An innovation of Law 304/2004 was to allow the creation of specialised courts, organised only at the district court level and limited to specific areas of law. Essentially, some specialised divisions within the district courts in the enumerated areas were reorganised as independent specialised courts.[23] A specific feature of the Romanian court system is that all courts, including the specialised courts, can be both courts of first instance and courts of last resort, depending on the nature and amount of the claim. In addition, district courts and courts of appeal may exercise appellate jurisdiction over the judgments issued by lower courts, subject to certain rules. As a general rule, the court competent to decide appeals and supervisory reviews is the court immediately superior on the hierarchical level to the court issuing the judgment attacked. Apart from this general court structure, Romania also has a Constitutional Court and military courts.

[23]It should be mentioned that after the NCPC entered into force, commercial law is no longer an area where specialised tribunals and specialised commercial divisions operate. Romania recently adopted a New Civil Code, which entered into force on 1 October 2011. One of the aims of the New Civil Code was the unification of all areas of private law, and therefore it abolished the Commercial Code. Similarly, the NCPC no longer contains provisions for a special procedure applicable to commercial litigation. Consequently, the newly formed specialised tribunals in the area of commercial litigation as well as commercial divisions existent within the ordinary courts have ceased to exist.

15.3 The Ordinary Course of Civil Litigation Before the Courts of First Instance

Under the procedural system in Romania, there are three main phases in civil litigation: (1) the written preliminary phase, centred on the initial pleadings; (2) the trial phase consisting of the investigation of the case, administration of evidence and oral arguments; and (3) a final phase consisting of the judges' deliberations and the rendition of judgment. In addition, a pre-action phase exists in certain limited circumstances (Fig. 15.1).

The NCPC provides for some changes in the structure of litigation. Of notable importance is the creation of a separate phase of 'investigation of the case', which entails the judicial administration of evidence. As envisaged by the NCPC, this phase is clearly delimited from the preliminary written phase, as well as from the oral debates, by providing that the investigation phase takes place *in camera,* and not in public hearings anymore. In the following, we will examine the ordinary procedure under the current legislation in force, pointing out the important changes expected under the NCPC.

15.3.1 The Pre-action Phase

In certain cases specifically provided by law, the commencement of civil litigation is conditioned upon the fulfilment of a 'pre-action' procedure.[24] In most cases, this procedure would take the form of an amicable demand or mediation, essentially an attempt by the would-be plaintiff to reconcile his differences with the other party and avoid useless and unnecessary litigation. Pursuing the 'pre-action' procedure is generally optional, especially in civil cases, and therefore as a practical matter this procedure is improperly 'glorified' as a separate phase in the litigation process.[25]

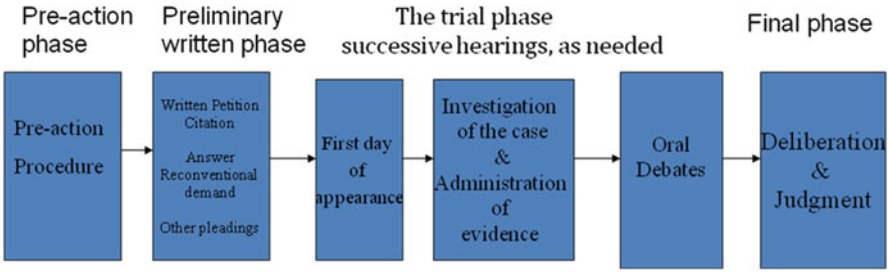


Fig. 15.1 Phases in Romanian civil litigation

[24] See Art. 109(2) CCP.

[25] In this context, the pre-action procedure discussed herein is to be distinguished from the 'pre-action protocols' that are available in England and Wales under the Civil Procedure Rules.

There are, however, at least two situations when the procedure is mandatory. The first situation concerns certain cases of administrative litigation, whereby a person aggrieved by the issuance of a unilateral administrative act must request the public authority in question[26] to revoke the act. The request must be submitted within 30 days from the date the administrative act was communicated.

The second situation regards all cases of commercial litigation whose object is subject to monetary evaluation. In these cases, prior to the filing of a petition initiating litigation, the plaintiff must attempt reconciliation directly with the other party. The procedure is provided in a special chapter of the Code of Civil Procedure dealing with litigation in commercial cases, which details the exact steps to be taken by the party attempting reconciliation. Essentially, the party must notify the opponent in writing of all the claims and legal grounds asserted against it, provide a list of supporting evidence and request a meeting take place no less than 15 days from the date the communication is received. A written statement describing the result or proof of attempting reconciliation must be provided as an annex to the petition for damages.

The requirement of the pre-action procedure has been justified by reasons of efficiency, avoiding unnecessary litigation and encouraging alternative ways of resolving disputes with the aim of avoiding the overloading of the court system. The imposition of a mandatory 'pre-action' procedure is generally viewed in more favourable terms by doctrine and practitioners with respect to commercial cases, but less so with respect to administrative litigation. Apparently, in commercial cases the procedure sometimes leads to an agreement between the parties, and therefore subsequent litigation is successfully avoided. However, this rarely happens in administrative cases, where the public entity is unlikely to revoke its own act. In this context, several authors have expressed the opinion that a mandatory pre-action procedure is likely to constitute an obstacle to the free access to justice and a considerable delay to a trial within a reasonable time in violation of Article 21 of the Romanian Constitution and Article 6(1) of the European Convention on Human Rights.[27]

Several challenges before the Romanian Constitutional Court have proved unsuccessful,[28] even where the Romanian Supreme Court had considered such a challenge to be well grounded.[29] Romania's highest court has generally proved more receptive to such arguments and has provided a more liberal interpretation regarding the pre-action procedure. For instance, in one case the court decided that the pre-action procedure had been validly satisfied in a commercial case even though the reconciliation procedure took place after the commencement of litigation, but before the first hearing date.[30]

[26] Alternatively, the request may be addressed to a different public authority that is hierarchically superior to the authority that issued the act.

[27] See Deleanu (2007), p. 192 *et seq.*

[28] See Decision No. 569/2006 (administrative litigation) and Decision No. 86/2007 (commercial case).

[29] See Decision No. 285/2002.

[30] See ICCJ (com. div) Decision No. 3184/2004.

Under the NCPC, there are several changes that will impact the application and availability of the pre-action procedure. The pre-action phase will no longer be required with regard to commercial litigation, but will remain mandatory in administrative litigation and other cases specifically provided by law (i.e. certain procedures related to successions). However, even where the pre-action phase remains mandatory, only the defendant may raise the issue of non-fulfilment of the procedure and only at the time the defendant files an answer to the plaintiff's petition. As provided by the NCPC, the court will no longer be able to raise *ex officio* the issue of non-fulfilment of this procedure, except in the procedure related to successions.[31]

15.3.2 The Preliminary Written Phase

The preliminary written phase marks the beginning of the litigation process and is essentially a pleading phase, whereby the parties formulate their positions and exchange their briefs through the court. Citation and service of process also occur during this phase.

Except for a few exceptional circumstances, the civil process must be initiated by a party and cannot be commenced by the court *ex officio*. Civil litigation is ordinarily started by the filing of a written petition (*cerere*)[32] with the court. Styled as a 'request to bring into judgment',[33] the petition is essentially a procedural mechanism by which a person formulates a demand before the court seeking satisfaction of a claim[34] in recognition or protection of a legal right or interest.[35] The petition must include: (1) an identification of all the parties by name, and domicile or

[31] See Art. 188 NCPC.

[32] The Romanian terminology is susceptible of having different meanings depending on the context. The word '*cerere*', which literally means demand, claim or request, is used in reference not only with the initial petition, but also with regard to other procedural acts in which the court or another party is requested to act, such as motions, incidental demands, procedural exceptions, third-party intervention, cross-claims, etc.

[33] The phraseology '*cerere de chemare in judecata*' may alternatively be translated as a 'request to call to justice', which may serve as a better reflection of the cultural underpinnings of the civil process, given the highly inquisitorial nature of Romanian civil litigation. Interestingly enough, the expression 'to bring into judgment' is the cause of a doctrinal debate between two leading academics on whether the vesting of the court with power to adjudicate the litigation is a procedural act distinct from the petition. The majority of the doctrine regards the petition as the same act as vesting the court (see Ciobanu 1997, Vol. II, p. 24; Leş 2010, p. 453), while one influential writer disagrees noting that in case of a non-contentious procedure the 'request to bring into judgment' takes the form of a joint petition, which vests the court but cannot be regarded as a 'bringing into judgment' or a 'call to justice' since both parties are in agreement over the demand. See Deleanu 2007, p. 319.

[34] Deleanu 2007, p. 134.

[35] Leş 2010, p. 334.

residence;[36] (2) the name and capacity of the plaintiff's representative – when represented by an attorney, the lawyer's name and office must be included; (3) the object of the demand and its estimated value if the demand is subject to pecuniary evaluation; (4) statements of fact and points of law on which the petition is grounded; (5) an offer of evidence for each specific claim alleged in the petition; and (6) a signature.

Failure to include all the enumerated elements has negative consequences for the plaintiff. The sanctions vary according to whether the elements omitted are considered essential or non-essential. Generally speaking, the most likely sanction is the nullification of the pleading, although it may not occur immediately, as the judge will generally allow the plaintiff time to complete or modify the petition. According to Article 133 CCP, 'the petition that fails to include the name of the plaintiff or the defendant, the object of the demand, or signature will be declared null'.

A specific sanction is afforded for failure to include the offer of evidence. In these circumstances the petition remains valid, but the plaintiff loses the right to make evidentiary offers and will be restricted to discussing and opposing the proof asserted by the other parties. This detrimental position is somewhat attenuated by the active role of the judge, who may request *ex officio* any evidence he deems necessary for the resolution of the case, being mindful of his stated duty to ascertain the truth.[37] Of course this exercise has certain limits, as the judge cannot take on for himself the position of the party and cannot supply the party's burden of proof.

The petition must be filed with the court, with delivery in person either by the plaintiff or a representative. Alternatively, delivery of the petition to the court can also be performed by certified mail (Article 104 CCP). The plaintiff must provide as many copies of the petition as there are defendants (Article 113(1) CCP). Where the law mandates a pre-action procedure, written proof of completion must be attached as well (Article 109(2) CCP).

Upon receipt of the petition the president, or more often a delegated replacement judge, will examine whether the petition complies with all the formal requirements. If the petition fails in this regard, the judge will ask the plaintiff to complete or modify the petition immediately. If this is not possible, the judge will record the petition and provide the plaintiff with a short time-frame in which to rectify the deficiencies. Failure to rectify the petition within the allowed time limits may lead to a suspension of the litigation and/or annulment of the petition.

If the petition complies with all the formal requirements, the judge will order citation of the parties and set a date for a hearing. Citation is undertaken only through the court – private service of process is not available. The first hearing date

[36] When juridical persons are involved, other identifying elements are required by the current legislation in force, such as: registration number, fiscal code and bank account. Under the NCPC, the additional identification elements for juridical persons are required only insofar as they are known to the plaintiff.

[37] Art. 129(5) CCP.

must be set as to allow a defendant at least 15 days to prepare his defence in ordinary cases and at least 5 days in emergency cases.

A defendant in civil litigation is required to file an answer unless the law provides otherwise. The answer must include (1) all procedural exceptions that the defendant may raise, (2) an answer to each factual and legal claim asserted in the petition, (3) an offer of evidence for each claim contested by the defendant; where witnesses are proposed, the defendant must indicate their names and residence; and (4) signature.

If a defendant has a counterclaim against the plaintiff, he may file a 'reconventional demand', which must satisfy the same formal requirements as the plaintiff's petition. The reconventional demand must be filed at the same time as the answer, or where the answer is not required, it may be filed at any time until the first day of appearance.[38] If the plaintiff has modified his original petition, the judge may allow the defendant an additional amount of time to file a reconventional demand.

The NCPC provides for some changes regarding the timeline of the preliminary written phase. Under the new scheme, after the plaintiff's petition is filed with the court the judge or the panel of judges in charge of the case will verify the petition's compliance with the formal requirements.[39] If the petition does not satisfy all the required elements, the plaintiff will receive a written notification advising him to rectify the deficiencies within 10 days, otherwise the petition will be declared null.[40] Once the judge is satisfied that all the requirements for a valid petition have been met, he will order that the petition be served on the defendant, who will be required to file an answer within 20 days.[41] The answer will then be communicated to the plaintiff, who may file a reply within 10 days.[42] Only after the reply has been filed will the judge set the date for the first hearing. These amendments are aimed at redressing a current practice by the attorneys who often file an answer only on the eve of the first hearing, which leads to delays inasmuch as the opponent will ask for time to analyse the answer and file a reply. Moreover, under the current framework, it is not unusual for a defendant to receive a copy of the petition at the time of the first hearing, in which case he will ask for additional time to file an answer or even to seek legal representation.

[38] The 'first day of appearance' is a hearing of particular importance which constitutes the point of reference for many procedural arrangements. The first day of appearance is to be distinguished from the first hearing. According to Art. 134 CCP, the first day of appearance is to be considered the hearing where the parties have been legally cited and are able to argue in the case. Thus, there may be several hearing dates prior to the first day of appearance. The NCPC abandons this terminology and replaces it with 'the first hearing date where the parties are legally cited'.

[39] Art. 195 NCPC.

[40] *Ibidem.*

[41] Art. 196 NCPC.

[42] *Ibidem.*

15.3.3 The Trial Phase

The trial phase essentially consists of a series of successive hearings in which the case is investigated, evidence is administered and the parties engage in debates over factual issues or arguments on points of law. There is no clear distinction on the type of hearings, nor is there a limit on the number of hearings allowed. There may be as many hearings as necessary to prepare the case for the final disposition, depending on the complexity of the case. Many simpler cases are indeed disposed of in one or two hearings, while more complex cases requiring evidence will take a substantial number of hearings to investigate. As a practical matter, the judge will generally dedicate a hearing to a particular purpose and will not hear more than two witnesses in one hearing. Hearing dates are ordinarily scheduled on a 3-week interval. All hearings are publicly held unless the law provides otherwise. In certain cases, the parties may agree to have the hearing held *in camera*.

All proceedings and rulings that take place during the hearings are indicated in a 'closing order,'[43] which must be issued at the end of every hearing and filed into the record of the case file. There are two types of closing orders: preparatory and interlocutory. Preparatory closing orders are rulings which aim to prepare the case and move it forward toward a final resolution, i.e. an order providing for the administration of a certain piece of evidence. Interlocutory closing orders are those rulings in which the court decides exceptions or arguments that touch upon the substance of the dispute, without constituting a final judgment on the merits.

The Code does provide certain rules regarding the sequence of issues to be disposed of during trial. According to Article 137 CCP, the court must first rule on procedural exceptions and those affirmative defences[44] that could make the investigation on the merits/substance of the case unnecessary. The exceptions must be decided separately and cannot be united with the substance of the case, unless they cannot be resolved without administering proof on the merits of the case.

Another relevant provision is the requirement that the administration of evidence should take place prior to the debates on the merits of the case (Article 167 CCP). As a consequence, during an 'evidentiary hearing' the judge will try to restrict the arguments raised by the parties to the factual issues and points of law that are directly relevant and limited to the evidence that is being administered.

From the various provisions of the Code, there is an apparent tendency toward a concentration of the trial,[45] at least in certain aspects. Thus, according to the same

[43] Despite the similar terminology, the closing order described herein should not be confused with the 'closing order' available under French civil procedure (*ordonnance de clôture*), which marks the end of the preparatory stage in French civil litigation.

[44] These defences are also raised by way of exception, but they mainly regard the substance of the dispute.

[45] Unlike the *Konzentrationsmaxime* available in German civil procedure, such a trend does not have the value of a recognised principle in Romanian civil procedure; rather, it appears to be a consequence of the principle of contradiction and the principle of immediacy.

Article 167, contrary proofs must be administered as much as possible at the same time, which means during the same hearing and in a close sequence. Furthermore, when witness testimony has been approved by the judge in cases where witnesses were not identified in the petition or in the answer, the contrary proof will be requested in the same hearing if both parties are present (Article 167(2)). If a party is not present at the time the judge approved the offer of evidence, the party must provide any contrary evidence at the next hearing in which the party makes an appearance (Article 167(3)).

Also, as a guideline courts generally hold the debates on the merits of the case in one single hearing toward the end of the trial. When the court considers that all matters are clarified and it has all the necessary facts to reach a decision, the presiding judge will declare the debates closed, which marks the end of the trial phase. The court may reopen the case on its own motion, at any point prior to the judgment, if it considers this necessary in order to ask for clarification.

Throughout the trial the judge has a pre-eminently dominant position, characterised by an active role in investigating the claims, administering the evidence and conducting the arguments on the merits. Thus, the judge is the one in charge of approving and admitting offers of evidence into the record, who conducts the interrogation of the parties and testimony of the witnesses, performs *in loco* investigations if necessary and generally prepares the case file containing a summary of all the arguments and evidence provided.

The principle of the active role of the judge represents a cornerstone of modern Romanian civil procedure. Although it is not stated verbatim in any source of law, the principle enjoys a great deal of recognition in doctrine and has been deeply entrenched in the judicial culture and practice.

Illustrative in this regard are doctrinal descriptions of the principle which consider the active role of the judge the only rational way of achieving, in the words of one author, 'a just and principled resolution of litigation, to guarantee the social peace in a democratic society'.[46] Moreover, according to the same author, 'the transition from a centralised socio-economic system to a free and democratic society cannot determine an abdication of the principle of the active role of the judge. To the contrary, a consolidation of the rule of law requires an enhancement of the duties and responsibilities of judges'.[47] Another author posits, in pertinent part:

> The active role of the judge expresses – in our procedural system as well – the exigencies and the characteristics of the 'inquisitorial procedure', [as] opposed to the 'adversarial procedure'. From the attribute of justice as a 'public service' derives the 'officialdom' of the civil process, which implies among other things an active role of the judge, which means neither partiality nor interference with the rights and interests of the parties. To the contrary, it represents a guarantee of such rights and interests.[48]

Similar assessments are found in the works of other academic writers.[49]

[46] Leş 2010, p. 48.

[47] *Ibidem.*, pp. 48–49.

[48] Deleanu 2007, p. 24.

[49] See Ciobanu 1997; Alexe 2008.

In the current legislation in force, there are many statutory provisions that promote this principle. Chief among these is 'the duty of the judge to strive by all available legal means to prevent any mistake in the ascertainment of the truth in the case'; and to this end, 'the judge may order the administration of any evidence he deems necessary even if the parties are opposed' (Article 129 (5) CCP). Moreover, with regard to the factual and legal grounds of the claims asserted by the parties, 'the judge is within his rights to request from the parties oral or written explanations, as well as to raise for debate any factual or legal circumstances, even if they are not mentioned in the [pleadings]' (Article 129 (4)).

The active role of the judge is generally limited by the principle of party-disposition, under Article 129(6), which provides: '[i]n all cases however, the judge may not decide beyond the object of the demand'. The principle of contradiction also limits the excessive application of the active role of the judge, by requiring the judge to put into discussion before the parties any points of law or fact raised by the court on its own motion.[50]

15.3.4 Administration of Evidence by the Attorneys

One of the innovations introduced relatively recently in Romanian civil procedure is the possibility of evidence being administered by the parties' attorneys, rather than by the judge. This procedural institution had a controversial history. It was first provided through the emergency governmental decree procedure by OUG 138/2000. However, the procedure was short-lived, being abolished within a few months by another emergency governmental decree OUG 59/2001. The procedure was brought to life again by Law 219/2005, which confirmed and re-enacted OUG 138/2000. It has remained in force ever since.

Essentially, the administration of evidence by the attorneys is intended to be an optional procedure, primarily aimed at relieving the court of its burden of micro-managing every evidentiary aspect of litigation. The attorneys become more involved in the process, having the duty to prepare the case file. However, as described below the judge remains highly involved in the process, as certain means of proof cannot be administered by the attorneys. The judge continues to exercise supervision over the process, being required to intervene at any point where a controversy arises.

The procedure of administration of proof by the attorneys is available only in litigation involving patrimonial rights and only where the law permits private settlement (Article 241i CCP).[51] For the procedure to be available, the parties must specifically consent to it at the first day of appearance. Once given, the consent

[50] See ICCJ (IP div.) Decision No. 5699/2004.

[51] There are a few circumstances in which settlement is not allowed by law, i.e. litigation involving the rights and interests of minors.

cannot be revoked by either party. If the procedure of administration of evidence by the attorneys is followed, all subsequent hearings may be held *in camera* in the presence of the parties and their attorneys, in derogation from the principle of publicity.

After verifying the validity of the consent expressed by the parties for the use of the procedure the court will rule on the procedural exceptions raised by the parties, and on those that it may raise *ex officio*. It will decide on any motions and demands against third parties and requests on provisional measures.

Thereafter the court will proceed to examine the claims raised by the parties in their pleadings and offers of evidence. The court will approve the administration of the evidence it considers relevant to the case and may provide *ex officio* for any additional evidence it deems necessary to the dispute. The court will then provide for a term of up to 6 months for the approved evidence to be administered by the attorneys. Within 15 days from the approval of evidence, the parties are required to present the judge with a detailed schedule regarding the administration of evidence, indicating the date and location for each individual proof. The schedule must be approved by the judge *in camera* and once approved it becomes mandatory for the parties and their attorneys.

The attorneys will then proceed with preparing the case file, which will be presented jointly to the court after the completion of the procedure. Different methods of proofs may be administered at the offices of the attorneys or in any other location agreed by them. When writings are involved, the attorneys must exchange and communicate with one another by certified mail all acts intended to be included in the case file. When a document is in the possession of a third party or an official authority, the attorneys cannot request production of the document directly; rather, they must ask the court for an order directing the possessor to provide the court with the document. Copies of the same are subsequently mailed to the office of each attorney.

The attorneys may take the deposition of any witness previously approved by the court according to the schedule, except for minors and witnesses who are mentally incapacitated. These witnesses may only be heard by the judge at the court. When the deposition is taken by the attorneys, the entire testimony should be recorded verbatim and signed by the witness. The recorder may be any person agreed by the parties, no specific licensing or professional requirements operate in this regard. The attorneys have the option of having a public notary record and authenticate the transcript of the deposition. The transcript will be included in the case file.

The attorneys cannot interrogate the parties, as they are not considered witnesses. The parties are subject only to interrogation by the judge.

In cases of expert evidence, the parties will agree upon one expert to provide a report that will be part of the case file. When the parties cannot agree on one person, the court will select the expert.

Whenever a dispute arises over the administration of evidence or the admissibility of a method of proof, the parties must file a motion with the court. The judge will rule on the controversy and decide the proper course of action.

After the expiration of the delay provided by the court for the administration of evidence (presumably completed by now), the parties will jointly present the judge

with a case file. The judge will then set a final hearing for oral arguments on the merits of the case, to take place in less than 1 month. At that hearing the judge may order the re-administration before the court of any evidence he considers necessary. The order must provide reasons for such a measure.

While the administration of evidence by the attorneys is an interesting development in Romanian civil procedure, it remains largely a matter of academic interest. In practice, the administration of proof by attorneys is extremely rare, to say the least.

The NCPC provides for maintaining this procedure as an alternative to the traditional way of administration of evidence by the judge. The *Exposé des Motifs* is quite optimistic in acknowledging that the procedure is 'not frequently used yet, but with time, it will find its field of application, as litigants will [gradually] increase their trust in its efficiency and in the responsibility of those called to accomplish it'.

15.3.5 Deliberation and Judgment

The last phase in the ordinary procedure before the courts of first instance refers to the deliberation and issuance of the final judgment on the merits. Once the debates are closed, the judges will deliberate in secret on the case. A judgment is expected to be rendered within 7 days from the day of final oral arguments. In special circumstances, this term may be increased to a maximum of 20 days. There is a single judgment issued in the name of the court, although the existence of a dissenting opinion must be indicated in the holding of the judgment.

15.4 Mediation

Mediation is a fairly new procedural institution in Romania. Prior to 2006, mediation was informally available to litigants, operating in the form of amicable demands and attempts at reconciliation. Formal mediation existed only in labour litigation and was subject to specific rules inherent in the nature of these disputes.

In 2006, the legislature adopted Law 192/2006 on the exercise of the profession of mediator, essentially making mediation a regulated legal profession. As a result, mediation is to be formally distinguished from conciliation or settlement, which take place directly between the parties themselves. As defined by Law 192/2006, mediation represents an amicable settlement of the dispute with the assistance of a professional, specialised as a mediator.[52]

Law 192/2006 and its subsequent amendments provide for specific requirements regarding licensing and the exercise of the profession. Thus, mediation can only be

[52] Art. 1 Law 192/2006.

exercised by a licensed professional[53] duly authorised to practise by a national body called the Mediation Council.[54] Unauthorised practice of mediation is regarded as a criminal act and may lead to criminal prosecution.[55]

Law 192/2006 imposes certain minimum requirements for eligibility to become a licensed mediator. Thus, in order to obtain authorisation to practise, a person must have a university degree, not necessarily in law, have at least 3 years of work experience in any field, be medically fit for exercising mediation, enjoy a good reputation and not have been convicted of a criminal offence likely to affect the prestige of the profession.[56] In addition, a prospective applicant must attend a training course in mediation approved by the Mediation Council or, alternatively, have a master's degree in the field of mediation by an accredited institution.[57] The Mediation Council keeps a register of all licensed mediators, whose names are listed in the Panel of Mediators and published in the *Official Journal*.[58] All mediators are subject to disciplinary action by the Mediation Council for failure to comply with their obligations imposed by law or by the Code of Ethics and Professionalism adopted by the Mediation Council.[59]

All mediators exercise their profession in private offices and cannot be subject to employment by a court or any other judicial bodies. Mediators are allowed to have under their employment jurists, translators and secretaries as well as any other specialists or support personnel necessary for the exercise of their profession as mediators.[60] In general, the exercise of the profession of mediator is compatible with any other profession, except as provided by special laws.[61] Thus, judges cannot be mediators, but attorneys can. However, an attorney representing a party cannot act as a mediator in the same case.

Under framework provided by Law 192/2006, mediation is available not only in civil and commercial litigation, but also in cases involving family law, consumer protection and even criminal law.[62] The parties can resort to mediation at any time, both before legal proceedings have been initiated in court and after the

[53] Art. 12(4) Law 192/2006.

[54] According to Art. 17(1) Law 192/2006, the Mediation Council is organised as an autonomous legal entity of public interest.

[55] Art. 12(5) Law 192/2006.

[56] Art. 7 Law 192/2006.

[57] *Ibidem.*

[58] Art. 12(1) Law 192/2006.

[59] Art. 20 in conjunction with Art. 40 Law 192/2006.

[60] Art. 22(1) Law 192/2006.

[61] Art. 13 Law 192/2006.

[62] Art. 2(1) Law 192/2006. With regard to criminal cases, mediation is available only in specific situations where criminal prosecution is conditioned upon the filing of a private complaint or where the law provides that the conciliation of the parties eliminates criminal responsibility (Art. 67(1)). It should be noted that neither the victim nor the criminal defendant can be forced to accept mediation (Art. 67(2)).

commencement of the litigation. More importantly, mediation can be used to fulfil the requirements of a pre-action procedure.[63] In this regard the law specifically provides that all natural and juridical persons have the right to resort to mediation as an alternative to the mandatory pre-action procedure.[64] In civil and commercial cases, mediation is generally available in all legal disputes, except those involving strictly personal rights (such as those related to the civil or marital status of a person) and rights which the law specifically provides cannot be subject to an agreement by the parties.[65]

The parties are allowed to include a mediation clause in any contractual agreement, and the validity of the mediation clause is to be determined independently from the validity of the contract containing the clause.[66]

In recent years, an interesting debate has occurred on whether mediation can be made mandatory for the parties. The debate was spurred by certain amendments to Law 192/2006 that eliminated the language in the current legislation which emphasised the optional character of the mediation procedure. Thus, in its original wording, Article 1 of Law 192/2006 defined mediation as an 'optional' method of amicable resolution of disputes between the parties with the assistance of a professional, specialised as a mediator. The amendments[67] eliminated the term 'optional', but introduced language indicating that mediation is subject to the 'free consent of the parties'. Similarly, the wording of Article 6 was changed to require judges, arbitrators and others with adjudicatory functions to inform the parties on the possibility and advantages of using mediation and to advise the parties to resort to mediation as a way of resolving their disputes.[68]

In truth, the amendments were never explicitly intended to make mediation mandatory for the parties. Rather, the amendments represented a legislative reaction to numerous complaints made by professional mediators regarding the fact that the public and the parties involved in litigation do not have sufficient knowledge and information regarding the possibility to mediate. Nonetheless, in light of the amendments it has become clear that judges have been charged with a statutory duty to inform the parties about the advantages of mediation and, more importantly, to recommend to the parties the use of mediation in resolving their disputes. Noteworthy, Article 129(2) CCP also provides for the duty of the judge to 'insist in all phases of litigation on the amicable resolution of the dispute between the parties'. However,

[63] The pre-action procedure is discussed in Sect. 15.3.1 above.

[64] Art. 2(3) Law 192/2006.

[65] Art. 2(4) Law 192/2006. Examples of rights which cannot be subject to an agreement by the parties include actions to establish paternity or filiation.

[66] Art. 2(5) Law 192/2006.

[67] See Law 370/2009; Governmental Decree 13/2010 and Law 2002/2010.

[68] In its original language, Art. 6 Law 192/2006 provided that judges, arbitrators and others with adjudicatory functions 'would' inform the parties on the possibility and advantages of using mediation and 'may' guide them to resort to mediation. The amendments eliminated the discretionary 'would' and 'may' from the text of the article.

since the law specifically provides that mediation is conditioned upon the 'free consent of the parties', it is also clear that the parties cannot be forced to participate in mediation against their will. Moreover, the very nature of mediation requires the cooperation of the parties.

In this context, judicial practice adopted a solution of compromise, whereby in all cases where the judge recommends mediation, the parties are under the obligation to participate in a first meeting with the mediator, informally referred to as the 'information session'. During this meeting the mediator has a duty to inform the parties and provide them with all the necessary explanations regarding the mediation activity, ensuring that the parties understand the scope, limits and the effects of mediation.[69] The information session is to be provided free of charge by the mediator.[70] The parties cannot be forced to participate beyond this first meeting, nor are they under any obligation to enter into a mediation contract.[71] Even if the parties do agree on mediation, a party is free to withdraw at any time. Of course, in such circumstances the party will have to bear the costs of mediation by paying the fee charged by the mediator as agreed by contract. This solution has been formally endorsed by a recent law adopted on 19 June 2012 and is expected to enter into force on 1 October 2012.

At the time Law 192/2006 came into force the legal profession was rather sceptical toward mediation. This is hardly surprising considering the fact that there was virtually no tradition of mediation or other forms of private alternative dispute resolution in the Romanian judicial culture. As explained elsewhere in this paper, litigation in Romania is regarded as an exclusively public affair where the judge enjoys a dominant position in the proceedings, being entrusted with an active role and a stated duty to ascertain the truth. The functioning of justice as a public service is proclaimed to be a fundamental principle of civil procedure.[72] Moreover, even mediation is declared to be an activity of public interest,[73] notwithstanding the fact that mediation is essentially concerned with an amicable settlement of the dispute between private parties.

In the last 2 years, mediation has enjoyed rapidly growing support and is increasingly becoming more popular. One of the main reasons behind this relative success lies in the fact that the legislator provided important financial incentives for using mediation after the commencement of the litigation. As already explained, the parties can resort to mediation not only before litigation, but also after the commencement of the proceedings. They have the right to freely choose their mediator[74] and may be represented by their attorneys during the mediation process. If, during the

[69] See Art. 29(1) Law 192/2006.

[70] Art. 26(3) Law 192/2006.

[71] Noteworthy, other than the 'information session', the law prohibits any mediation activity without a written agreement to mediate concluded between the parties and the mediator.

[72] See Art. 1 NCPC and Exposé des Motifs 2009.

[73] Art. 4 Law 192/2006.

[74] Art. 5(2) Law 192/2006.

Table 15.1 An overview of the statutory fees charged by the courts based on the value of the demand

Value of the demand	Judicial fee
Less than 50 RON	6 RON
Between 50 and 500 RON	6 RON + 10 % of the amount over 50 RON
Between 501 and 5,000 RON	51 RON + 8 % of the amount over 500 RON
Between 5,001 and 25,000 RON	411 RON + 6 % of the amount over 5,000 RON
Between 25,001 and 50,000 RON	1,611 RON + 4 % of the amount over 25,000 RON
Between 50,001 and 250,000 RON	2,611 RON + 2 % of the amount over 50,000 RON
Over 250,000 RON	6,611 RON + 1 % of the amount over 250,000 RON

RON is approximately 0.25 EUR

course of the litigation, the parties agree to mediation and are successful in reaching a settlement following the mediation procedure, they may recuperate all the court fees that they paid in advance at the time the litigation was initiated.

In Romania, a plaintiff as well as a defendant making a reconventional demand must pay the court in advance a certain judicial fee called 'the judicial stamp tax'. This fee is generally calculated as a percentage of the estimated value of the object of the claim and, therefore, in certain cases it may be quite high.[75] (See Table 15.1.)

Thus, if the parties proceed to mediation, they may get the chance of reaching a much cheaper resolution of their dispute. Where successful, the result of mediation will be cast into a formal judgment by the court and the judicial fee will be returned to the parties.[76]

Nonetheless, the effect of the mediation procedure should not be overstated. According to a recent report on the functioning of the justice system in Romania,[77] during the year 2011 the courts approved mediation in only 1,525 cases. The number is quite insignificant considering the overall number of cases filed every year in Romania. On the positive side, the number is four times higher than the number of court-approved mediation in 2010, which totalled a meagre 258 cases. It should be kept in mind that these numbers reflect only court-approved mediation, whereas the total number of cases submitted to mediation was reportedly much higher.

In any event, mediation represents an interesting development in the Romanian judicial system. There is clear evidence of growing support toward this procedural institution, as more and more people apply to become professional mediators. Many applicants are practising attorneys who seek to expand their practice by becoming licensed mediators.

[75] We note that this 'judicial stamp tax' is to be paid in advance and does not cover other litigation expenses such as attorney fees, expert fees, costs associated with hearing a witness (i.e. transportation or lodging) or any other expenses that are necessary for the adjudication of the dispute. Obviously, at the end of the litigation the winning party will be able to recover from the losing party all litigation expenses including the judicial fee, in accordance with the 'loser pays' rule that is applicable in Romania.

[76] Art. 61 Law 192/2006.

[77] Report 2011, p. 130.

15.5 Concluding Remarks

Civil procedure in Romania is in a continuous state of reform, with various amendments being passed almost every year. As already indicated, a New Code of Civil Procedure has entered into force in 2013. One of the innovations of the NCPC is to provide for an express legislative recognition of fundamental principles of procedure that have been developed by doctrine and sanctioned to a large extent in the jurisprudence. The NCPC provides for no less than 15 such fundamental principles: the functioning of justice as public service, the right to a fair trial (equitable process) within an optimal and foreseeable time-frame, the principle of celerity (speedy trial), the principle of legality (rule of law), the principle of equality, the principle of party disposition, the principle of good faith, the right of defence, the principle of contradictory proceedings, the principle of orality, the principle of immediacy, the principle of publicity, the principle of continuity, the principle of the active role of the judge in the pursuit of truth and the requirement that all court proceedings be conducted in the Romanian language.

Despite the comprehensive proclamation of these principles, most of which had not been included in the previous formulations of the Code, their usefulness in practice remains questionable. Many of these principles reflect an encyclopaedic orientation of the Code and doctrine, and do not really apply in practice. The principle of continuity and the principle of publicity are the best examples where the NCPC departs from the application of the stated principles by way of its concrete provisions;[78] other principles are subject to so many exceptions and derogations as to make the principles obsolete.[79]

The Romanian High Court of Cassation and Justice has expressed concerns regarding several changes envisaged by the NCPC. One point deserves to be mentioned, as it is illustrative of the underlying philosophy of the NCPC. Contrary to the stated principle of publicity, the NCPC envisages a new investigation phase to take place *in camera*, rather than in public hearings as it is currently applied.[80] In a letter addressed to the Senate, the Court proposed to abrogate the new provisions and maintain the existing rule which provides that all proceedings should be held in public. Unfortunately, the Court's objections were not taken into consideration. To the contrary, in a recent article the president of the commission that was in charge of drafting the NCPC (Prof. Ciobanu) criticised the Court for its attitude and even ridiculed the objections as being the result of ignorance and gross misunderstanding on the part of the Court on how basic legal institutions work.[81] According to Prof. Ciobanu, moving the investigation of the case from a public hearing to a hearing

[78] As one academic authority acknowledges: '[f]or objective reasons determined by the application of other principles (truth, right of defence, etc.), the principle of continuity is not fully applied in our procedural system'. Leş 2010, pp. 63–64.

[79] For instance, the principle of party disposition.

[80] See Art. 235(1) NCPC.

[81] See Ciobanu 2012.

that takes place in the judges' chambers was aimed primarily to establish efficiency in the cooperation between the judge and the parties, and not to constitute a 'dessert' for the public seeking amusement in the courthouse.[82]

The criticism directed at the proposal of the High Court of Cassation and Justice seems unfair, to say the least, and the explanation in support of the change leaves much to be desired. In truth, the change envisaged by the NCPC is quite concerning especially when considering the larger context in which the Romanian Judiciary operates. One major problem that has marred Romanian society following the fall of Communism is the existence of widespread corruption at all levels of state institutions, including the Judiciary. In recent years, following Romania's accession to the European Union, the levels of corruption have been greatly reduced and a significant increase in the standard of living has been achieved. However, corruption is far from having been eradicated. In this context, conducting litigation outside the eyes of the public is likely to cast serious doubts on the legitimacy of the entire process.

It is perhaps not surprising that Romania has one of the lowest levels of trust in the Judiciary among European countries. Data from the Eurobarometer survey consistently show the level of trust in the Judiciary in Romania at 26–28 % over the last 8 years. By contrast, the level of trust in EU institutions was at 74 % in 2004 and 2005, the highest in Europe, and at 66 % in 2008. Data from WorldValueSurvey seem to indicate the same thing: over 70 % of the respondents have either no trust at all (24.4 %) or very little trust (46.3 %) in the judicial system.

Considering these circumstances, the reforms of civil procedure should have been aimed at increasing the level of trust in the Judiciary, rather than aimed at ensuring efficiency and swift justice. One way to increase the levels of acceptance and legitimacy of judicial opinions in the eyes of the public could have been achieved by increasing the control and the involvement of the parties in the litigation process, instead of further enlarging the powers of the judge. By allowing greater participation of the parties and providing for restraint on the part of the court, the litigants would be more likely to accept an unfavourable outcome of the adjudication process and their sentiments toward the way the courts operate would be enhanced.

Unfortunately, the NCPC does not share this philosophy. A recurring theme behind the legislative reform of Romanian civil procedure is the greater need for increased efficiency and avoidance of undue delays. When confronted with practical problems, the NCPC adopts the same old ideological solution of enhancing the powers of the judge to the detriment of party autonomy. In the name of efficiency and swift justice, the rights of the parties and fundamental guarantees are readily sacrificed.

However, a closer look at litigation in Romania reveals that, overall, the system is quite efficient. The annual reports provided by district courts and courts of appeal

[82] *Ibidem.* It should be noted that the entry into force of the provisions related the investigation of the case under the NCPC has been postponed until 1 January 2016 due to a lack of sufficient office space in the courts to accommodate *in camera* investigations. See Law 2 of 2013. See also *supra* n. 22.

indicate an average time of disposition of less than 6 months when the case is tried before a court of first instance.[83] More than 80 % of cases are disposed of in less than a year.[84] In cases of appeal and review, the duration is slightly higher, but still the vast majority of cases are disposed of within 1 year. These figures are consistent with the numbers provided by several national reports.[85] When compared with other European countries, Romania is doing fairly well in terms of length of the proceedings, with an efficiency rate that is likely to rival Germany. There are indeed many cases that may take years to reach a final disposition and the European Court of Human Rights has indeed sanctioned Romania in this regard. However, it should be pointed out that the cause of delay in such cases is not due to a defect in the procedure, but rather to the inherent nature of the disputes.[86]

The efficiency of the Romanian system is even more impressive when considering the fact that in practice the biggest hurdle in terms of duration is obtaining a first hearing. Because of backlogs in the court, this process may take anywhere between 2 and 6 months. Seen in this light, the actual time of disposition of the case is, in many cases, much less than 6 months. What Romania needs is in fact more judges. The official data indicate that the average judge has a workload of 1,000 cases per year, which appears to be quite high considering the level of responsibility and involvement of the judge in the litigation process. According to a recent report,[87] the average workload for a judge at the High Court of Cassation and Justice was 942 cases per year, for a judge at the courts of appeal 1,034 cases, for a judge at the district court level 1,058 cases and for a judge at the local courts 1,101 cases. These numbers reflect averages; in some situations the workload per judge can go as high as 2,300 cases per year.[88]

[83] As previously mentioned, courts of appeal can also act as courts of first instance depending on the nature of the claim.

[84] See Tables A.1, A.2 and A.3 included in Appendix 3 to the present contribution.

[85] See CEPEJ 2009 and Report 2011.

[86] Many of the cases that reached the European Court of Human Rights concern real property and enforcement of judgments. In the first two decades after the Communist regime assumed power in Romania, the government seized large amounts of real estate and immovables from private owners and dedicated them to public use. Since the fall of the Communist regime in 1989, the former owners and their descendants have sought to reclaim these properties, only to be faced with many difficulties related to the burden of proving ownership, the fact that the properties are either part of the public domain or have been transferred by the former government to the ownership or 'perpetual use' of other private individuals, who also have claimed a legitimate right over these properties. As a result, the status of these properties continues to be subject to challenges from various third parties claiming ownership or other related rights acquired from the presumptive owners or apparent possessors. To make things even more complicated, the compensation afforded in such cases has been deemed to be insufficient considering the high inflation of the Romanian currency in the period immediately after 1990.

[87] Report 2011, pp. 19–25.

[88] Report 2011, p. 25.

If there is a lesson to be learned from the Romanian experience, it would be that the problems of the West are not necessarily the problems of the East. While Western Europe and particularly Southern Europe are primarily confronted with concerns regarding efficiency and speedy resolution of disputes, the picture in Eastern Europe is quite different. As indicated above, Romania's main problems are not related to the efficiency of the justice system; rather, the main concerns regard corruption and the low level of public trust in the judicial authorities. Each country is different and the problems encountered in each judicial system are very much influenced by the differences in the historical and socio-political traditions of their respective societies. There is no perfect system and there is no universal medicine to cure the defects. In the field of civil procedure, the task of the legislator is to provide a proper framework for litigation, with an optimal balance between the powers of the judge and the powers of the parties in the litigation process. The aim of any successful reform is to apply changes when and where they are needed, in an attempt to prevent excesses resulting from an imbalance in the distribution of authority among the actors involved in litigation.

Appendices

Appendix 1: Facts and Figures Relevant for the Powers of the Judge and the Parties in Civil Litigation

Romania

Year of Reference: 2008

Part I: General Data on the National Civil Justice System

1. Inhabitants, GDP and average gross annual salary

Number of inhabitants	21,528,627
Per capita GDP (gross domestic product)	€6,363
Average gross annual salary	€5,743

2. Total annual budget allocated to all courts €385,309,000

3. Does the budget of the courts include the following items?

	Yes	Amount
Annual public budget allocated to salaries	☒	€330,427,080
Annual public budget allocated to computerisation	☒	€7,409,000
Annual public budget allocated to court buildings	☒	€5,331,256
Annual public budget allocated to training and education	☒	€74,000
Annual public budget allocated to legal aid	☒	€4,376,694
Other (please specify)	☒	€3,275,909

4. Is the budget allocated to the public prosecution included in the court budget?

☒ Yes
☐ No

(a) If yes, give the amount of the annual public budget allocated to the prosecution services

Legal Aid (Access to Justice)

5. Annual number of legal aid cases and annual public budget allocated to legal aid

	Number	Amount
Civil cases – non criminal cases	N/A	€875,339
Other than civil cases – criminal cases	N/A	€3,501,355
Total of legal aid cases	N/A	€4,376,694

Organisation of the court system and the public prosecution

6. Judges, non-judge staff and *Rechtspfleger*

	Total number	Sitting in civil cases
Professional judges (full time equivalent and permanent posts)	3,820	N/A
Professional judges sitting in courts on an occasional basis and paid as such	N/A	N/A
Non-professional judges (including lay-judges) who are not remunerated but who can possibly receive a defrayal of costs	N/A	N/A
Non-judge staff working in the courts (full time equivalent and permanent posts)	8,648	N/A
Rechtspfleger	N/A	N/A

The performance and workload of the courts

7. Total number of civil cases in the courts (litigious and non-litigious): 1,983,627

8. **Litigious civil cases and administrative law cases in the courts**

		Litigious civil cases in general	Civil cases by category (e.g. small claims, family, etc.)		
Total number of first-instance cases	Pending cases by 1 January of the year of reference	371,451	Land registry 19,809	Divorce 23,213	Administrative 62,900
	Pending cases by 31 December of the year of reference	433,066	10,879	24,391	71,767
	Incoming cases	1,612,176	32,883	64,097	213,824
	Decisions on the merits	1,544,961	33,948	62,919	204,957
Average length of first-instance proceedings		6 months	N/A	N/A	N/A

Appendix 2: Data on Civil Cases in a Selected Court or Courts to Be Answered by a Judge or Judges of that Court

Local Court (*Judecătorie*) Mediaş

1. What types of civil cases does your court decide?

- Divorce
- Inheritance
- Debt recovery

2. What is the volume of cases and their proportion to the caseload that your court decides on an annual basis?

	Type of case	Cases pending on 1.1. of the reference year	New cases initiated in the reference year	Resolved cases in the reference year	Cases pending on 31.12. of the reference year
1	**Civil cases**	**420**	**4,012**	**4,074**	**428**
1a	Litigious divorces	71	228	251	48
1b	Damages				
	Debt recovery	64	1150	956	61
2	**(Other cases)**				
	TOTAL				

3. Do you consider some of the types of cases as complex cases? If yes, please indicate which cases are regarded as complex, in terms of time and efforts needed.

Inheritance, land recovery and land delimitation because of the difficulties encountered in proof taking. Especially expert reports take a long time.

4. Do you consider some of the types of cases as urgent cases? If yes, please indicate which cases are regarded as urgent, and how this does affect the time of processing.

Commercial cases, order for payment and special summary proceedings (RO *ordonanţă preşedinţială*; FR *ordonnance de référée*)

5. Do you have information on the average or mean duration of particular types of civil cases? If yes, please provide information on average/mean duration of these cases.

	Type of case	Average duration (in months and/or days)		Mean duration (in months and/or days)	
1	**Civil cases**				
1a	Litigious divorces	4 months			
1b	Damages	6 months			
2	**(Other cases)**	6 months in general			
	TOTAL				

6. Do you monitor cases that are considered to last excessively long? If yes, please explain which cases are considered to be excessively lengthy (e.g. cases pending more than 3/4/5 years), what their proportion is in the court's caseload, and which measures have been introduced for speeding up these cases.

	Duration of cases completed in reference year (situation as per 31.12.) Indicate percentage of cases completed in the reference year								
		<1 month	1–3 month	0–6 month	7–12 month	1–2 year	2–3 year	3–5 year	5 year>
1	**Civil cases**			**3,904**	**115**	**45**	**9**	**1**	
1a	Litigious divorces			246	5				
1b	Damages								
2	(Other cases)			147	10	1			

(continued)

(continued)

	Duration of cases completed in reference year (situation as per 31.12.) Indicate percentage of cases completed in the reference year								
		<1 month	1–3 month	0–6 month	7–12 month	1–2 year	2–3 year	3–5 year	5 year>
	Total of Cases			4,297	130	46	9	1	

All cases older than 1 year are monitored constantly. The highest percentage of such cases concern inheritance and land recovery. We have begun the year with 17 cases that had lasted over 1 year at that time out of a total number of 5,854 cases that need to be decided.

Appendix 3

Table A.1 Summary of the number of cases and the productivity index, Romanian courts of appeal

Court of appeal	Reporting year	Type of jurisdiction	Pending cases, beginning of the year	Incoming cases	Decided	Pending cases, end of the year	Suspended	Productivity index (%)
Alba Iulia (civ. div.)	2007	First instance						
		Appeal						
		Review						
		Total	302	895	971	226	119	90.07
Alba Iulia (com. div.)	2007	First instance						
		Appeal						
		Review						
		Total	157	1,214	1,279	92	20	94.67
Bacau	2011	First instance						
		Appeal						
		Review						
		Total	1,421	6,295	6,238	1,478		83.90
Bucuresti (civil div.)	2010	First instance	10	55	64	1	1	98.46
		Appeal	519	850	772	597	84	60.08
		Review	957	1,325	1,609	683	210	77.28
		Total						
Bucuresti (com. div.)	2010	First instance	135	411	450	96	28	86.89
		Appeal	675	1,049	1,202	522	141	75.75
		Review	411	3,714	3,342	1,468	121	71.33
		Total						

(continued)

Table A.1 (continued)

Court of appeal	Reporting year	Type of jurisdiction	Pending cases, beginning of the year	Incoming cases	Decided	Pending cases, end of the year	Suspended	Productivity index (%)
Constanta (civ. div.)	2010	First instance	3	20	20	3	2	95.23
		Appeal	196	482	305	373	77	50.74
		Review	593	1,628	1,815	406	149	87.59
		Total						
Constanta (com. div.)	2010	First instance	215	525	540	200	98	84.11
		Appeal	93	198	194	97	50	80.49
		Review	716	3,037	3,141	612	196	88.30
		Total						
Craiova (civ. division)	2010	First instance	0	41	41	0	0	100
		Appeal	109	539	499	149	64	85.59
		Review	299	1,591	1,478	412	69	81.16
		Total						
Craiova (com. div.)	2010	First instance			80			
		Appeal			250			
		Review			1,436			
		Total	225	1,882		341	29	97.36
Galati (civil division)	2011	First instance						
		Appeal						
		Review						
		Total	355	895	976	274	101	84.94
Galati (com. div.)	2011	First instance						
		Appeal						
		Review						
		Total	472	2,283	2,053	702	87	76.94

Iasi (civil division)	2010	First instance	0	45	45	0	0	100
		Appeal	57	192	184	65	26	82.51
		Review	138	687	669	156	71	88.73
		Total						
Iasi (commercial div.)	2010	First instance	0	10	9	1	1	100
		Appeal	22	104	100	26	9	85.47
		Review	166	622	668	120	31	88.24
		Total						
Oradea (civil division)	2009	First instance	96	65	156	5		96.90
		Appeal	86	137	159	64		71.30
		Review	728	2,021	1,977	772		71.90
		Total						
Oradea (com. + adm.)	2009	First instance	60	446	369	137		72.90
		Appeal	54	114	124	44		73.80
		Review	317	1,451	1,246	522		70.50
		Total						
Pitesti (civil division)	2011	First instance	8	90	75	0		100
		Appeal	69	102	129	20		86.58
		Review	477	3,055	2,703	92		96.71
		Total						
Ploiesti (civ. div.)	2010	First instance						
		Appeal						
		Review						
		Total	336	1,721	1,383	647		88.20
Ploiesti (com. div.)	2010	First instance		491	378			
		Appeal		190	150			
		Review		2,638	2,326			
		Total					55	87.44

(continued)

Table A.1 (continued)

Court of appeal	Reporting year	Type of jurisdiction	Pending cases, beginning of the year	Incoming cases	Decided	Pending cases, end of the year	Suspended	Productivity index (%)
Targu Mures (civ. div)	2011	First instance	0	17	17	0	0	100
		Appeal	52	79	98	33	12	82.35
		Review	202	1,740	1,393	549	49	74.32
		Total						
Targu Mures (com.d)	2011	First instance	135	236	258	113	9	71.27
		Appeal	36	92	81	47	8	67.50
		Review	529	3,728	2,567	1,690	6	60.39
		Total						

Table A.2 Overview of the average length of the proceedings at the district court level

Court	Year	Average length of the proceedings	Number of cases disposed in:			
			Less than 6 months	6 months to 1 year	1–2 years	Over 2 years
Tribunal Alba	2009	0–6 months	8,714	304	133	25
Tribunal Arad (civil division)	2008	2–6 months				
Tribunal Bacau (civil division)	2011		1,454	307	194 *(over 1 year)*	
Tribunal Bacau (com. division)	2011		2,323	506	698 *(over 1 year)*	
Tribunal Iasi (civil division)	2011		5,404	1,988	253	29
Tribunal Iasi (commercial div.)	2011		7,271	3,048	84	6
Tribunal Mehedinti (civ. div.)	2010	4 months				
Tribunal Mehedinti (com. Div.)	2010	3.5 months				
Tribunal Mures (com. div.)	2011		2,768	1,324	9	
Tribunal Prahova (civil div.)	2011	8 months				
Tribunal Prahova (com. div.)	2011	4 months				
Tribunal Valcea (civ. div.)	2011		3,033	856	121	
Tribunal Valcea (com. div.)	2011		3,741	322	224	

Table A.3 Overview of the average length of the proceedings. A sample of district courts and courts of appeal with breakdown on type of jurisdiction

Court	Year	Type of Jurisdiction	Average length of the proceedings	Number of cases disposed in:			
				<6 months	6 months to 1 year	1–2 years	>2 years
Tribunal Bucuresti (civil division)	2011	First instance	7–12 months				
		Appeal	3–6 months				
		Review	0–3 months				
Tribunal Bucuresti (com. div.)	2011	First instance	3 months–2 years				
		Appeal	2 months				
		Review	1 months				
Tribunal Sibiu (civil division)	2009	First instance		140	14	20	1
		Appeal		87	35	11	0
		Review		182	15	1	0
Tribunal Sibiu (com. division)	2009	First instance		178	27	18	8
		Appeal					
		Review		70	9	0	0
Court of Appeal Constanta (civ.)	2010	First instance		20	0	0	0
		Appeal		229	46	25	5
		Review		1,722	85	7	1
Court of Appeal Constanta (com.)	2010	First instance		502	32	6	0
		Appeal		168	18	7	1
		Review		3,036	54	1	
Court of Appeal Bucuresti (civ.)	2010		0–6 months				
Court of Appeal Bucuresti (com.)	2010		0–6 months				
Court of Appeal Ploiesti (com.)	2010			362	13	3	

References

Alexe CE (2008) Judecătorul în procesul civil, între rol activ şi arbitrar, vol 2. C.H. Beck, Bucureşti
CEPEJ (2009) National report for Romania. Available at: http://www.coe.int/t/dghl/cooperation/cepej/evaluation/2010/2010_Romania.pdf
Ciobanu VM (1997) Tratat Teoretic şi Practic de Procedură Civilă, vol 2. Naţional, Bucureşti
Ciobanu VM (2012) Înalta Curte de Casaţie şi Justiţie între aniversarea a 150 de ani de la înfiinţare şi lupta sa cu Noul Cod de procedură civilă. Revista română de drept privat No. 1/2012, pp 63–75
Deleanu I (2006) Instituţii şi proceduri constituţionale în dreptul român şi dreptul comparat. C.H. Beck, Bucureşti
Deleanu I (2007) Tratat de Procedură Civilă, vol 2. C.H. Beck, Bucureşti
Exposé des Motifs (2009) Expunere de Motive Proiect Lege privind Codul de Procedură Civilă. Available at: http://www.just.ro/Sections/PrimaPagina_MeniuDreapta/ProiectulnouluiCoddeProcedur%C4%83Civil%C4%83/tabid/648/Default.aspx
Leş I (2010) Tratat de drept procesual civil, 5th edn. C.H. Beck, Bucureşti
Mironescu GG (1901) Revizuirea Codului de Procedură Civilă. Tipografia Gutemberg, Bucureşti
Porumb G (1960) Codul de Procedură civilă comentat şi adnotat. Editura ştiinţifică, Bucureşti
Report (2011) Consiliul Superior al Magistraturii, Raport privind Starea Justiţiei 2011. Retrieved from: http://www.membricsm.ro/wp-content/uploads/2012/03/raportjustitie2012.pdf
Spinei S (2011) The Romanian legal profession. In: Uzelac A, Van Rhee CH (eds) The landscape of the legal professions in Europe and the USA: continuity and change. Intersentia, Antwerp, pp 41–54
Văcărelu S (2012) Legal culture and civil procedure. Romania's place among civil procedural systems (Romanian national report). In: Maleshin D (ed) Civil procedure in cross-cultural dialogue: Eurasia context: IAPL world conference on civil procedure. Statut Publishing House, Moscow, pp 290–310

Part VIII
Annex

Chapter 16
Case Management and Procedural Discipline in England & Wales: Fundamentals of an Essential New Technique

Neil Andrews

16.1 Introduction[1]

The English courts possess extensive 'case management' powers. In his reports of 1995–1996[2] Lord Woolf adopted this technique as the mainstay for actions on the 'multi-track', thus including all High Court litigation (this track covering more expensive County Court litigation and all High Court actions). The court must now ensure that matters are properly focused, procedural indiscipline checked, expense reduced, and progress maintained or even accelerated.

In his 22 November 2011 lecture, 'Achieving a Culture Change in Case Management'[3] Jackson noted the criticism that case management, if not applied efficiently, might itself become a drain on the system and increase the overall cost of litigation.[4] He suggested that the legal system must steer a middle course between Scylla and Charybdis: '*in this context Scylla is officious intermeddling by the courts, which gobbles up costs to no useful purpose' and 'Charybdis is laissez-faire litigation, which leaves the parties to swirl around in uncontrolled litigation—with all the problems which Lord Woolf identified in his Reports.'*

[1] On the new system from the perspective of the traditional adversarial principle, Andrews 2000, 2003, paras. 13.12–13.41; 14.04–14.45; 15.65–15.72. Andrews (2013), Chapters 9 ('Case Management and Procedural Discipline'), 22 ('Multi-Party Litigation'), 23 ('Complex Litigation'), and 24 ('The Commercial Court').

[2] Woolf 1995–1996; for comment, Zuckerman and Cranston 1995 and Cranston 2006, Chapter 5.

[3] http://www.judiciary.gov.uk/Resources/JCO/Documents/Speeches/lj-jackson-speech-achieving-culture-change-case management.pdf (last consulted in September 2012).

[4] *Ibidem*, at para. 1.8, noting Legg 2011.

N. Andrews (✉)
Clare College, Cambridge, UK

Cambridge University, Cambridge, UK
e-mail: nha1000@cam.ac.uk

C.H. (Remco) van Rhee and Fu Yulin (eds.), *Civil Litigation in China and Europe*, Ius Gentium: Comparative Perspectives on Law and Justice 31,
DOI 10.1007/978-94-007-7666-1_16,

This form of procedural organisation enjoys international support. The (non-binding) American Law Institute/UNIDROIT's 'Principles of Transnational Civil Procedure' recommend that[5] the court should 'actively manage the proceedings, exercising discretion to achieve disposition of the dispute fairly, efficiently, and with reasonable speed.'[6]

To prevent each managerial judge 're-inventing the wheel', and to ensure consistency, in his 26 March 2012 lecture on 'Reforming the Civil Justice System – the Role of Information Technology',[7] Sir Rupert Jackson noted the need for all judges to have access to soft-ware systems providing model directions.[8]

16.2 Functions of Case Management

Case management has three main functions: to encourage the parties to pursue mediation, where this is practicable; secondly, to prevent the case from progressing too slowly and inefficiently; finally, to ensure that judicial resources are allocated proportionately, as required by 'the Overriding Objective' in CPR Part 1. This requires the court and parties to consider the competing demands of other litigants who wish to gain access to judges, the court's 'scarce resources'.

The essence of the case management regime was encapsulated by Sir Anthony Clarke (now Lord Clarke), the former Master of the Rolls, in his 2007 lecture[9]:

> Taken together, the overriding objective [in CPR Part 1] and active judicial case management [notably CPR 3.1] seek to ensure that each case is afforded no more than a proportionate amount of judicial and party resources, that the real issues in dispute are identified early and concentrated upon by the court and the parties, and that the claim is dealt with expeditiously.

He added that the knife of judicial management, whetted by the principles of proportionality and expedition, permits:

> a simple and straightforward procedural system to be tailored effectively to the needs of the court, the parties and to litigants in general so that justice in the individual case can be achieved at a reasonable cost and within a reasonable timeframe.

---

[5] Principle 14.1; accessible at: http://www.unidroit.org/english/principles/civilprocedure/main.htm (last consulted in September 2012). Also published as UNIDROIT 2006, pp. 33–34.

[6] *Ibidem*, Principle 14.1; the case management of cases should be conducted 'in consultation with the parties' (Principle 14.2; and there is acknowledgment of the need for time-tables, Principle 14.3).

[7] http://www.judiciary.gov.uk/Resources/JCO/Documents/Speeches/lj-jackson-lecture-13-it-society.pdf (last consulted in September 2012).

[8] *Ibidem*, at 3.2 *et seq*. See also remarks in his 22 November 2011 lecture, 'Achieving a Culture Change in Case Management' (http://www.judiciary.gov.uk/Resources/JCO/Documents/Speeches/lj-jackson-speech-achieving-culture-change-casemanagement.pdf) at para. 4.5 (last consulted in September 2012).

[9] Clarke 2007.

Sir Anthony Clarke (now Lord Clarke) also identified three aspects of 'effective case management', using that phrase to describe the whole development of a case towards a focused conclusion.[10]

> (1) Identification of the real issues between the parties. Once this had been done, discovery of documents can be restricted to documents relevant to those issues, the factual evidence can equally be limited, as can the expert evidence. Equally, it may often be possible for one or more key issues to be decided first, with a view to settlement, mediation or, if absolutely necessary, trial, of the remaining issues.
> (2) Experts should meet to identify the areas of common ground and areas of dispute between them.

The background to this point is that the CPR empowers the court to direct that there should be a pre-trial 'discussion' between the parties' experts, followed by the experts making a 'joint statement'.[11] The rule provides: 'the court may direct that following a discussion between the experts they must prepare a statement for the court showing: (a) those issues on which they agree; and (b) those issues on which they disagree and a summary of their reasons for disagreeing.'[12] Such discussions can engender settlement, reduce the adversarial sting of the contest, narrow the scope of the dispute, and produce ideas for streamlining the dispute.

> (3) The trial process should be as focused as possible … There seems to me to be scope for limiting the oral evidence, including cross-examination. For example, not many cross-examiners do better if they have three days rather than, say, one. Co-operation between the advocates to the parties is crucial.

Forms of Judicial Intervention: The CPR lists the following managerial responsibilities, although these are not intended to be exhaustive statements of the court's new active role.[13]

Maintaining Impetus: The court must fix (in consultation with the parties and their lawyers) time-tables. More generally, it should control the progress of the case.[14] It must give directions which will bring the case to trial as quickly and efficiently as possible.[15]

Co-operation and Settlement: The courts should encourage the parties to co-operate[16]; help them to settle all or part of the case[17]; and promote alternative dispute resolution,[18] where it is appropriate. For this last purpose, the court has power to stay the action to enable such extra-curial negotiations or discussions to be pursued.[19]

---

[10] *Ibidem*.

[11] CPR 35.12; Blom-Cooper 2006, Chapter 7.

[12] CPR 35.12(3).

[13] CPR 1.4(2); CPR 3.1(2); CPR Parts 26, 28, 29.

[14] CPR 1.4(2)(g).

[15] CPR 1.4(2)(l).

[16] CPR 1.4(2)(a).

[17] CPR 1.4(2)(f).

[18] CPR 1.4(2)(e).

[19] CPR 3.1(2)(f).

Determining Relevance and Priorities: The court must help to identify the issues in the case.[20] This includes power to exclude issues from consideration because they are irrelevant.[21] The court should decide the order in which the issues are to be resolved.[22] It must try to determine as early as possible which issues need a full trial and which can be dealt with summarily.[23]

However, in his 26 March 2012 lecture on 'Reforming the Civil Justice System – the Role of Information Technology',[24] Sir Rupert Jackson rejected the idea 'despite the urgings of some' that there should be an institutionalised post-pleadings system of comprehensive 'lists of issues'.[25] This would, he said,

> 'add another work stage and generate yet more paper or electronic material. The issues are defined by the pleadings. It is to the pleadings that the parties and the court have recourse when identifying the issues which specific expert or factual witnesses should address.' This refusal to add another pre-trial documentary layer to all civil litigation is undoubtedly sound, not just because it would increase cost, but also it would tempt parties to take less time and effort when formulating their pleadings.

However, in Commercial Court litigation, and in other cases where the case is evidently complex, case management already generates a list of central issues. Thus *The Admiralty and Commercial Courts Guide*[26] states that '*Key features*' of case management include:

> … a case memorandum, a list of issues and a case management bundle [all of which] will be produced at an early point in the case … In particular the list of issues will be used as a tool to define what factual and expert evidence is necessary and the scope of disclosure; the court itself will approve or settle the list of issues and may require the further assistance of the parties and their legal representatives in order to do so ….

No doubt, this degree of case management intensity is not required across the whole gamut of English litigation. But there is a need for a common goal: that the courts, in exercise of their case management responsibility, should constantly seek to ensure that the action remains focused on essential issues and that the case does not lose direction or becomes bogged down in *minutiae* or side-issues.

The Court of Appeal in *JSC BTA Bank v. Ablyazov* (2011)[27] held that the timing of contempt proceedings and trial, where there would be overlap between the subject-matter of these hearings, was a case management decision. The appellate court would be slow to interfere, and would do so only if the judge had not applied the correct principles. The case is examined in more detail in the next paragraph.

---

[20] CPR 1.4(2)(a).

[21] CPR 3.1(2)(k).

[22] CPR 1.4(2)(d); 3.1(2)(j).

[23] CPR 1.4(2)(c).

[24] http://www.judiciary.gov.uk/Resources/JCO/Documents/Speeches/lj-jackson-lecture-13-it-society.pdf (last consulted in June 2013).

[25] *Ibidem*, at para. 4.7.

[26] Commercial Court 2011, at Section D2.

[27] [2011] EWCA Civ 1386; [2012] 1 W.L.R. 1988, at [32]–[36], and [47].

In *JSC BTA Bank v. Ablyazov* (2011) the claimant was a bank in Kazakhstan, of which the defendant was the former chairman. The Bank accused the defendant of 'widespread misappropriation of the Bank's funds', totalling U.S. $4 billion. The Bank had secured a freezing order, orders for disclosure and a receivership order against the defendant but claimed that these had been 'routinely flouted'. The Bank therefore applied to have the defendant committed to prison, advancing 35 allegations of contempt. At first instance Teare J required the Bank to select only three allegations with which to proceed, for case management reasons, but preserved the Bank's right to apply for permission to proceed with its other allegations at a later date. The defendant appealed, claiming *inter alia* that the preservation of the Bank's right to bring its other allegations of contempt was unjust. The defendant was unsuccessful on this ground because: *'a decision, whether or not to leave over for future consideration extant allegations of contempt, is a case management decision of the Judge, with which this Court should be slow to interfere, save on well-recognised grounds.'*[28]

Making Summary Decisions: The court should decide: whether to initiate a summary hearing (under CPR Part 24)[29]; or whether the claim or defence can be struck out as having no prospect of success[30]; or whether to dispose of a case on a preliminary issue.[31]

Regulating Expenditure: The court must decide whether a proposed step in the action is cost-effective,[32] taking into account the size of the claim ('proportionality').[33]

Case Management and Appeal, A 'Light Touch' Approach: Appellate courts are prepared to show considerable deference to judges' case management decisions, including decisions concerning the conduct of trial. But appeal judges will overturn decisions if they are incorrect in principle, or based on failure to consider all pertinent factors, or motivated by an irrelevant consideration, or where the judge has misunderstood the purpose of the relevant discretion.[34] (For an unusual instance where a first instance judge in later litigation protested that the Court of Appeal had itself erred in law in repudiating his earlier procedural decision – concerned with amendment of pleadings – *Nottinghamshire & City of Nottingham Fire Authority v. Gladman Properties Ltd.* (2011).[35]

---

[28] *Ibidem*, at [32], *per* Gross L.J.

[29] P.D. (26) 5.1, 5.2.

[30] CPR 3.4(2).

[31] CPR 3.1(2)(l).

[32] E.g., suggestion that video-conferencing be used for short appeals: *Black v. Pastouna* [2005] EWCA Civ 1389; [2006] CP Rep 11, (Brooke L.J.).

[33] CPR 1.4(2)(h) and 1.1(2)(c).

[34] *Thomson v. O'Connor* [2005] EWCA Civ 1533, at [17]–[19], *per* Brooke L.J. is instructive; see also the authorities cited in Andrews 2003, paras. 13.61–13.68, 38.49 and in Zuckerman 2006a, para. 23.193 *et seq*.

[35] [2011] EWHC 1918 (Ch); [2011] 1 W.L.R. 3235.

A party must first obtain permission to appeal, including an appeal from a case management decision. If the first instance judge withholds permission for an appeal, the Court of Appeal can itself decide whether to grant it. The rules circumscribe this 'gateway' discretion by noting the need to avoid too many case management decisions to proceed to appeal. A party must obtain permission to appeal from a case management decision, but such permission will be difficult to obtain.[36] Furthermore, in the *Biguzzi* case (1999) Lord Woolf commented on these powers: *'… judges have to be trusted to exercise the wide discretions which they have fairly and justly … [Appeal courts] should not interfere unless judges can be shown to have exercised their powers in some way which contravenes the relevant principles.'*[37] Furthermore, in his 26 March 2012 lecture on 'Reforming the Civil Justice System – the Role of Information Technology',[38] Sir Rupert Jackson noted that the Master of the Rolls has agreed that there should be two nominated lords justices of appeal available to hear all appeals concerning case management matters, in the interest of consistency.[39]

16.3 General Methods for Improving Case Management

In his 22 November 2011 lecture, 'Achieving a Culture Change in Case Management'[40] Sir Rupert Jackson noted that efficient case management requires: (i) judicial experience; (ii) adequate pre-hearing reading by judges and proper preparation by lawyers; (iii) the same judge should deal with each successive hearing (see also next paragraph on docketing); (iv) there should be consistency between courts; (v) 'robust but reasonably fair' case management orders should be upheld by the Court of Appeal.[41]

---

[36] P.D. (52) 4.4, 4.5: 'Case management decisions include decisions made under rule 3.1(2) [containing a long list of procedural powers] and decisions about disclosure, filing of witness statements, or experts reports, directions about the timetable of the claim, adding a party to a claim, and security for costs.' In this context, a decision concerning permission to appeal requires consideration whether 'the issue is of sufficient significance to justify the costs of an appeal', whether 'the procedural consequences of an appeal (e.g., loss of trial date) outweigh the significance of the case management decision', and whether 'it would be more convenient to determine the issue at or after trial'; the Court of Appeal in *JSC BTA Bank v. Ablyazov* [2011] EWCA Civ 1386; [2012] 1 W.L.R. 1988, at [32]–[36], and [47] held that the timing of contempt proceedings and trial, where there would be overlap between the subject-matter of these hearings, was a case management decision.

[37] *Biguzzi v. Rank Leisure plc* [1999] 1 W.L.R. 1926, 1934 F, C.A.

[38] http://www.judiciary.gov.uk/Resources/JCO/Documents/Speeches/lj-jackson-lecture-13-it-society.pdf (last consulted in September 2012).

[39] *Ibidem*, at para. 4.8.

[40] http://www.judiciary.gov.uk/Resources/JCO/Documents/Speeches/lj-jackson-speech-achieving-culture-change-case management.pdf (last consulted in September 2012).

[41] *Ibidem*, at para. 4.1.

16.4 Docketing

Lord Neuberger (since 1 October, 2012, President of the Supreme Court of the United Kingdom), in his lecture entitled 'Docketing: Completing Case management's Unfinished Revolution' (2012),[42] proposed that in complex cases[43] individual judges should take charge of the case, from inception to trial, including conducting the trial. (See also his remarks in his 22 November 2011 lecture, 'Achieving a Culture Change in Case Management'[44] by Sir Rupert Jackson.)[45]

He said[46]:

> as a revolution in our approach to the conduct of civil litigation, introduction of case management is one which is unfinished. It is the introduction of a form of docketing or, in the terms of the Jackson Report, of "measures … taken to promote the assignment of cases to designated judges with relevant expertise", which will help to complete that revolution.

Lord Neuberger also referred to the encouraging results achieved in a Leeds pilot scheme,[47] and to experiences within the Technology and Construction Court,[48] and to rule changes in the Commercial Court,[49] as well as the experience in the USA.[50]

Lord Neuberger identified four main benefits of docketing:

1. lawyers' determination to adhere to deadlines will be reinforced by the fact that judges are known to be 'on top' of the case at all stages[51];
2. less judicial time will be spent 'getting up to speed' because the same judge will have acquired familiarity with the minutiae of the case[52];
3. case management decisions will be better informed; and 'formulaic' managerial decisions will decline[53]; this is connected to the observation that complex cases require better tailored case management[54];
4. the case will be more likely to be handled in a consistent way, rather than being subject to different judicial interventions, in a spasmodic and haphazard manner.[55]

---

[42] Neuberger 2012.

[43] *Ibidem*, at [30], making clear that small claims, fast track, and non-complex multi-track litigation would not be subject to the docketing system.

[44] http://www.judiciary.gov.uk/Resources/JCO/Documents/Speeches/lj-jackson-speech-achieving-culture-change-case management.pdf (last consulted in September 2012).

[45] *Ibidem*, at para. 4.3 *et seq*.

[46] Neuberger 2012, referring to Jackson 2009–2010, Vol. II, at p. 469.

[47] Neuberger 2012, at [26], citing a 2012 study.

[48] *Ibidem*, at [27], noting Sir Rupert Jackson's experience in that court between 2004 and 2007.

[49] Commercial Court 2011, Section D4, at 25–26.

[50] *Ibidem*, at [17], but especially at [20], citing U.S. materials.

[51] *Ibidem*, at [15].

[52] *Ibidem*, at [22].

[53] *Ibidem*.

[54] *Ibidem*.

[55] *Ibidem*, at [24].

Other points made by Lord Neuberger are:

5. active steps can be taken to insist on strict adherence to a rigorous time-table[56];
6. the value of 'proportionality' can be given more concrete form, as the judge will ensure that only necessary and cost-effective matters are pursued;
7. the case will not be allowed to meander and to collect collateral debris as it proceeds gently to trial[57]; instead greater time-discipline will ensure concentration on the essentials of the case;
8. 'shortness of time concentrates the mind'; and this will counter 'the siren song of hourly billing'[58];
9. early identification of issues will provide a firmer basis for early settlement.[59]

16.5 Sanctions and Procedural Discipline

The main sanctions for breach of a procedural requirement are: costs orders[60]; the court's decision to issue a stay of the proceedings[61]; or a decision to strike out part or all of the claim or defence.[62]

The Court of Appeal in *Marcan Shipping (London) Ltd. v. Kefalas* (2007)[63] made clear that sanctions specified in procedural orders or in the procedural rules operate automatically under the CPR, and that it is necessary for the party subject to the sanction to apply for relief from the sanction or for the court itself to grant such relief of its own initiative[64]:

> 'The scheme of the rules relating to conditional orders is in my view both clear and salutary in its effect, namely, that such orders mean what they say, that the consequences of non-compliance take effect in accordance with the terms of the order, but that the court has ample power to do justice under CPR 3.8 on the application of the party in default, or, in an exceptional case, acting on its own initiative' [and for this last point the Court of Appeal noted its earlier decision in *Keen Phillips v. Field* (2006)].[65]

---

[56] *Ibidem*.

[57] *Ibidem*, at [25].

[58] *Ibidem*, at [21].

[59] *Ibidem*, at [21].

[60] CPR 3.8(2).

[61] CPR 3.1(2)(f).

[62] CPR 3.4(2)(c).

[63] [2007] EWCA Civ 463; [2007] 1 W.L.R. 1864 (considered in *Rybak v. Langbar International Ltd.* [2010] EWHC 2015 (Ch).

[64] *Ibidem*, at [30], *per* Moore-Bick L.J.

[65] *Ibidem*, at [32] and [33], noting *Keen Phillips v. Field* [2006] EWCA Civ 1524; [2007] 1 W.L.R. 686, C.A. (which made clear that the court's general case management powers to extend time pursuant to CPR 3.1(2)(a) and to act on its own initiative pursuant to CPR 3.3(1) are not cut down by CPR 3.8(1). The court therefore has jurisdiction to extend time for compliance with a case management order even where no application has been made under rule 3.8 by the party in default for relief from the sanction for non-compliance with the order).

In the *Marcan* case (2007) Moore-Bick L.J. continued[66]:

> In my view it should now be clearly recognised that the sanction embodied in an "unless" order in traditional form takes effect without the need for any further order if the party to whom it is addressed fails to comply with it in any material respect. This has a number of consequences, to three of which I think it is worth drawing particular attention. The first is that it is unnecessary, and indeed inappropriate, for a party who seeks to rely on non-compliance with an order of that kind to make an application to the court for the sanction to be imposed or, as the judge put it, "activated". The sanction prescribed by the order takes effect automatically as a result of the failure to comply with its terms … Unless the party in default has applied for relief, or the court itself decides for some exceptional reason that it should act of its own initiative, the question whether the sanction ought to apply does not arise. It must be assumed that at the time of making the order the court considered all the relevant factors and reached the decision that the sanction should take effect in the event of default ....

Moore-Bick L.J. added: [67]

> The second consequence, which follows from the first, is that the party in default must apply for relief from the sanction under CPR 3.8 if he wishes to escape its consequences. Although the court can act of its own motion, it is under no duty to do so and the party in default cannot complain if he fails to take appropriate steps to protect his own interests. Any application of this kind must deal with the matters which the court is required by CPR 3.9 to consider.

Finally, in the *Marcan* case (2007) Moore-Bick L.J. said: [68]

> The third consequence is that before making conditional orders, particularly orders for the striking out of statements of case or the dismissal of claims or counterclaims, the judge should consider carefully whether the sanction being imposed is appropriate in all the circumstances of the case.

An example of this type of case management can be found in *Rybak v. Langbar International Ltd.* (2010).[69] Here the terms of an 'unless' order provided that the respondents' claim and defence to counterclaim would be struck out unless they complied with a pre-existing order for inspection of computers. Morgan J held that they had failed to comply, and indeed there had been deliberate deletion of computer data, which was an irreversible breach. Accordingly, the respondents were not entitled to relief from these sanctions. Morgan J declared that the claim and defence to counterclaim were struck out.

---

[66] *Ibidem*, at [34].

[67] *Ibidem*, at [35].

[68] *Ibidem*, at [36].

[69] [2010] EWHC 2015 (Ch); considering *Marcan Shipping (London) Ltd. v. Kefalas* [2007] EWCA Civ 463, [2007] 1 W.L.R. 1864 and *Tarn Insurance Services Ltd. v. Kirby* [2009] EWCA Civ 19, [2009] C.P. Rep. 22 applied (in which the severity of breach was emphasised as a leading criterion in this context, considering that there had been deliberate breach of an unless order made to enforce compliance with a freezing injunction; and noting *CIBC Mellon Trust Co. v. Stolzenberg (Sanctions: Non-compliance)* [2003] EWHC 13 (Ch), *Times*, 3 March 2003). Relief from sanctions was granted in *JSC BTA Bank v. Shalabayev* [2011] EWHC 2915 (Ch), where Henderson J refused to declare that non-compliance with an 'unless' order had the effect of overriding a sufficiently particularised claim to litigation privilege.

Breach of a judicial order or injunction (for example a freezing injunction)[70] can involve contempt of court.

Relief from Sanctions and Procedural Clemency: Procedural non-compliance cannot be treated as uniformly reprehensible. Examples of procedural default vary greatly in their intrinsic importance. They also cause, or have the potential to cause, different degrees of 'collateral' impact, that is, disturbing the 'case flow' of other litigation in the same 'list' of actions. For example, the courts have sensibly refrained from making draconian orders where parties have slightly delayed in making disclosure of expert reports or witness statements, provided this delay can be acceptably explained.[71] Furthermore, litigants in person require special consideration.[72]

In *Pannone LLP v. Aardvark Digital Ltd.* (2011) the Court of Appeal upheld the lower courts' (district judge, upheld by a High Court judge) decision to grant a party relief from sanctions and to allow more time on the following facts.[73]

These were the facts of the *Pannone* case (2011). The claimant firm of solicitors had sued for unpaid fees. The defendant, a client, raised a defence and also made a counter-claim for a substantial sum, alleging professional negligence. The defendant acted through its directors and was an unrepresented litigant. The claimant conducted its claim using another firm of solicitors. The claimant was slightly slow in responding to the defence and counter-claim. The defendant then drove a procedurally very hard bargain, which was described as 'draconian'. It induced the claimant to agree a case management 'consent order' which extended time for the claimant's response from 4 pm on Friday until 1.00 pm the following Monday, an extension of less than one working day, but with the agreed sanction that the claim would be struck out with immediate effect if the claimant failed to meet this deadline. It was curious that the claimant agreed to this tight deadline. It was also odd that the claimant did not make clear that its response could be e-mailed. In fact the claimants were found to have e-mailed and faxed their responses a couple of minutes later than the Monday deadline of 1.00 pm.

It was held that e-mailed service was sufficient, as a matter of implication on these facts.[74] As for the slight delay, the Court of Appeal explained that the court retained power to relieve a party from a sanction under CPR 3.9(1), even though the relevant order is made by consent. There is no jurisdictional need for the court to

[70] E.g., *Daltel Europe Ltd. v. Makki* [2006] EWCA Civ 94; [2006] 1 W.L.R. 2704.

[71] *Meredith v. Colleys Vacation Services Ltd.* [2001] EWCA Civ 1456; [2002] C.P. 10; *RC Residuals Ltd. v. Linton Fuel Oils Ltd.* [2002] EWCA Civ 11; [2002] 1 W.L.R. 2782; N. Madge in Blom-Cooper 2006, para. 4.34 *et seq*.; *cf*., in a different context, *Calden v. Nunn* [2003] EWCA Civ 200 (where the trial window would be missed and the application for permission to adduce the report of a party-appointed expert was unacceptably late); and for refusal to make a disproportionate order in respect of late disclosure of a witness report, *Halabi v. Fieldmore Holdings Ltd.* [2006] EWHC 1965 (Ch).

[72] *Hougie v. Hewitt* [2006] EWHC 2042 (Ch) (relief from striking out for breach of an 'unless order'; litigant in person's default mitigated by depression).

[73] [2011] EWCA Civ 803; [2011] 1 W.L.R. 2275.

[74] *Ibidem*, at [15].

identify unusual circumstances. The present case cried out for relief from the automatic sanction of striking out. It was appropriate for the court to grant an extension of time so as to validate the dilatory service which had taken place.

The court in the *Pannone* case (2011) noted the amplitude of the discretion under CPR 3.9(1), which states:

> On an application for relief from any sanction imposed for a failure to comply with any rule, practice direction or court order the court will consider all the circumstances including – (a) the interests of the administration of justice; (b) whether the application for relief has been made promptly; (c) whether the failure to comply was intentional; (d) whether there is a good explanation for the failure; (e) the extent to which the party in default has complied with other rules, practice directions, court orders and any relevant pre-action protocol; (f) whether the failure to comply was caused by the party or his legal representative; (g) whether the trial date or the likely trial date can still be met if relief is granted; (h) the effect which the failure to comply had on each party; and (i) the effect which the granting of relief would have on each party.

Tomlinson L.J. noted that the present consent order was no more than a procedural accommodation[75]:

> Where … the agreement is no more than a procedural accommodation in relation to case management, the weight to be accorded to the fact of the parties' agreement as to the consequences of non-compliance whilst still real and substantial will nonetheless ordinarily be correspondingly less, and rarely decisive. Everything must depend on the circumstances, and CPR 3.9(1) prescribes that on an application for relief from a sanction for a failure to comply with a court order the court will consider all the circumstances.

And so the court's hands were free to relieve a party from an agreed sanction and to make an extension of time under CPR 3.8(3), which states:

> Where a rule, practice direction or court order – (a) requires a party to do something within a specified time, and (b) specifies the consequence of failure to comply, the time for doing the act in question may not be extended by agreement between the parties.

How Robust Must Procedural Sanctions Be? The 'Disciplinarian' Approach: Adrian Zuckerman has contended that the courts have not been consistent and tough enough in exercising their powers of case management.[76] In particular, he contends that they have shown undue clemency towards procedural default. In his view, the courts are wrong to relieve parties and their lawyers from failure to comply efficiently with the procedural framework and with specific orders made as part of the court's case management. In his 22 November 2011 lecture, 'Achieving a Culture Change in Case Management'[77] Sir Rupert Jackson conceded that there had been some undue clemency and that the provision concerning 'relief from sanctions' (CPR 3.9) needed to be simplified and to place more emphasis upon the need for

[75] *Ibidem*, at [33].

[76] Zuckerman 2010, pp. 89–108, Zuckerman 2006b, Chapter 12; and Trocker and Varano 2005, p. 143 *et seq*.; Piggott 2005.

[77] http://www.judiciary.gov.uk/Resources/JCO/Documents/Speeches/lj-jackson-speech-achieving-culture-change-case management.pdf (last consulted in September 2012).

procedural compliance.[78] He also attractively suggested that courts should become more active in 'following up' their directions and orders by seeking confirmation from parties that these measures are being respected and that everything remains 'on track'.[79]

The Argument in Favour of Measured and Responsible Clemency: It is one thing to concur that procedural compliance is a good thing. It is another to present a balanced approach, which recognises the legitimate counter-argument of 'procedural equity'.[80]

> 'Justice must, in an appropriate case, be seasoned with mercy.' (Judge Hodge 2011)[81]
>
> [The] whole thrust of the CPR is that parties are not to be punished fatally for mistakes or non-compliance with the rules if those mistakes and non-compliance matters can be addressed without causing an injustice to the other party.[82] (Peter Smith 2011)
>
> There is of course the (possibly) new argument in the era of the CPR which emphasises the importance of any misuse of court resources. It is well to be aware of the important public interest bound up in the efficient use of those limited resources. However, to seek to turn that proper concern, in such a case as these, into a surrogate for the doctrine of abuse of process is to my mind a disciplinarian view of the law of civil procedure which risks overlooking the overriding need to do justice. (Rix 2011)[83]

More generally, in *Summers v. Fairclough Homes Ltd.* (2012: 00.00),[84] the Supreme Court examined the procedural doctrine of striking out claims or defences on the ground of abuse of process, and Lord Clarke (in a passage which hardly endorses a Stalinist procedural approach of zero-tolerance) observed[85]:

> the court has a wide discretion as to how to exercise its case management powers. These include the power to strike out the whole or any part of a statement of case at whatever stage it is made, even if it is made at the end of the trial. However the cases stress the flexibility of the CPR: see e.g. *Biguzzi v. Rank Leisure plc* [1999] 1 W.L.R. 1926, 1933 B, *per* Lord Woolf M.R., *Asiansky Television v. Bayer-Rosin* [2002] CPLR 111, at [49], *per* Clarke L.J. and *Aktas v. Adepta* [2011] Q.B. 894, at [92], where Rix L.J. said: "Moreover, it should not be forgotten that one of the great virtues of the CPR is that, by providing more flexible remedies for breaches of rules as well as a stricter regulatory environment, the courts are given the powers and the opportunities to make the sanction fit the breach. That is the teaching of one of the most important early decisions on the CPR to be found in *Biguzzi v. Rank Leisure plc*".

---

[78] *Ibidem*, at para. 3.1 *et seq*.

[79] *Ibidem*, at para. 3.3.

[80] E.g., *Keen Phillips (A Firm) v. Field* [2006] EWCA Civ 1524; [2007] 1 W.L.R. 686, at [18]; *Estate Acquisition and Development Ltd. v. Wiltshire* [2006] EWCA Civ 533; [2006] C.P. Rep. 32; *Horton v. Sadler* [2006] UKHL 27; [2007] 1 AC 307; *Baldock v. Webster* [2004] EWCA Civ 1869; [2006] Q.B. 315; but there are limits, e.g., *Olafsson v. Gissurarson* [2006] EWHC 3162 (Q.B.); [2007] 1 All E.R. 88 (invalid service in Iceland could not be cured under CPR 3.10).

[81] Judge Hodge Q.C., sitting as a High Court judge, and quoted on further appeal in *Pannone LLP v. Aardvark Digital Ltd.* [2011] EWCA Civ 803; [2011] 1 W.L.R. 2275, at [23].

[82] *Nottinghamshire & City of Nottingham Fire Authority v. Gladman Properties Ltd.* [2011] EWHC 1918 (Ch); [2011] 1 W.L.R. 3235, at [33], *per* Peter Smith J.

[83] *Aktas v. Adepta* [2010] EWCA Civ 1170; [2011] Q.B. 894, at [92]: and see the Supreme Court's approval in the *Summers* case (2012) next note.

[84] [2012] UKSC 26; [2012] 1 W.L.R. 2004.

[85] *Ibidem*, at [49].

This view also chimes with the (non-binding) American Law Institute/UNIDROIT's *'Principles of Transnational Civil Procedure',* which recommend that[86]: *'Sanctions should be reasonable and proportionate to the seriousness of the matter involved and the harm caused and reflect the extent of participation and the degree to which the conduct was deliberate*.'

References

Andenas M, Andrews N, Nazzini R (eds) (2006) The future of transnational commercial litigation: English responses to the American Law Institute/UNIDROIT draft principles and rules of transnational civil procedure. British Institute of Comparative and International Law, London, Re-printed

Andrews N (2000) A new civil procedural code for England: party-control "going, going, gone". Civ Justice Q 19:19–38, and in ZZP Int 4, 1999, p 3–25

Andrews N (2003) English civil procedure. Oxford University Press, Oxford

Andrews N (2013) Andrews on civil processes, vol 1, Court proceedings, especially chapters 9 ('Case management and procedural discipline'), 22 ('Multi-party litigation') 23 ('Complex litigation'), 24 ('The commercial court'). Intersentia, Cambridge

Blom-Cooper L (ed) (2006) Experts in civil courts. Oxford University Press, Oxford

Clarke L (2007) The supercase-problems and solutions. Annual KPMG Forensic Lecture. http://www.judiciary.gov.uk/docs/speeches/kpmg_speech.pdf

Commercial Court (2011) The admiralty and commercial courts guide, 9th edn. http://www.justice.gov.uk/downloads/courts/admiralitycomm/admiralty-commercial-courts-guide.pdf

Cranston R (2006) How law works. Oxford University Press, Oxford

Dwyer D (ed) (2010) The civil procedure rules: ten years on. Oxford University Press, Oxford

Jackson SR (2009) Review of civil litigation costs: final report. Stationery Office, London

Legg M (2011) Case management and complex civil litigation. Federation Press, Sydney

Neuberger L (2012) http://www.judiciary.gov.uk/Resources/JCO/Documents/Speeches/mor-speech-solicitors-cost-conference-lecture-feb2012.pdf

Piggott D (2005) Relief from sanctions…. Civ Justice Q :103–129

Trocker N, Varano V (eds) (2005) The reforms of civil procedure in comparative perspective. G. Giappichelli Editore, Torino

UNIDROIT (2006) American Law Institute/UNIDROIT'S Principles of Transnational Civil Procedure. Cambridge University Press, Cambridge

Woolf L (1996) Access to justice: interim report (1995), and access to justice: final report. Stationery Office, London

Zuckerman AAS (2006a) Zuckerman on civil procedure. LexisNexis, London

Zuckerman AAS (2006b) Compliance with process obligations and fair trial. In: Andenas M, Andrews N, Nazzini R (eds) The future of transnational commercial litigation: English responses to the American Law Institute/UNIDROIT draft principles and rules of transnational civil procedure. British Institute of Comparative and International Law, London. (Re-printed 2006), pp 127–150

Zuckerman AAS (2010) Litigation management under the CPR: a poorly-used management infrastructure …. In: Dwyer D (ed) The civil procedure rules: ten years on. Oxford University Press, Oxford, pp 89–108

Zuckerman A, Cranston R (1995) The reform of civil procedure: essays on 'access to justice'. Oxford University Press, Oxford

[86]Principle 17.2; accessible at: http://www.unidroit.org/english/principles/civilprocedure/main.htm (last consulted in September 2012). Also published as *American Law Institute/UNIDROIT'S Principles of Transnational Civil Procedure* (Cambridge University Press, 2006), p. 38.

Chapter 17
Case Management in France

Emmanuel Jeuland

French civil procedure is a hybrid. Its Frankish origin gives it its adversarial tint. This contrasts with French criminal procedure: criminal procedure was traditionally much more inquisitorial with the presence of the examining judge. But mainly after 1976, little by little doses of the inquisitorial approach were introduced into French civil proceedings.

A European historian of civil procedure, C.H. van Rhee, has shown that the idea of case management was born in Austria.[1] Franz Klein (1854–1926), the prominent Austrian lawyer at the turn of the nineteenth century, advocated the concept of the social function of the judge. As far as the procedural social function is concerned the judge may be interventionist in the proceedings, and not merely neutral and passive. Procedural interventionism may lead to the discovery of facts which could be the basis of the substantial reasoning of the judge. This mechanism is close to a very old distinction that existed in Roman-canonical procedure between the *officium solemne* of the judge (which is an action brought to the judge when there is no predefined action)[2] and the *officium desserviens*[3] (called *desserviens* because it serves the action),[4] which is more procedural in nature.

[1] Van Rhee 2007, pp. 307–319.

[2] For example, this cause of action allowed illegitimate children to get an allowance from their natural parents.

[3] Ourliac 1981, p. 635; also Lefebvre 1953, p. 115.

[4] It is interesting to note that the primary *officium*, which concerned the application of rules, involved the protection of one party (a poor party, for example). A hypothesis could be that European procedural law, which is developed for cross-border litigation, can to a certain extent be regarded as the successor of Roman-canonical law. Proceedings (in the small claims Regulation No. 861/2007 of 11 July 2007, for example) are quick, cheap, written (by way of new technologies), almost secret (if there is a video-conference) and the role of the judge is to protect the parties and to be interventionist (in the taking of evidence, for example).

E. Jeuland (✉)
University of Paris 1 Pantheon Sorbonne, Paris, France
e-mail: emmanueljeuland@wanadoo.fr

C.H. (Remco) van Rhee and Fu Yulin (eds.), *Civil Litigation in China and Europe*, Ius Gentium: Comparative Perspectives on Law and Justice 31,
DOI 10.1007/978-94-007-7666-1_17,

The different countries of Europe developed their own style of proceedings even though they often influenced each other. French civil procedure is one style of these European proceedings. Traditionally, from the Frankish period, the civil judge was neutral and passive (still in the 1806 Code of Civil Procedure). At the beginning of the twentieth century some reforms tended to authorise the judge to be more interventionist. But these reforms were limited. Case management (*la mise en état*) did not work very well because the judge in charge of it did not have sufficient powers. The new Code of Civil Procedure of 1976 (CPC) recreated this judge in charge of case management on a broader scale. This reform was influenced by Alsatian procedural law (which was of German origin) and by German procedure directly through the figure of H. Motulsky.[5] It is worth recalling that the Alsace region used to be German, between 1870 and the First World War, so that its civil procedure was of German origin. When Alsace was restored to France after the First World War, the region kept its civil proceedings as before up until the reform of 1976 that unified French civil procedure in part influenced by Alsatian case management. Thus case management has a continental European origin.

Lord Woolf, who was in charge of the reform of English civil proceedings in the 1990s, studied the French 'case management judge', among other traditions, and was certainly influenced by it. As the English proceedings were overly complicated, costly and lengthy, he suggested the creation of the position of 'case management judge'. He envisaged the position in the English style in terms of negotiation and protocols. The common law makes the connection between court administration and case management since court administration in English is loosely translated (in French) as court management. Court administration and the management of a particular case belong to the same large category of judicial management. As a result, the English case management judge has to take into account management requirements such as efficiency, costs and reasonable time. But this idea of management, which comes from the sciences of management, was not in the minds of the French reformers in 1976. Today in France court administration is quickly developing through digital technologies and court communications systems, but this is something new which is growing on the old ground of the French case management judge.

The English word 'management' used to seem quite strange to a French lawyer because it comes from the French *ménage*, which relates to the good keeping of a house. So the French word *ménagement* became in English 'management' and the word management is now used in French to mean the direction of a group, a firm or a court. This transfer of meaning is certainly difficult for a non-European to follow but says a lot about the game of reciprocal influences.

I will now focus on the French managing judge, maintaining that he has very little to do with court management. The French term *juge de la mise en état* – or rather here in English 'case management judge' – will be used to refer to the judge who has to prepare a case to be judged.

[5]The great scholar who influenced the new Code of Civil Procedure of 1976 was educated in Germany where he practised law.

French civil procedure is neither totally adversarial nor totally inquisitorial. From a critical approach, the case management judge plainly does not use his power, a power which seems to be a rather good tool.[6] From a more realistic approach, the case management judge is still more a reactive judge than a passive or active one. Case management remains mainly formal and virtual, with the fixing of dates accomplished by means of messaging and email via intranet networks. But when there is an interlocutory matter, whether procedural or evidentiary, case management may become 'intellectual' in the sense that the managing judge becomes more interested in the content of the case, especially in procedural impediments and in the finding of facts. This is why I will present, firstly, the basic formal function of the managing judge, which is scheduling, and, secondly, the reactive function, which is intellectual case management.

17.1 Conventional Case Management: Scheduling

There are different rules for case management in written and in oral proceedings. In French procedural law, half of the first-instance courts use oral proceedings (commercial courts, labour courts and small-claims courts) in the sense that what counts is the hearing. The parties may exchange or not exchange written pleas, but they can present whatever grounds and claims they wish during the hearing. In oral proceedings, there is no specialised case management judge, but one member of the chamber who is in charge of preparing the case.

Conversely, the civil high court (*Tribunal de grande instance*) follows a written procedure which means that what counts are written pleas, and there may not even be a hearing on the merits. In the civil high court, a specialised judge is in charge of case management.

Both the case management judge in the civil high court and the reporting judge in oral proceedings are principally dedicated to the scheduling of the case. Broadly speaking, the main idea which explains the powerful growth of the case management judge is the acceleration of proceedings and the principle of reasonable time.

17.1.1 Case Management in the Civil High Court

The civil high court has jurisdiction in a case where more than €10,000 are at stake. There are legally three tracks of proceedings – short, medium and long – which seem to have inspired the English version of case management. (As a matter of fact, English case management is more extensive as it includes the idea of pre-action protocols.)

[6] Ménabé 2006, pp. 47–58.

17.1.1.1 Short Track

When a case is simple, the president of the civil high court forwards it immediately to the chamber for a hearing on the merits. This path is called 'short track' or 'very short track' (*circuit court* or *ultracourt*). This track is possible when the president thinks that the case is ready to be decided on the merits. In this track, the claimant has already presented his arguments in the first writ (*assignation*) and he has had 4 months to register the writ. During these 4 months the defendant may have received an answer to his defence and included this in his own written statement of case (conclusions). So when the president receives the file both parties have given their arguments prior to the allocation of the case to a specific chamber based on the type of case.

This short track is used as well when the defendant does not appear at the first hearing. In that case, the president closes the preliminary examination with a specific order and fixes the day for the hearing which may be the same as the day of the order. It is even possible not to enter an oral plea if the lawyers accept the waiver of an oral plea and the case is directly submitted for deliberation. According to Article 760 CPC: 'The president will send the case to the hearing for those matters that, based on the explanations of the lawyers and on the examination of the statements of case exchanged and documents transmitted, appear to him to be ready to be decided on the merits of the case. He will send similarly to the hearing those matters in which the defendant has defaulted if they are ready to be decided on the merits of the case, unless he orders a fresh service of the writ of summons on the defendant …' As a matter of fact, this track is not often used in practice. Only the medium track and the long track are generally used.

17.1.1.2 Medium Track

When the president of the civil high court considers that there is a need for a last exchange of statements, he fixes a second term for the parties to communicate certain documents or written pleas. This path is called the 'medium track' or, something which can create confusion with the previous situation, the short track (*circuit moyen ou court*). Subsequently, the president sends the case to the hearing. Article 761 CPC provides: 'The president may equally decide that the advocates will appear afresh before him, on a date that he will specify, so as to confer on the matter for a last time, if he thinks that an ultimate exchange of statements of case or an ultimate exchange of documents would be sufficient to make the matter ready or that the statements of case of the parties are to be brought in line with the provisions of Article 753. In the latter event, he will give to each lawyer a time-limit necessary for the service (through a bailiff) of the statements of case and, if necessary, for the submission of documents.'

17.1.1.3 Long Track

In the long track, a complex case is assigned to a chamber. In each chamber there is a case management judge who is in charge of overseeing the preparation of the case.

There are two ways of organising this long track: step-by-step or according to a management calendar. The case management judge may fix, step-by-step, a time-limit for a party to submit his statements of case or documents. The judge can give the party more time if necessary, and he has the power to close the examination period for this party if the party does not submit a pleading or a document in due time. If none of the parties has made his submissions, the case management judge may close the examination period and immediately send the case to the hearing, or even strike the case from the docket (Article 781 CPC). This power is only useful for multi-party proceedings since if there are only two parties, the judge will simply decide to terminate the period for examination.[7]

According to Article 764(1), (2) and (6): 'The pre-trial judge will fix, progressively, the time-limits necessary for the examination of the matter, in relation to the nature, urgency and complexity of the same, and after having heard the opinion of the lawyers. He may grant extensions of time. He may adjourn the matter in view of favouring the resolution of the dispute.'

Practice and a legislative decree have introduced a case calendar, which is discussed at the beginning of a case and which deals with every procedural step in advance. Even the dates of the deliberation for judgment and of the judgment itself may be fixed (Decree of 28 December 2005, Article 764(3), (4) and (5), but this seems to be rare in practice). The decree creates a case-management calendar (*calendrier de la mise en état*). In practice, the scheduling of medium-track and long-track case management takes place via intranet networks between judges and lawyers. The software is called WinCi TGI; each procedural step is recorded and the procedural hearing, called 'conference', is an exchange of emails. In certain courts the case management judge offers the parties the possibility to meet him at assigned office hours if needed.[8] The case management judge has many powers as far as reasonable time is concerned. Article 3 CPC deals with the power of the judge in general and states that the judge fixes the time-limits. Article 764 deals specifically with the power of the case management judge (Article 764(1), (2) and (6)): 'The case management judge will fix, progressively, the time-limits necessary for the examination of the matter, in relation to the nature, urgency and complexity of the same, and after having heard the opinion of the lawyers. He may grant extensions of time. He may adjourn the matter in view of favouring the resolution of the dispute.' Strangely enough, this practice cannot always be observed in practice (the court I visited to check this point fixes the case calendar up until the closing date of the hearing).[9]

For appellate cases, the Decree of 9 December 2009 decided on a fixed calendar: 3 months for the appealing party to submit his statement; 2 months for the defendant to respond. If these time-limits are not complied with, the case management judge will decide that the case is inadmissible (Article 902 CPC).

[7] Miniato 2010, p. 42.

[8] Interview with the head of a civil high court in the Paris suburb.

[9] Salati 2009, p. 192; Miniato 2010.

Lastly, protocols have been signed between certain civil high courts and courts of appeal and the bar associations (*le barreau*). They tend to impose a normalised structure to the statements of case. A statement should encompass, according to these protocols, primarily procedural questions, then, if needed, admissibility questions and lastly any arguments on the merits. All the claims should be brought forward in a concentrated manner[10] and summed up in the statement.[11] These statements should be submitted within a reasonable time (see, for example, the protocol of 13 December 2011 between the Paris Court of Appeal and the bars).[12] These kinds of protocols organise a standardised and formal preparatory phase. They are not formally compulsory, but they are best practices. They exist for oral proceedings as well.

17.1.2 Basic Case Management in Oral Proceedings

In oral proceedings no case management under the supervision of a dedicated judge as in the civil high court is taking place. In effect, only the hearing counts in oral proceedings and the written statements may be very short. The practice, especially in large labour or commercial courts, has been to designate a reporter judge to prepare the case. A reporter judge is a member of the chamber of judges to whom the case has been allocated (to the contrary, in the civil high court the case management judge is a case management specialist and not necessarily a member of the chamber). A trend favoured by the Decree of 1 October 2010 is to organise the preparatory stage in case management protocols between the courts and the bar. In other words, a protocol may be signed between the bar association and the court to organise the calendar in advance.[13] It is possible to speak of 'contractualisation' of justice and to qualify these protocols as a kind of collective bargaining agreement. Thus, for example, there is a case management protocol signed by the commercial court of Créteil (a Paris suburb) and the bar. There is another protocol which provides a standard schedule of proceedings at the commercial court of Bobigny. The risk with these protocols is that they may cause a fragmentation of national civil procedure and oblige lawyers to master the rules of each specific court. Moreover, it appears that this is a way of rationalising and standardising justice which may be achieved to the detriment of the individualisation of cases.

In the labour court, an attempt at conciliation is compulsory. Only in one out of ten times are such conciliation proceedings successful, but conciliation may

[10]This requirement takes into account the principle of concentration imposed by the famous *Cesareo* case (Cass. Ass. Plen., 7 July 2006, Bull. Civ. Ass. Plen., No. 8, Legifrance).

[11]This requirement takes into account the compulsory 'recapitulating plea' (Art. 954 CPC for appeal proceedings).

[12]Lataste 2012, p. 5; Travier and Guichard 2012, p. 692.

[13]Bléry 2012, alerte 5.

nevertheless be seen as a preparation of the case, a sort of preliminary stage. A reporter judge may order examination measures, but there is no exclusivity. The court on the merits may order the same, whereas in the civil high court the case management judge decides on this matter as he is in charge of the case.

In the commercial court a reporter judge may order examination measures, but there is no exclusivity since the court on the merits may order the same measures.

At the lower first-instance court (small-claims court or *Tribunal d'instance*) there are 'conciliators' (*conciliateurs de justice*) who are volunteers and whose services are not compulsory for the parties. Either the judge may refer the parties to the conciliator or the parties themselves may submit their case to conciliation. Conciliation, even if it fails, may serve as a preparation of the case. It leads to the establishment of what the facts are and what the claimant wants.

A recent decree (1 October 2010) allows the commercial court and the small-claims court to establish a calendar for the submission of statements of case, the hearing and even for the date of the judgment.

As a whole, at the civil high court and the commercial and small-claims courts, the preparatory stage is mainly used for online scheduling. So it simply results in formal case management designed to speed up and prepare the case. There are fewer and fewer face-to-face procedural meetings. Nothing happens in this stage as far as the evidentiary or procedural aspects of the case are concerned, unless a party raises a point concerning those aspects. If this happens, the case management judge may become an active case manager. However, generally speaking it is fair to say that these judges are rather reactive instead of active in their approach to the case.

17.2 Intellectual Case Management

Over time, the court managing judge has gained many powers to examine the case as well as procedural powers (Decrees of 28 December 1998, 20 August 2004, 28 December 2005, and in appeal proceedings Decrees of 9 December 2009 and 28 December 2010). The judge uses his powers in interlocutory matters. He is more reactive than active. The primary reason for these increased powers is that the judge needs to ascertain the true nature of the problem. Once this nature has become clear, the case can be tried on the merits by the court. For a long period, case management did not work very well because the case management judge had neither sufficient nor exclusive powers. His decisions did not have force of *res iudicata*, so that on the merits the court could retry the same preliminary issues. Now, the case management judge has obtained many exclusive powers. But he will only use them when one party decides to raise an issue and/or to request a procedural order from the judge. Article 771 CPC, modified many times (Decree No. 81–500 of 12 May 1981, Decree No. 98–1231 of 28 December 1998, Decree No. 2004–836 of 20 August 2004), gives the case management judge exclusive case management powers: '… where a claim is brought after the case management judge has been appointed and until the time when the matter is removed from him, this judge will, at the exclusion

of any other bench of judges of the court, be the only competent judge to: 1. decide upon procedural pleas; 2. decide upon interim payment for litigation costs; 3. order interim payment to the creditor where the claim is not seriously challengeable …; 5. order, even *sua sponte*, any investigation measure.'

17.2.1 Powers to Examine the Case

According to Article 763 CPC, the case management judge supervises (*contrôler* in French and not *diriger*) the examination of the case. The word 'supervise' (and not 'manage') shows that the pre-trial judge is not active, but simply reactive as far as examination is concerned. So, the parties have to faithfully communicate their documents under the supervision of the case management judge. Nevertheless, this judge may hear the parties' lawyers and even require them to act in particular to facilitate the communication of documents between the parties (Articles 763(3) and 770 CPC), which means that the case management judge needs to have in-depth working knowledge of the case. Consequently, it is possible to speak of 'intellectual case management', which means case management where the judge thoroughly reviews the case.

Moreover, the managing judge has the power to examine the case, even *sua sponte*. If the parties do not manage to establish the facts, the judge may complement their insufficient evidence by ordering further examination (Article 140 CPC). The judge may not do this if the parties do not make an attempt to submit evidence. It should be noted that the proceedings are not inquisitorial. The judge may order the hearing of witnesses or parties (Article 767 CPC) and he may be involved in the inspection of a locality. The judge may order an expert to assist and to submit an expert opinion. In French law the expert serves as an assistant to the judge, not as a witness. The case management judge may hear the lawyers of the parties and the parties themselves, even *sua sponte*. He may suggest that a third party intervene in the case or he may accept an intervention requested by a party. Conciliation is possible during this stage of the action. The case management judge has exclusive powers to order examination measures (Article 771 CPC) as soon as the case is allotted to him and supervises (Article 777 CPC) the execution of these investigation measures (especially where an expert is involved).

17.2.2 Procedural Powers

The case management judge has acquired procedural powers over procedural pleas. As soon as a case is allocated to this judge, he decides on jurisdiction and procedural pleas in general. The judge also has the power to suspend the action, for example in the case where a lawyer retires in the middle of the action and has to be replaced. The judge is competent for all procedural pleas such as those

concerning jurisdiction (e.g. *lis pendens*) or nullity (if a party is under 18 years of age and without a representative or if a lawyer has no power of attorney to represent a party in court). The case management judge is competent for interlocutory issues which terminate the hearing (Article 771–1 CPC) such as a settlement, a dismissal of the case, the death of a party or the applicability of a procedural limitation period (if no procedural act is performed during a period of 2 years after the service of the original writ, the case is struck from the docket). Nevertheless, the case management judge has no power to decide on the admissibility of pleas (see the advice of the Court of Cassation of 13 November 2006 and the advice of 13 February 2012, No. 11–00008). In effect, the case management judge is not competent with respect to matters of admissibility such as the claimant's interest to bring the action, the effect of *res iudicata* or substantive limitation issues except for the admissibility of an appeal (Decree of 9 December 2009). And so, the court on the merits will have to deal with the issue of admissibility. Several scholars consider that the case management judge should have powers regarding the issue of admissibility at first instance (similar to his powers on appeal). This would accelerate the hearing and avoid discussions about the distinction between procedural pleas and admissibility.[14]

The case management judge may order interim payment when the claim is not seriously challengeable. In this situation, the judge plays the role of an interlocutory judge.

When the case management judge has exclusive powers over procedural pleas, his decisions acquire force of *res iudicata* and an appeal is possible (Article 776 CPC). Article 775 provides: 'The decisions of the case management judge concerning the case on the merits will acquire force of *res iudicata*', which means that the court on the merits can change these orders, but it cannot change the decision on procedural pleas since this decision has force of *res iudicata*.

17.3 Conclusion

Case management in France is becoming a complex issue. Over the last decade, the case management judge has gained powers but does not often use them; and when he does it is usually only on a reactive basis. The preliminary stage in civil litigation is increasingly standardised and accelerated, both in written and in oral proceedings. This type of formal case management is entirely conducted online. Videoconferences with witnesses and parties could be developed in the near future. Court hearings may be live or online if needed. The case management judge could acquire new powers to decide on admissibility, the exclusive effect of *res iudicata* and the interest to bring an action.

[14] See advice of the Court of Cassation, 13 February 2012, No. 11–00008, Legifrance.

References

Bléry C (2012) De la contractualisation à la règlementation unilatérale: dérive des protocoles de la mise en état. Procédures (2) alerte 5

Lataste S (2012) Le protocole sur la mise en œuvre des principes de concentration et de structuration des écritures est un guide de bonnes pratiques pour les avocats: Gaz. Pal. 2–3 mars 2012, p 5

Lefebvre C (1953) L'officium iudicis d'après les canonistes du Moyen Age, L'Année canonique, vol II. Société internationale de droit canonique et de législations religieuses comparées, Paris, pp 115–120

Ménabé JP (2006) Plaidoyer pour un bel outil. In: Foyer J, Puigelier C (eds) Le Nouveau Code de Procédure Civile. Economica, Paris, pp 47–58

Miniato L (2010) L'évolution du role du juge de la mise en état. IFR actes de colloques No. 14, journées des 22 et 23 Nov 2010

Ourliac P (1981) L'office du juge dans le droit canonique classique. In: Mélanges offerts à P. Hébraud. Université de Toulouse, Toulouse, pp 627–644

Salati O (2009) Après le décret du 28 déc. 2005, trois ans de mise en état dans la jurisprudence de la cour de cassation. Droit et procédures 7(4):192–199

Travier B, Guichard R (2012) Les protocoles sur les écritures judiciaires, justice coutumière ou justice moderne? JCP(692)

Van Rhee CH (2007) Civil litigation in twentieth-century Europe. Leg Hist Rev 75:307–319

About the Authors

Neil Andrews (England & Wales) MA, BCL, Oxon; Fellow in Law, Clare College, Cambridge; Professor of Private Law and Civil Justice, Cambridge University Faculty of Law; Barrister; Bencher of Middle Temple.

Cai Yanmin (People's Republic of China) PhD, Sun Yat-sen University; Professor of Law, Sun Yat-sen University; Vice Director of the Committee of Chinese Clinical Legal Educators; Vice Director of the National Civil Procedural Law Association; Senior Visiting Scholar at New York University, 2003; World Fellow of the Yale World Fellows Programme, 2002; Fulbright Visiting Scholar at Chicago-Kent College of Law, 1996.

David Chan (Hong Kong) Called to the Hong Kong Bar in 2000; practice in civil litigation including personal injuries, landlord and tenant, employment, employees' compensation, commercial law, company law, building management, family law and tort claims; regularly instructed to render opinion to the Legal Aid Department on claimants' applications for legal aid; from September 2009 to June 2013 Teaching Fellow of the School of Law, City University of Hong Kong, taught Civil Litigation Practice, Advocacy, Legal Writing and Drafting, the Bar Course and Commercial Law.

Peter C.H. Chan (Hong Kong) Teaching Fellow of the School of Law, City University of Hong Kong; former litigation and regulatory lawyer at an international law firm in Hong Kong; publishes regularly in civil procedure; particular research interest in the Chinese civil justice system and its legal history; member of the International Association of Procedural Law.

Chen Lei (Hong Kong) Assistant Professor, School of Law, City University of Hong Kong; author of articles on Chinese civil law in legal journals and edited volumes of multi-disciplinary scholarship worldwide; member of the International Academy of Comparative Law; panel arbitrator of the Beijing Arbitration Commission.

Fu Yulin (People's Republic of China) Professor of Law, Peking University Law School; member of the International Association of Procedural Law; standing

C.H. (Remco) van Rhee and Fu Yulin (eds.), *Civil Litigation in China and Europe*, Ius Gentium: Comparative Perspectives on Law and Justice 31,
DOI 10.1007/978-94-007-7666-1, © Springer Science+Business Media Dordrecht 2014

committee member of the Civil Procedure Association of China; main research focus on civil justice, comparative civil procedure, arbitration; has written more than 50 articles and 10 books (including six translations); Judge for 10 years; currently arbitrator in several arbitration committees (CIETAC and BAC); Visiting Scholar at Yale University, University of Tübingen, Montreal University and Northeastern University, USA.

Irmgard Griss (Austria) Former President of the Austrian Supreme Judicial Court; Deputy Member of the Austrian Constitutional Court; Honorary Professor of Civil Law and Commercial Law, Graz University; Speaker of the Senate of the European Law Institute.

Burkhard Hess (Germany) Founding and Executive Director of the Max Planck Institute Luxembourg for International, European and Regulatory Procedural Law; held chairs at the Universities of Tübingen and Heidelberg; acted as Visiting Professor in Beijing, Paris (Sorbonne) and Georgetown; served as a part-time Judge on the Court of Appeal of Karlsruhe; serves on a regular basis as an expert and advisor to the European Commission, the European Parliament, the Council of Europe and national governments.

Rob Jagtenberg (Netherlands) Key expert to the European Commission for several projects pertaining to out-of-court settlement (ADR), most recently in the field of transnational labour disputes; co-authored international studies on court-referred mediation and judicial efficiency commissioned by the Netherlands Council for the Judiciary and Ministry of Justice; moderator of various World Bank and Asian Development Bank projects on the role of law in economic development; Senior Fellow of Erasmus School of Law, Rotterdam.

Emmanuel Jeuland (France) Professor of Law, Sorbonne Law School, University of Paris 1 Pantheon Sorbonne; co-author of a leading French textbook on civil procedure and author of a textbook on French procedural law; currently Head of the Research Department on Law and Justice; member of the International Association of Procedural Law and involved in research in the management of justice.

Adela Olga Ognean (Romania) BA, LLM, University of Sibiu, Simion Barnutiu Faculty of Law; PhD candidate and Researcher at Maastricht University, Faculty of Law, Netherlands; research interests in civil procedure and comparative law; attorney in Romania.

C.H. (Remco) van Rhee (Netherlands) PhD, Leiden University, 1997; Professor of Comparative Civil Procedure and European Legal History, Maastricht University, Faculty of Law; Fellow of the Maastricht European Private Law Institute; member of the European Law Institute; Director of the programme 'Foundations and Principles of Civil Procedure' of the Ius Commune Research School; Council Member of the International Association of Procedural Law; Co-director of the Public and Private Justice seminar at the Inter-University Centre Dubrovnik, Croatia; founding member and Vice President of the European Society for Comparative Legal History; Editor-in-Chief of the Chinese and Comparative Law book series (Brill

Publishers, Leiden); Editor-in-Chief of the History of Private Law book series (Brill Publishers, Leiden); member of the editorial board of the Legal History Review; member of the editorial board of *Tijdschrift voor Civiele Rechtspleging* (Dutch journal of civil procedural law); expert to the Council of Europe (civil procedure); member of various scholarly associations; Visiting Professor at various law schools in Europe, the USA, Russia, China and South Africa.

Elisabetta Silvestri (Italy) Associate Professor of Law, University of Pavia Law School; educated at the University of Pavia, Faculty of Law and Cornell Law School; Visiting Scholar at Yale Law School and the London School of Economics; main areas of interest include Italian civil procedure, comparative civil procedure, judicial organisation and alternative dispute resolution; author of many published essays; Director of the Centre for Conflict Resolution at the University of Pavia; Co-director of the Public and Private Justice seminar at the Inter-University Centre Dubrovnik, Croatia.

Christopher To (Hong Kong) International arbitrator, adjudicator, dispute resolution advisor and mediator; qualifications in computing, engineering and law.

Alan Uzelac (Croatia) Professor of Law, University of Zagreb; teaches Comparative Civil Procedure, Judicial Organisation and Alternative Dispute Resolution; founding member of the European Commission for the Efficiency of Justice (CEPEJ), Strasbourg; delegate in the UNCITRAL Working Group on Arbitration and Conciliation; Co-director of the Public and Private Justice seminar at the Inter-University Centre Dubrovnik.

Serban S. Vacarelu (Romania) BA, University of Oradea; LLB, Babes-Bolyai University; LLM, Louisiana State University, USA; PhD candidate and Researcher at Maastricht University, Faculty of Law, Netherlands; former law clerk for the Supreme Court of Louisiana; primary research interests in the field of civil procedure and comparative law; attorney in Romania and Louisiana; has lectured at various universities in the Netherlands and other countries.

Remme Verkerk (Netherlands) Practises law at Houthoff Buruma in Rotterdam; specialises in commercial (supreme court) litigation and bankruptcy law.

Mario Vukelić (Croatia) LLB, BA in Economics; President of the High Commercial Court of the Republic of Croatia; Senior Lecturer in Commercial Law, VERN-University of Applied Sciences, Zagreb; mediator and arbitrator; has written several books and a number of papers on the topics of bankruptcy, company law, mediation and alternative dispute resolution; lecturer and participant in a large number of law conferences and conventions; member of numerous prestigious law associations.

Andrea Wall (Austria) Research Assistant, University of Zurich, Switzerland; former Research and Teaching Assistant, Department of Civil Procedure and Civil Law, University of Vienna.

Wang Fuhua (People's Republic of China) Professor of Law, Law School of Shanghai Jiaotong University; Bachelor's degree, China University of Political

Science and Law, 1989; Masters degree, Peking University, 1995; PhD, China University of Political Science and Law, 2005; from 1989 to 1992 Judge at the Inner Mongolia Hulunbeier Intermediate People's Court; from 1995 to 2002 Associate Professor, Yantai University School of Law.

Wang Yaxin (People's Republic of China) Professor of Law, Tsinghua University Law School; standing committee member of the Civil Procedure Association of China; former Associate Professor, Kyushu University and Kagawa University, Japan; academic interest in the interaction between law and society; specialises in the legal sociological analysis of the practical operation of the Chinese judicial system and the dogmatic analysis of the norms of Chinese civil procedural law; involved in the translation into Chinese of many Japanese legal publications.