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AJEE is an English-language journal covering various issues relating to access to justice and the right to a fair and impartial trial. The specific area of AJEE is East European law of such countries as Ukraine, Poland, Lithuania and other countries of the region due to special features of legal traditions` evolution. While preserving the high academic standards of scholar research, we also give the opportunity to young legal professionals and practitioners to present their reviews of the most current questions.

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ABOUT AJEE

Ensuring effective, fair, impartial and timely protection of rights and freedoms of citizens in accordance with the European Convention has been among the greatest challenges of our society during the recent years. Therefore, the topic of access to justice is in the highest demand for scholars and practitioners' attention.

In the light of this, we are happy to introduce the new journal **Access to Justice in Eastern Europe** (*AJEE*). The main purpose of *AJEE* is to offer a forum for discussion of topical issues of Judiciary and Civil Procedure reforms, a platform for sharing of research results related to access to justice in East European countries including Ukraine, Poland, Lithuania and others. The key areas have been chosen due to special mixed features of post-social legal doctrine's legacy and Western influence, as well as the legislative approximation to the EU law. It is a great honour for us to have well-known scholars from all over the world among our Editorial Board Members, who represent twelve states – Ukraine, Poland, Lithuania, Croatia, Italy, Germany, Austria, the Netherlands, Spain, Greece, Luxemburg and Brazil.

The content of *AJEE* includes five parts, such as *Research Articles*, partly consisting of young academics' essays; *Supreme Courts Practice* with an overview of current judgments important for law enforcement; *Book Reviews* related to current most popular scientific monographs, projects etc.; *ICA Practices and Novelties* as well as announcements of the conferences.

Issue 1 of the Journal contains relevant and original manuscripts within the subject area. Among them is an interesting comparative essay by ***Elisabetta Silvestri***, dedicated to Small Claims Procedure in France, Spain and Italy. The developments of commercial judiciary in Ukraine as well as some results of current reforms are analysed in the article of ***Dmytro Prytyka***. A great contribution to the development of scientific thought in the field is an essay of ***Cornelis H. Van Rhee*** related to the Civil Procedure development today, in particular, the harmonisation as a result of national law reform, competition between procedural systems and international harmonisation projects.

Two reports of court practice generalizations are included in this Issue due to their significant value for further research of Small Claims Procedure in Ukrainian Civil Procedure. The next Issues will also include the best papers of the Conference, which was held on November 23-24, titled "**Small Claims Procedure: European and Ukrainian Experiences**". In addition, summaries

of this conference, prepared by *Iryna Izarova* and *Radoslaw Flejszar* are included in the issue.

We sincerely hope, that this contribution will be in demand and useful for a wide audience interested in this area of law.
AJEE is open to cooperation with various authors who are interested in the research and practice. We use online submission only and a double-blind peer review system. Moreover, this is an Open Access Journal and we support the idea of free knowledge sharing. All our team will certainly help the contributors to bring their achievements into life.

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SMALL CLAIMS AND PROCEDURAL SIMPLIFICATION: EVIDENCE FROM SELECTED EU LEGAL SYSTEMS

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Summary: 1. Introduction. – 2. France: Simplified Procedures for the Recovery of Small Credits. – 3. Spain: *Juicio Verbal* and *Monitorio Notarial*. – 4. Italy: the Justices of the Peace. – 5. Concluding Remarks.

Most legal systems have a long-standing tradition of simplified procedures for the disposition of small claims. Obviously, the elements that qualify a claim as 'small' vary: the most significant one, meaning the amount of money at stake, reflects the economic situation of a given country. In any event, and regardless of the maximum sum that can be recovered, small claims are the claims that are most important to ordinary citizens. For if people had to turn to full-fledged litigation, probably many would relinquish their rights, being unable to bear the costs and the delays of a traditional judicial procedure. That is the reason why legal systems should provide inexpensive and expedited procedures for small claims if they really want to fulfil the promise of access to justice for all.

This essay examines the solutions adopted in France and Spain, pointing out that the use of easily available forms can make a big difference, as can also the accessibility of IT platforms specifically designed for the recovery of small credits. The state of affairs in Italy for simplified procedures for small claims is also addressed through a description of the jurisdiction of the Italian justices of the peace.

Key words: small claims; simplified procedure; access to justice; forms; IT platforms.

1. INTRODUCTION

The anonymous author of an essay published in an American Law Journal in 1924 wrote that, 'A small claims court is doomed to failure unless it can speedily bring its cases to a *final* determination.'[1] Further on in the essay, the reader can find a

1 Anonymous, *Small Claims Procedure is Succeeding* (8 J Am Jud Soc 1924) 247, 248.

detailed list of the procedural features that are deemed to be essential for the swift disposition of small claims: an informal and untechnical procedure; a judge acting as 'an impartial investigator into the truth', being 'in affirmative control of the whole proceeding';[2] and the possibility for the parties to appear in court without the representation of lawyers, since "it is desirable that lawyers should not commonly appear because it is desirable that the expense of their appearance should be avoided".[3]

It is astonishing to discover that almost a century ago scholars were already debating over the need to provide for procedural models suitable for small claims, so that one may be inclined to think that nothing new is invented when contemporary lawmakers provide for simplified procedures aimed at granting small claims an expedited, inexpensive but also fair treatment in court. More or less, all European Union legal systems deal with small claims in specific ways, sometimes allocating them to special judicial bodies (for instance, small claims courts or courts operated by lay judges), other times relying on procedural rules that are different from the ones followed before the ordinary courts of first instance. Alongside national procedures, the European Small Claims Procedure (hereinafter ESCP)[4] exists for cross-border cases, so that two parallel procedures (the national one and the European one) are available for small claims that meet the requirements for the application of the European instrument at the choice of the plaintiff.

This essay will not deal with the ESCP even though it is a piece of European legislation specifically aimed at devising a uniform, simplified procedure for the recovery of small claims across Member States. A recent, comprehensive study has analysed the ESCP in depth, clarifying the background of the Regulation, its purposes and shortcomings, and therefore this author does not consider it necessary to repeat concepts that have been masterfully expounded by someone else.[5] Furthermore, the optional nature of the ESCP is such that its actual application, at least in some Member States, is negligible. This is the case, for instance, in Italy, where the practical relevance of the ESCP is inversely proportional to the theoretical commentaries on the Regulation produced by Italian scholars.[6]

In addition to Italy, the legal systems that this author has chosen for her analysis of simplified procedures for the disposition of small claims are those of France and Spain. This choice does not signify a value judgment, since a value judgment is not possible when looking at the two national procedures from a distance and without the benefit of empirical data. That said, the impression of a foreign 'bystander' is that both the French and the Spanish procedures are (at least, in theory) efficient, simple and with a touch of modernity that potentially will make them even more accessible to individuals. After all, the ability of a legal system to grant access to justice across the board is

2 Id 251.

3 Id 252

4 Regulation (EC) No 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European Small Claims Procedure, *OJ L 199, 31.7.2007, 1–22;* Regulation (EU) 2015/2421 of the European Parliament and of the Council of 16 December 2015 amending Regulation (EC) No 861/2007 establishing a European Small Claims Procedure and Regulation (EC) No 1896/2006 creating a European order for payment procedure, *OJ L 341, 24.12.2015, 1–13 (in force since 2017).*

5 Reference is made to E A Onțanu, *Cross-Border Debt Recovery in the EU: A Comparative and Empirical Study on the Use of the European Uniform Procedures* (Intersentia 2017).

6 *See* E Silvestri, 'Italy: Simplification of Debt Collection in Italy – National and EU Perspectives', in V Rijavec, et al (eds), *Simplification of Debt Collection in the EU* (2014) 347–61.

tested not with respect to cases where the amount at stake is large and the parties have all the resources (financial, social and cultural) necessary to navigate complex, costly and long court procedures, but with respect to cases where the amount at stake is small.

2. FRANCE: SIMPLIFIED PROCEDURES FOR THE RECOVERY OF SMALL CREDITS

As far as France is concerned, a detailed study of the procedures provided for the disposition of claims whose value is limited should entail an analysis of a variety of proceedings available before the *Tribunaux d'instance*, meaning the courts of first instance whose jurisdiction includes claims up to the value of €10,000.[7] As a matter of fact, the French Code of Civil Procedure contemplates four different proceedings that can be lodged with a *Tribunal d'instance*. Out of these proceedings one seems particularly interesting, since it concerns claims that, at least from the point of view of this author, can truly be deemed small. For claims not exceeding the value of €4,000, the plaintiff can choose to resort to a simplified procedure that entails a simple *déclaration au greffe*, meaning a statement addressed to the court's clerk who provides for its registration.[8] The statement can be made orally or in written form. In any event, the statement must meet the general requirements specified by the Code for the introductory pleading before any civil jurisdictions and a summary explanation of the cause of action supporting the claim. The *déclaration au greffe* can be made also by filling in a form that can be downloaded from a number of websites managed by the French public administration.[9]

One peculiar feature of this procedure is that a preliminary attempt at conciliation is mandatory. Actually, the duty of the plaintiff to explore possible ways to reach a settlement with his adversary has a general character, since the introductory pleading of all cases lodged with any courts of first instance must mention 'the diligences taken with a view to reaching an amicable resolution of the dispute' (my translation).[10] When this rule was adopted in 2015 in furtherance of the recourse to ADR methods, failure to comply with the duty to attempt conciliation or other forms of peaceful resolution of the dispute was not sanctioned, and probably one reason for that was the fuzziness of the concept of acceptable 'diligences' suitable

7 Until 1 July 2017, claims up to €4,000 belonged to the jurisdiction of the *juges de proximité*, lay judges established in 2002 and considered, rightly or wrongly, the heirs of the traditional justices of the peace. They have been repealed from the French judicial geography, since their operation had never been satisfactory and their establishment has often been seen by stakeholders as a useless factor of complication in the identification of the appropriate court of first instance: *see* Commission sur la répartition des contentieux présidée par Serge Guinchard, Rapport au Garde des Sceaux: L' ambition raisonnée d'une justice apaisée 204 204 (La documentation Française 2008). On the 'philosophy' supporting the establishment of community justice in France, *see* M Vericel et al, *Juridictions et juges de proximité : leur rôle concret en matière d'accès à la justice des petits litiges civils* [Rapport de recherche] (2008) <https://halshs.archives-ouvertes.fr/file/index/docid/946154/filename/Rapport_annexes_Juges_de_proximite.pdf> accessed 1 November 2018.

8 *See* arts 843–844 of the French Code of Civil Procedure.

9 For instance, one address is <https://www.formulaires.modernisation.gouv.fr/gf/cerfa_11764.do.> accessed 1 November 2018.

10 *See* arts 56, s 3, and 58, s 3. of the French Code of Civil Procedure, as modified by art 18 of the decree no 2015-282 of 11 March 2015 (*Décret n° 2015-282 du 11 mars 2015 relatif à la simplification de la procédure civile à la communication électronique et à la résolution amiable des différends*).

to put an end to the controversy. But a statute passed in 2016 reinforced the duty,[11] providing for a harsh sanction in case of failure to comply with it: if a preliminary attempt at conciliation has not taken place, the *Tribunal d'instance*, even *ex officio*, can declare the case inadmissible, unless some special circumstances occur, for instance when the parties can give proof that they have carried out other 'diligences' with a view to reaching a mutually acceptable solution of their dispute.

If the attempt at conciliation is unsuccessful, the case can proceed according to the rules governing contentious procedure. A hearing is set for the parties to appear in person or, if they wish, by a representative (for instance, a family member), since the assistance of council is merely optional. The proceeding is oral, at least in principle. It is up to the judge to attempt again the conciliation of the parties or to delegate this task to a *conciliateur de justice*, who is a judicial officer whose specific task is to help the parties reach a settlement, under a duty of impartiality and confidentiality. If an agreement is reached, it will be made enforceable by the judge; otherwise the proceeding will end up with a judgment that can be appealed against, not before the intermediate court of appeal, but only before the French Supreme Court, that is, the *Cour de cassation*.[12]

Since 1 June 2016 a new, simplified procedure for the recovery of small claims has been in operation.[13] The creditor can avoid any judicial proceeding by simply resorting to a bailiff, provided that the credit does not exceed €4,000 and arises out of contracts or statutory obligations. Special rules determine which bailiff can be in charge of the procedure, but the interesting thing is that the creditor can petition the bailiff by means of a simple letter, a verbal statement or via electronic communication. Actually, all the exchanges between the bailiff and the parties can take place via an IT platform devoted to the recovery of small credits.[14]

The bailiff bears the responsibility of the whole procedure: he informs the debtor of the request made by the creditor and invites him to take part in the simplified procedure. Thanks to the bailiff's good offices, the parties are expected to reach an agreement on the amount to be recovered and the terms of payment. If an agreement is reached, the creditor receives from the bailiff an enforceable title that he will be able to use for the recovery of the money owed to him, should the debtor fail to honour the agreement. If the debtor fails to accept the invitation to take part in the simplified procedure or if no agreement is reached by the parties, the bailiff acknowledges the defeat of the procedure, and the creditor will be forced to resort to a contentious procedure for the recovery of his claim.[15]

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11 *See* art 4 of the statute no 2016-1547 of 18 November 2016 (*Loi n° 2016-1547 du 18 novembre 2016 de modernisation de la justice du XXIe siècle*).

12 *See* S Guinchard et al, *Procédure civile* (3d ed Dalloz 2013) 426 34.

13 This procedure was introduced by the decree no 2016-285 of 9 March 2016 *(Décret n. 2016-285 du 9 mars 2016 relatif à la procédure simplifiée de recouvrement des petittes créances).*

14 The platform (website) is accessible via the following addresses: <https://www.petitescreances.fr/ and https://www.credicys.fr/> accessed 2 November 2018. The website is managed by the National Association of Bailiffs *(Chambre nationale des huissiers de justice). See* the order issued by the Ministry of Justice on the establishment of the platform: *Arrêté du 3 juin 2016 relatif à la mise en oevre par voie électronique de la procédure simplifiée de recouvrement de petites créances,* available at <https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000032657522&categorieLien=id.> accessed 1 November 2018.

15 *See* arts R125-1–125-6 of the Code des procédures civiles d'exécution.

The advantages of the procedure managed by bailiffs are several. The fact that the whole procedure can be conducted online, simply by filling in a few forms that are easy to access on a secure website, means a considerable savings in terms of time, which is made even more attractive if one keeps in mind that the debtor has only one month to decide whether or not he is willing to agree to take part in the simplified procedure. Another positive feature of the procedure is the reduced cost: when the creditor turns to the bailiff and the procedure begins, a payment of €14.92 is required. If the procedure is unsuccessful, no further fees are due. If, on the contrary, the parties reach an agreement, €30 will be charged to the creditor for the delivery of the enforceable title. Furthermore, a modest amount of money will have to be paid by the creditor as remuneration for the bailiff who managed the procedure: the remuneration is calculated by applying specific ratios to the amount of the recovered credit. In any event, the total cost of the procedure is truly reasonable, as it should always be for the disposition of small claims that are likely to be relinquished if the legal costs associated with their recovery are bound to exceed their value, which still happens – unfortunately – in some legal systems.

3. SPAIN: *JUICIO VERBAL* AND *MONITORIO NOTARIAL*

For claims whose value does not exceed the threshold of €6,000 the Spanish Code of Civil Procedure (in Spanish, *Ley de enjuiciamiento civil*, hereinafter LEC) provides for a simplified procedure called *juicio verbal* (oral proceeding).[16] As its denomination makes clear, it is a proceeding that is conducted orally before the judge, at least in principle. Better yet, the orality of the procedure was its main feature in the original version of the LEC, passed in 2000. At present, due to the reforms adopted in 2015, the oral character of the procedure appears to be diluted in favor of more formal and written procedural steps.

The complaint lodged by the plaintiff is written, but if the amount at stake does not exceed the sum of €2,000 the Code allows a 'succinct demand' (my translation of the Spanish *demanda sucinta*), with the basic information concerning the identity of the parties, the remedy sought and the facts constituting the cause of action. Alternatively, the plaintiff can resort to standardized forms that can be downloaded from the website of the Spanish General Council of the Judiciary. It is worth noting that below the value of €2,000 the assistance of attorneys is merely optional, which makes understandable the reasons why the statement by which the court is petitioned can have a simple outlook or consist in a standardized form.

Before 2015, the defendant's answer to the plaintiff's **complaint** could be presented orally at the hearing. This feature of the *juicio verbal* made sense in the context of a procedure whose tenets were the principles that are normally associated with orality, meaning the principles of concentration and immediacy (the latter suggesting that the judge in charge of deciding the case must be the one in charge of the taking of evidence, too). In spite of that, it was widely accepted that this very feature was

16 *See* arts 437–447 of the LEC. On the *juicio verbal*, *see*, for instance, José Garberí Llobregat, *El nuevo juicio verbal En la Ley de Enjuiciamiento Civil* (Bosch 2015); A José Vélez Toro 'El juicio verbal y la tutela judicial efectiva: Desajustes del modelo establecido en la Ley de Enjuiciamiento Civil' (2016) 9 Revista de Paz y Conflictos 263, 263–96.

prejudicial for the plaintiff, since he was able to gain knowledge of the defences of his opponent only at the hearing: a surprise effect deemed detrimental to the right of action and defence enshrined in article 24, section 1 of the Spanish Constitution.[17] The reforms of 2015 have radically changed the situation: now the defendant must lodge a written answer in which he is expected to disclose all his defences. As for the plaintiff, if the value of the claim does not exceed the amount of €2,000 and therefore the assistance of an attorney is not mandatory, the defendant, too, can prepare his answer relying on a standardized form to be filled in.

Another far-reaching change brought about by the reforms of 2015 is the fact that the hearing will take place only insofar as the parties request (or, at least one party requests) the holding of the hearing. Therefore, the possibility exists that if the parties waive their right to a hearing, the proceeding will end up being exclusively written. Of course, the mutation of the *juicio verbal* into a written proceeding, lacking the 'event' that was considered its most important feature, that is, the hearing (*vista* in Spanish) devoted to the clarification of the factual terms of the dispute, the taking of evidence and the final arguments of the parties, seems almost a contradiction in terms. In spite of that, the text of the relevant rule is unambiguous where it provides that if neither party requests a hearing nor does the judge deem it necessary, the judgment on the case will be rendered immediately, presumably on the sole base of the plaintiff's complaint and the defendant's answer, without any further exchange of pleadings or procedural steps.[18] At the same time, it is hard to deny that for small claims, and especially for those that, due to their limited value, can be litigated by the parties in person, a written procedure that can be conducted simply by filling in ready-made forms is probably the best course of action. After all, even the ESCP, which is supposed to be the archetype of a simplified procedure aimed at granting access to justice in expedited and inexpensive ways, is designed as 'essentially a written procedure. Oral hearings should only be held exceptionally where it is not possible to give the judgment on the basis of the written evidence or where a court or tribunal agrees to hold an oral hearing upon a party's request.'[19]

Returning to the Spanish *juicio verbal*, if the hearing does take place, the LEC contemplates the possibility that the parties inform the judge that they have already reached an agreement or 'show their willingness to reach an agreement' (my translation).[20] It is possible, too, that the proceeding is stayed, should the parties express their common intention to attempt mediation. If a settlement is submitted to the judge, he can homologate it, which means to make the agreement an enforceable instrument. If no settlement is reached by the parties either in court or out of court, the procedure will continue with the taking of evidence and a round of final arguments. Afterwards, the judge will issue the judgment, which is subject to appeal, provided that the value of the claim is above the amount of €3,000.[21]

17 Art 24, s 1 reads: 'Every person has the right to obtain the effective protection of the Judges and the Courts in the exercise of his or her legitimate rights and interests, and in no case may he go undefended.' This is the official translation into English of the Spanish Constitution of 1978, available at <http://www.congreso.es/constitucion/ficheros/c78/cons_ingl.pdf.> accessed 13 October 2018.

18 *See*, in particular, art 438, s 4 of the LEC

19 *See* recital no 11 of Regulation (EU) 2015/2421, *supra* note 4.

20 *See* art 443 of the LEC.

21 *See* art. 455 s1 of the LEC.

Since 2015, another simplified procedure for the recovery of money claims has been in operation. This procedure does not specifically concern small claims, because it is available for any money claims, no matter what their value is, provided that the claim is uncontested. The procedure, called *monitorio notarial*, is managed by notaries public and, because of that, can be defined as an out-of-court, non-judicial procedure.[22] It does not seem necessary to describe in detail the various steps of the procedure, which begins with an oral application lodged by the creditor upon presentation of the documents necessary to demonstrate that the credit exists 'beyond any doubts' (my translation of the Spanish *la deuda … sea indubitada*). The notary will make delivery to the debtor of a formal request to pay the amount due within a short deadline (twenty days). The procedure is successful if the debtor meets with the notary and pays the amount due, keeping in mind that the debtor may appear before the notary for the sole purpose of challenging the claim, which will put an end to the notarial procedure and force the creditor to explore the regular judicial avenues to recover his claim. Furthermore, for the positive outcome of the procedure it is essential that the location of the debtor is known to the creditor, since the notary public is devoid of any powers of investigation as to the debtor's whereabouts. If the debtor does not meet with the notary or shows up, but neither pays nor challenges the claim, the notarial deed attesting the failure of the procedure will work as an enforceable instrument that the creditor will be able to use for the recovery of his credit according to the ordinary enforcement procedures.

The procedure managed by notaries public is quite informal, in view of the fact that the parties do not have to be assisted by their attorneys, and it is deemed the fastest and least expensive one among the different proceedings provided by Spanish law for the recovery of money claims. These very features, of course, are important most of all for small claims even though the odds of a failure of the procedure if the debtor does not pay or is nowhere to be found seem particularly high.[23]

4. ITALY: THE JUSTICES OF THE PEACE

The Italian legal system does not provide for any simplified procedures for small claims. Claims up to the value of €5,000 belong to the jurisdiction of the justices of the peace, who are lay judges placed at the bottom of the judicial pyramid. The problem is that their jurisdiction shoots up to €20,000 for claims concerning the

22 The procedure is governed by arts 70 & 71 of the Notarial Law, as amended by the statute on non-contentious jurisdiction adopted in 2015 *(Ley 15/2015, de 2 de julio, de la Jurisdicción Voluntaria)*. The text of the Notarial Law (in Spanish) can be accessed at <https://www.boe.es/buscar/pdf/1862/BOE-A-1862-4073-consolidado.pdf.> accessed 13 October 2018. On the new procedure, *see*, for instance, J Bonet Navarro, 'Reclamacion de deudas dinerarias no contradichas a traves de notario (uno instrumento entre la deficiencia y la eficacia)' (190) noviembre 2016 Revista Ceflegal 1–38. available at <https://www.uv.es/~ripj/obraspdf/Reclamaci%C3%B3n%20deudas%20dinerarias%20no%20contradichas%20a%20trav%C3%A9s%20de%20notario.pdf> accessed 3 November 2018; J Banacloche Palao 'Los Nuevos Expedientes y Procedimientos de Jurisdicciyn Voluntaria' (2015) 15 Analisis de la Ley 259–62.

23 For this opinion, *see* R Jan-Sánchez, 'Small Value Claims and Digital Justice in Spain: Cost and Efficiency', (2017) 2 International Journal of Procedural Law 250, 260.

recovery of damages caused by traffic accidents.[24] Therefore it would be incorrect to identify the offices of justices of the peace as the small claims courts of Italy, also keeping in mind that whatever the amount at stake is, the procedure stays the same, with no simplified features for claims whose value is limited. It is true that below the threshold of €1,100 the parties can litigate in person,[25] but this is the sole saving grace of a procedure that is only a 'variation on the theme' of the ordinary procedure before the courts of first instance, whose rules apply insofar as the Code of Civil Procedure does not dictate any special regulations.

The future does not look bright for small claims in Italy. According to a statute that was passed in 2017, but will enter into force in 2021, the jurisdiction of the justices of the peace will increase dramatically, reaching the amount of €30,000 or €50,000 depending on the cause of action of the claim.[26] It is true that what makes a claim 'small' can vary according to an array of factors, but nobody can deny that a claim worth tens of thousands of euros is anything but a small claim. In any event, the future reform will increase the jurisdiction of justices of the peace without modifying the rules governing the procedure and, most of all, without providing for a real simplified procedural path for small claims. Another missed opportunity of the prospective reform is the lack of any reference to any easily accessible, standardized forms to be used at least for the cases that the parties can litigate in person.

Presently, the procedure before the justices of the peace is mainly written, even though (at least in theory) some room is left for orality. For instance, the complaint can be lodged verbally, in which case it is recorded by the judge, who also takes care of the serving of the complaint on the defendant.[27] Needless to say, in the contemporary practice and procedure before the justices of the peace oral complaints are unheard of. Similarly, at the hearing the justice of the peace is supposed to question the parties in order to gain first-hand knowledge of the facts in dispute and with a view to attempting their conciliation.[28] This oral dialogue between the parties and the judge is more often than not a mere formality, or a step that the judge can avoid with the certainty that his omission will not be sanctioned.

All in all, one could venture to say that the Italian legislators do not show any interest in providing expedited and inexpensive judicial procedures for small claims, probably with the hope that the many mandatory forms of ADR that are in operation are sufficient to satisfy the need for access to justice for those who will end up relinquishing their claims rather than facing the delays and costs of litigation.[29] According to widespread public opinion, resorting to ADR is anyway better than doing nothing, even

24 Art 7, ss. 1 & 2 of the Italian Code of Civil Procedure.

25 *See* art 82 s 1 of the Italian Code of Civil Procedure.

26 The reform, which not only raises the financial value of the claims, but also extends the jurisdiction of the justices of the peace to a number of enforcement procedures and a few non-contentious proceedings as well, was adopted by legislative decree no 116 of 13 July 2017.

27 *See* art 316, s 2 of the Italian Code of Civil Procedure.

28 *See* art 320, s 1 of the Italian Code of Civil Procedure.

29 On the development of ADR methods in Italy with a confusing alternation between a mandatory and an optional character of the means that can be chosen to settle disputes, see E Silvestri, 'Too Much of a Good Thing: Alternative Dispute Resolution in Italy' (2017) 21 (4) Nederlands-Vlaams tijdschrift voor Mediation en conflict management 77–90.

though what you get is often less than (or different from) what you really wanted to obtain, due to the fact that you must somehow compromise in order to reach an agreement with your opponent. One may subscribe to this point of view and think that it is just a different form of access to justice, a justice that it is not the traditional, classic one dispensed by the courts of law, but a multifaceted, informal justice that opens up a kaleidoscope of avenues for the vindication of one's rights. All of that may be true, but this author is proud to be old school in her belief that one of the duties of a State is to provide access to the court system without 'outsourcing' the administration of justice.

5. CONCLUDING REMARKS

The closing sentences of an essay on small claims published almost twenty years ago by two American authors read as follows: 'Those in the legal community who share our commitment to a civil justice system that truly serves all American should join the reform efforts to expand and improve small claims courts. It really can make a difference.'[30] Indeed, the treatment of small claims, whether through specialized courts or simplified procedures or a combination of both, is one of the test benches of a given legal system and its ability to satisfy the needs of ordinary citizens. In this regard, an interesting list of 'general guidelines' for the appropriate resolution of small claims can be found in the same essay mentioned above: no attorneys for the parties; sample forms to be filled in for the complaint of the plaintiff and the answer of the defendant; simplified rules of evidence; a single hearing held within a short time after the suit has been filed; and a decision issued at the closing of the hearing itself or announced within a few days. What seems critical is to avoid that the court in charge of small claims becomes solely 'a debt collection agency where businesses routinely turn bad debts into uncontested judgments and individuals rarely participate as anything other than defendants'.[31] Furthermore, while the claims may have a limited monetary value, this does not necessarily mean that they deal with uncomplicated and trivial issues. All of this must be taken into account in designing procedures that are simple, fast and inexpensive, but also able to guarantee to individuals the appropriate remedies for their legal problems.

November 3, 2018

30 J C Turner, J A McGee, 'Small Claims Reform: A Means of Expanding Access to the American Civil Justice System' (2000) 5 UDC L. Rev 177, 188.

31 S McGill, 'Small Claims Court: A Vehicle for Social Change and the Case for Equitable Relief' (2017) 26 JL & Soc Pol'y 90, 90–91.

CIVIL PROCEDURE BEYOND NATIONAL BORDERS

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Summary: 1. Introduction. – 2. Harmonisation as a Result of National Law Reform. – 3. Harmonisation as a Result of Competition between Procedural Systems. – 4. Intended Harmonisation. – 5. Final Remarks.

The present paper focuses on the harmonisation of civil procedural law in Europe and on a global scale. As the title of the paper indicates, this will be done by also taking into consideration past experiences in this field. The question as to the desirability of harmonisation will not be discussed. The paper will especially focus on (1) Harmonisation as a result of national law reform, (2) Harmonisation as a result of competition between procedural systems, and (3) Harmonisation as a result of international harmonisation projects.

Key words: harmonisation of civil procedure, national law reform, procedural systems, international harmonisation projects.

1. INTRODUCTION

A first glance at the various civil procedural systems of our modern world shows considerable disparities. One of the explanations for this is often found in the historical differences in the approach to civil litigation in what may be called the Common Law and Civil Law families of civil procedure.[32] However, this explanation may not be sufficient anymore, since even within the two main families of civil procedure the differences are sometimes large. It has even been stated that because of this the dichotomy between Civil Law and Common Law may have lost much of its relevance.[33] The truth of this statement may be demonstrated by comparing

32 R Van Caenegem, 'History of European Civil Procedure', *International Encyclopedia of Comparative Law* (2005) Vol XVI 16-23; C H van Rhee, 'Introduction' in C H Van Rhee (ed) *European Traditions in Civil Procedure* (Intersentia 2005) 3-23.

33 N Andrews, *A Modern Procedural Synthesis: The American Law Institute and UNIDROIT's 'Principles and Rules of Transnational Civil Procedure'* (Tijdschrift voor Civiele Rechtspleging 2009) 52: 'This project [i.e. the ALI/Unidroit Priniciples of Transnational Civil Procedure] also shows that a jurisdiction's historical association with the Common Law or Civil Law tradition is

England and Wales (shortly 'England' hereafter) and the United States of America. As all comparative procedural lawyers will know, in England the jury has nearly disappeared from civil trials,[34] whereas the right to a jury trial is a constitutional right in the US.[35] It is also a known fact that the role of pre-trial discovery (currently known as disclosure in England) is radically different in these two jurisdictions. Whereas discovery in the US is still rather extensive, at least from a European perspective,[36] stringent limits have been introduced in England by the Woolf Reforms (1999).[37] At the same time, it seems that the differences between jurisdictions from different procedural families are becoming less pronounced.[38] When one compares modern English civil procedure with the procedure of various continental European jurisdictions, it appears, for example, that both in England and in large parts of the Continent the judge has become an active case manager in civil proceedings, albeit in England mainly as regards the formal aspects of litigation, whereas the judge is also active as regards the content of the case in many Continental jurisdictions.[39] In this respect, England has moved away from the traditional Common Law approach and in the direction of the European Continent.[40] Additionally, various continental systems of civil procedure continue to demonstrate an interest in English procedural devices and rules, for example English style documentary discovery (disclosure) mechanisms (here one may refer to the recent reforms in civil procedure in Ukraine), even though such mechanisms are traditionally absent in these systems, a situation which has occasionally caused concern in some countries. In the Netherlands, a draft Civil Code from 1804 – part of civil procedure was regulated by the Civil Code in these days – already attempted to introduce very extensive duties for litigants and third parties to allow access to documents beneficial to the case of the opponent party,

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not an immutable genetic stamp. Arguably, this backward-looking distinction will soon have lost any clear value in modern procedural structures.' And also: 'These differences [between the USA and English systems, and between the various civil law jurisdictions] make a nonsense of the glib phrase "Anglo-American procedure" and, especially, of the crude expression "Civilian procedure".' See also E Storskrubb, *Civil Procedure and EU Law. A Policy Area Uncovered* (Oxford University Press 2008) 285, and N Trockner and V Varano, 'Concluding Remarks' in N Trockner and V Varano (eds) *The Reforms of Civil Procedure in Comparative Perspective* (Giappichelli Editore 2005) 243-247.

34 N Andrews, *English Civil Procedure. Fundamentals of the New Civil Justice System* (Oxford University Press 2003) nos 34.08 – 34.10; Supreme Court Act 1981, s69; R Stürner, *The Principles of Transnational Civil Procedure: An Introduction to their Basic Conceptions* (Rabels Zeitschrift 2005) para 201; C H van Rhee, 'English Civil Procedure Until the Civil Procedure Rules' in C H van Rhee (ed) *European Traditions in Civil Procedure* (Intersentia 1998) 129.

35 Seventh Amendment of the US Constitution.

36 W Burnham, *Introduction to the Law and Legal System of the United States* (Thomson/West 2006) 226-259.

37 Lord Woolf, *Access to Justice: Final Report* (HMSO 1996) para 37 ff; Andrews (n 34) nos 26.01 – 26.128.

38 P H Lindblom, *Harmony of Legal Spheres: A Swedish View on the Construction of a Unified European Procedural Law* (European Review of Private Law 1997) 20.

39 Lord Woolf (n 37) s II; C H van Rhee, 'The Development of Civil Procedural Law in Twentieth-Century Europe: From Party Autonomy to Judicial Case Management and Efficiency' in C H van Rhee (ed), *Judicial Case Management and Efficiency in Civil Litigation* (Intersentia 2008) 11-25.

40 C H van Rhee, 'Towards a Procedural Ius Commune?' in J Smits and G Lubbe (eds), *Remedies in Zuid-Afrika en Europa* (Intersentia 2003) 217-232. See for an overview of the major similarities and differences between the world's civil procedural systems, ALI/UNIDROIT 2006, 4-7.

even if the specific documents could only be identified in a very inexact manner,[41] whereas Franz Klein, the famous Austrian law reformer, referred to discovery as a beneficial procedural device in his *Pro Futuro*, published in the 1890s.[42] Due to the increasing conviction in many countries that civil judgments should be based on the substantive truth instead of the truth as fabricated by the parties only, it is not unlikely that documentary discovery will soon be part of most modern Continental civil procedural codes.[43] This will obviously result in a move of Continental procedural systems in the direction of England, at least in this particular respect.

In the present paper I will focus on the prospects of the harmonisation of civil procedural law in the future. As the title of my paper indicates, I will also do this by taking into consideration past experiences in this field. The question as to the desirability of harmonisation will not be discussed in depth here.[44]

I will focus on three types of harmonisation:
1) Harmonisation as a result of national law reform;
2) Harmonisation as a result of competition between procedural systems;
3) Harmonisation as a result of international harmonisation projects.

2. HARMONISATION AS A RESULT OF NATIONAL LAW REFORM

Some procedural systems have a tendency to become more alike – at least as regards the civil procedure rules, i.e. black latter law – even though this is not the primary aim of the Legislature or other rule-making authorities. This is due to the fact that

41 H Aa et al (eds), *Bronnen van de Nederlandse Codificatie sinds 1798* (Kemink en Zoon N V, Utrecht 1968) vol I 459-461: (Ontwerp-Cras 1804): Art 55. 'Gelijk elk verpligt is, daar toe behoorlijk geroepen zijnde, getuigenis der waarheid te geven, zoo moet ook elk, die eenige bewijsstukken onder zich heeft, welke tot ontlasting of bezwaar, 't zij in burgerlijke, 't zij in misdadige zaken, strekken, dezelve aan den belanghebbenden, of die daar recht op hebben, uitreiken.' (Similar to the rule that everyone, who has been called to court in the prescribed manner, has to testify, also everyone who has any beneficial or detrimental documentary proof under him has to provide anyone with an interest in or an entitlement to these documents, with these very documents, both in criminal and in civil cases). However, even though this rule seems extremely broad, the defendant – but only the defendant – did, according to the draft, in most cases not have to disclose documents to the claimant; see Art 59. 'Gelijk, in het algemeen, de eisscher met het bewijs zijner vordering belast is, zonder dat de verweerder iets daar tegen behoeft te berde te brengen, zoo kan ook deze niet genoodzaakt worden, om de bewijzen, welke hij voor de vordering van den eisscher in zijnen boezem heeft over te geven.' (Similar to the rule that, generally speaking, the claimant has the burden of proof as regards his claim, without the need for the defendant to act in this respect, also the defendant cannot be obliged to disclose documents in his power which are beneficial for the claimant's case). After the draft has listed some exceptions to this rule, Art 62 states that in situations other than those listed as exceptions to the general rule, the judge has considerable discretion as regards the defendant's duty to disclose documents; see Art 62. 'In welke andere gevallen een gedaagde tot overgifte der brieven, welke bij hem berusten, gehouden zij, moet de rechter beoordeelen.' (In which other cases the defendant can be obliged to disclose documents has to be determined by the judge).

42 F Klein, *Pro Futuro: Betrachtungen über Probleme der Civilprocessreform in Österreich* (Franz Deuticke 1891) 41 ff.

43 On the introduction of discovery devices in some Continental jurisdictions, see also Trockner and Varano (n 33) 255-258; and R Verkerk, *Fact-finding in Civil Litigation: A Comparative Perspective* (Intersentia 2010) 37.

44 G P Miller, 'The Legal-Economic Analysis of Comparative Civil Procedure' (1997) 45 American Journal of Comparative Law 905.

comparative civil procedure – explicitly or implicitly – has, since times immemorial, been used as a tool where attempts are made to reform a national procedural system. Such an approach may be wise since foreign experiences may offer information on the functioning of particular procedural rules in practice. An early example is the fifteenth and sixteenth century Low Countries, where explicit legislative attention for French-Burgundian procedural law resulted in a considerable alignment with that procedure. This proved to be the case not only as regards black letter law, but also as regards procedural practice, as appears from the history of various courts in the Low Countries, notably the so-called Great Council of Malines, one of the superior courts of that area in the early modern period.[45] In more recent times, examples abound. Reference may be made to the nineteenth and twentieth century Netherlands[46] and Belgium.[47] Since implicit attention for foreign civil procedure – i.e. attention which is not specifically mentioned by the Legislature, for example for political reasons – is more difficult to demonstrate and needs considerable additional research, the present paper will concentrate on examples of explicit attention.

A first question that may be addressed is which jurisdictions are usually studied in law reform projects. It appears that often the jurisdictions that are studied are related in one way or another to the system in need of reform as it is apparently thought that these jurisdictions offer examples that may be implemented in a relatively uncomplicated manner. There are, of course, exceptions to this rule, as is shown by the introduction of the German civil procedural legislation in Japan in 1890, as part of the law reform project started after the Meiji Restoration in 1868.[48] These exceptions are, however, rare and usually only occur when a whole legal systems is replaced in a single blow by another legal system and not when gradual law reform is contemplated, as is usually the case.

The relationship between the system in need of reform and the foreign legal system is usually the result of a close contact, not only in the procedural field but also as regards the law in general, the economy, politics and/or culture, between the various jurisdictions. The fifteenth century Low Countries, for example, were in various of these respects closely related to their French-Burgundian example (the Burgundian dukes ruling the Low Countries were a younger branch of the French royal house of Valois) and French influence continued – maybe surprisingly – in the sixteenth century under Habsburg rule.[49] This is also true for the nineteenth century Netherlands and Belgium. The annexation of these territories by France had resulted in the introduction of French legislation. This legislation was not repealed after the defeat of Napoleon Bonaparte.

45 C H van Rhee, *Litigation and Legislation: Civil Procedure at First Instance in the Great Council for the Netherlands in Malines (1522-1559)* (Archives générales du Royaume1997) 313 ff. See also C H van Rhee 'Civil Procedure: A European Ius Commune?' (2000) 8 (4) European Review of Private Law, 589-611.

46 A W Jongbloed, 'The Netherlands (1838-2005)' in C H Van Rhee (ed.), *European Traditions in Civil Procedure (Ius Commune Europaeum 54),* (Intersentia 2005) 69-95.

47 D Heirbaut, 'Efficiency: the Holy Grail of Belgian Justice?' in A Uzelac and C H Van Rhee (eds) *Access to Justice and Judiciary: Towards New European Standards of Affordability, Quality and Efficiency of Civil Adjudication* (Intersentia 2009) 89-117.

48 O G Chase et al (eds), *Civil Litigation in Comparative Context* (Thomson/West 2007) 35-36.

49 D P Blok et al (eds), *Algemene Geschiedenis der Nederlanden*, vol. IV (Unieboek B V Bussum 1980) 135 ff, and idem 311 ff.

From a legal point of view (and, before the defeat of the French emperor at Leipzig, also from the political and economic perspective), the Netherlands and Belgium were integrated into the French legal system, something that especially in Belgium was reinforced by the French cultural and linguistic orientation of the elite of that country during the nineteenth and a large part of the twentieth century. Consequently, for Belgium it was only natural to look at French procedural law and contemporary French criticism of the French Code of Civil Procedure when far-reaching reforms to the Belgian Code of Civil Procedure were contemplated in the second half of the nineteenth century (other foreign influences were at that time less important and restricted to countries which were still influenced by France even though they had their own codifications: Geneva, the Netherlands and the Kingdom of Italy)[50] and again in the second half of the twentieth century when reforms were actually introduced (at this time the list of relevant jurisdictions other than France was considerably longer, even though French influence remained dominant).[51] The same is true for the Netherlands. This country introduced its own civil procedural code in 1838 which showed a strong French influence. In later reform projects, the Dutch lawmaker looked at other jurisdictions, notably Austria and Germany at the start of the twentieth century,[52] and England and Wales at the start of the twenty-first century.[53] This, in my view, is the result of the fact that these jurisdictions had to a certain extend replaced France as the dominant force in the legal, economic, political and cultural fields in the Netherlands in this period.

The current legal, economic, political and to a certain extent cultural integration of the Member States of the European Union may serve as a strong impetus for the 'spontaneous' harmonization or, at least, approximation of the civil procedural systems in Europe in the future.[54] An example of spontaneous approximation that may be observed in Europe is the increase in the case management powers of the judge in a large number of European jurisdictions including England (as of 1999), mentioned in the introduction of this paper.[55] Although this development started at the end of the nineteenth century in Austria, it is not unlikely that European integration is one of the factors that has stimulated its acceptance in a growing number of current EU Member States. After all, especially during the last decades, when European integration became more intense than before, the introduction of case management powers for the judge has occurred at an increasing pace,[56] especially

50 C H van Rhee, 'The Influence of the French Code de Procédure Civile (1806) in 19th Century Europe' in L Cadiet G Cavinet (eds), *De la Commémoration d'un code à l'autre: 200 ans de procédure civile en France* (Litec 2006) 129-165 ; ; Heirbaut (n 47).

51 Heirbaut (n 47).

52 C H van Rhee, *'Ons tegenwoordig sukkelproces': Nederlandse opvattingen over de toekomst van het burgerlijk procesrecht rond 1920* (Tijdschrift voor Rechtsgeschiedenis 2000) 331-346.

53 C H van Rhee, 'The Development of Civil Procedural Law in Twentieth-Century Europe: From Party Autonomy to Judicial Case Management and Efficiency' in C H van Rhee (ed), *Judicial Case Management and Efficiency in Civil Litigation* (Intersentia 2008).

54 C H van Rhee (n 40). The use of the term 'approximation' is based on the title of the Report of the Storme Group, discussed below (M Storme (ed), *Approximation of Judiciary Law in the European Union/ Rapprochement du Droit Judiciaire de l'Union européenne* (Kluwer, Dordrecht 1994). See now also Art. 81(1) of the Treaty on the Functioning of the European Union.

55 C H van Rhee (n 53).

56 C H van Rhee (n 53); R Stürner, *The Principles of Transnational Civil Procedure: An Introduction to their Basic Conceptions* (Rabels Zeitschrift 2005) 226-227.

in Western Europe. Given the fact that the States of Western Europe have for a long time been in close contact with each other within the framework of the European Community (or the European Free Trade Association), this is in my opinion not a surprise. It is not surprising either that the judge's case management powers are more problematic in the former Eastern Block States that are currently a member of the EU,[57] given their isolation from Western Europe during the Cold War period and their radically different political and economic make-up at that time. This may, however, change over time, not only due to the continuing integration of Europe within the context of the European Union, but also due to the increasing availability of information through the Internet and the important activities of international bodies like the International Association of Procedural Law and the Council of Europe (e.g. the European Commission for the Efficiency of Justice).

The example of spontaneous harmonisation in the area of judicial case management shows that this type of harmonisation is not limited to minor issues in the procedural field, but that it may influence important aspects of the existing civil procedural systems in today's world. After all, the early nineteenth century idea, clearly expressed in the highly influential French *Code de procédure civile* of 1806, that civil litigation is a private matter and only of interest to the parties to the lawsuit, was originally one of the corner stones of most European legal systems.[58] According to the French Code, the parties were considered to be free in deciding how they would conduct their case. They could opt for litigating expediently, but could also decide to have their case move forward at a slow pace. Although according to one nineteenth-century observer the French judge had already become rather active at the end of the nineteenth century without the need for specific procedural regulations to this end,[59] it was only after the necessary theoretical framework had been developed by this very same observer (Franz Klein, 1854-1926) that the new perspective of the judge as case manager became popular, first in Austria and later beyond.[60]

Klein's influence in Europe may be demonstrated by the reception of his theoretical ideas in other European jurisdictions. Klein's aim was the realisation of the so-called 'social function' (*Sozialfunktion*) of civil litigation. This 'social function' may be viewed as a reaction against the nineteenth century liberal ideal of procedure. It meant that litigation should not only be considered as a means to solve individual lawsuits

57 C H van Rhee, 'Introduction' in C H Van Rhee (ed) *European Traditions in Civil Procedure* (Intersentia 2005) 23.

58 On the history of the French Code of Civil Procedure, see A Wijffels, 'The Code de procédure civile (1806) in France, Belgium and the Netherlands' in C H van Rhee et al. (eds.), *The French Code of Civil Procedure (1806) after 200 years. The Civil Procedure Tradition in France and Abroad* (Kluwer 2008) 5-73.

59 Franz Klein (1854-1926) claimed in the 1890s that even though the French Code of Civil Procedure did not grant the French judge far-reaching case management powers, such powers were, in practice, exercised by him without a legal basis in the Code. See Klein (n 42)25: 'Dem französischen Rechte ist der Richter in Prüfen, Glauben und Urtheilen eine lebendige Person mit zu achtenden intellectuellen und moralischen Bedürfnissen, nicht ein blutleerer Judicaturapparat, wie sich ihn das gemeine Recht ausgesonnen hat. Diese so unscheinbare Wahrheit […] erklärt, warum in Frankreich freie Instructionsthätigkeit des Richters ohne besondere gesetzliche Anerkennung bestehen, die allercursorischste Normirung genügen kann.' That claim echoes an observation constantly made by French authors themselves writing on civil procedure from the latter part of the nineteenth century onwards, although of course verifying the veracity of such statements would require extensive research of the French case law and of day-to-day practice during this period.

60 P Oberhammer and T Domej, 'Germany, Switzerland and Austria (ca. 1800-2005)' in C H van Rhee (ed), *European Traditions in Civil Procedure* (Intersentia 2005) 103-128.

between private litigants, but also as a phenomenon that affected society as a whole.[61] Civil procedure should serve the public interest (*Wohlfahrtsfunktion*), but it had to be viewed from an economic perspective as well. The economic perspective meant that one should, for example, guard against civil procedure being used as a means to postpone payment of a debt or to obtain money at a low interest rate.[62] As a result, the judge was given the task to make sure that court time was used in the right manner. His case management powers were also needed because the parties were only theoretically equal (the premise of equality lies at the basis of the French *Code de procédure civile* of 1806). Conducting litigation in an inefficient manner was, for example, usually not the result of a joint decision of the parties, but only of one party who would gain from protracted litigation and who had the money to afford this type of litigation.

The new perspective was adopted in many European States, first only in Germany (especially from the 1920s onwards),[63] but in the second half of the twentieth century also in many other jurisdictions.

Due to the increasing pace of internationalization and globalization, which results in the legal, economic, political and/or cultural integration of various parts of the world in larger entities, one may expect harmonisation as described in this section to occur on an ever larger scale in the future. After all, internationalization and globalization mean a closer contact between a larger number of States in the legal, political, economic and cultural sphere, and this will result in an ever growing number of *relevant* foreign procedural models in national law reform projects that adopt a comparative approach, either explicitly or implicitly.

3. HARMONISATION AS A RESULT OF COMPETITION BETWEEN PROCEDURAL SYSTEMS

In the present chapter, I will deal with harmonisation of civil procedural law as a side-effect of the wish to create a competitive forum for civil litigation. Although this may not be the major goal of law reformers in today's world, this may change in the future for reasons stated below. Before we look at the future, however, I would like to have a look at the past and summarise the success story of the medieval Romano-canonical procedure that lies at the basis of the various systems of civil procedural law on the European Continent.[64] In my opinion, competition between procedural systems in the medieval world explains this success and, consequently, it is a good example of harmonisation of procedural models as a side-effect of competition.

61 Klein asked the following rhetorical question: 'Sollte das "Processeigenthum" stärker als alles sonstige Privateigenthum sein, und muss erst gesagt werden, welches die öffentlichen Interessen sind, mit denen die uns so selbstverständliche schrankenlose Disposition über den Processinhalt collidirt, und was sich dann gerade aus der Eigenthumsanalogie ergibt?' (Klein n 42 17).

62 See H W Fasching, 'Die Weiterentwicklung des österreichischen Zivilprozessrechts im Lichte der Ideen Franz Kleins' in Hofmeister (ed), *Forschungsband Franz Klein (1854-1926). Leben und Wirken* (Manz 1988) 97-117, and Van Caenegem (n 32) 97.

63 G Walter, 'The German Civil Reform Act 2002: Much Ado About Nothing?' in Trockner and Varano (eds), *The Reforms of Civil Procedure in Comparative Perspective* (Giappichelli Editore 2005) 67-72.

64 For more detailed information, see C H van Rhee, Civil Procedure: A European Ius Commune?' (2010) 8 (4) European Review of Private Law 2000 589-611.

The Romano-canonical procedure was developed within the context of the medieval Church and its spread to secular courts can – at least in part – be explained on the basis of its attractiveness for the litigants. Much earlier than medieval secular courts, medieval ecclesiastical courts knew a written procedure which aimed at uncovering the substantive truth by way of a rational system of proof. This system of proof did not appeal to supra-natural forces – as the old system did, for example by way of ordeals such as trial by battle – but was based on means of proof that are still recognized in our modern procedural systems: the emphasis was on documents, but, for example, the examination of witnesses also started to play an important role. This increased the predictability of the outcome of cases and, as a result, many litigants tended to prefer litigation before a church court instead of litigation before a secular jurisdiction. In areas and cases where a choice of forum was possible, this was detrimental to worldly rulers in various ways, for example from the perspective of their prestige and influence, but also as regards the revenues related to court litigation. Since a choice of forum was more often possible in the medieval world than today due to overlapping jurisdictions and the absence of clear-cut jurisdictional rules, high numbers of litigants started to flock to the ecclesiastical courts quickly after the introduction of the new procedure there. As a result, the secular courts lost a considerable amount of business, and it has been held that this is one of the reasons why they started to adopt elements of the Romano-canonical procedure, first of all the superior secular courts. After all, they needed to strengthen their position in respect of the ecclesiastical courts. They did not chose for a wholesale adoption of the new procedure, however, since each secular court knew its own mix of Romano-canonical and indigenous elements. Nevertheless, this mixing must have served its purpose since as a result the secular courts in the various parts of Europe were able to increase their success vis-à-vis the church courts. At the same time it resulted in a certain approximation of the procedural models of the various European courts.

In our modern world and especially in a national context, competition between courts on the basis of procedural rules has virtually disappeared. This is due to the introduction in most States of nation-wide uniform procedural models for the courts. Nevertheless, this does not mean that the State courts do not have to fear any competition at all. After all, although litigants cannot influence the procedural law applied by the State courts and therefore have to accept the national procedural models when litigating at these courts, they can in various cases decide to avoid litigation at these courts all together by choosing arbitration or other types of ADR, or opt for the court of a foreign State by way of a choice of forum. In this way, they indirectly chose the applicable rules of procedural law and, in a study by Vogenauer and Hodges,[65] it is shown that as regards choices of forum the procedural law applied by the forum is one of the factors that is taken into consideration by businesses.[66] States who consider it important to attract international litigation will – or at least should – therefore consider whether their procedural law – either positively or negatively – affects a choice of forum. Comparative civil procedure is relevant

65 S Vogenauer and C Hodges (eds), *Civil Justice Systems in Europe: Implications for Choice of Forum and Choice of Contract Law* (Hart Publishing 2011).

66 Vogenauer and Hodges (n 65).

for these States because comparing a national procedural model with foreign procedural regimes is indispensable in order to evaluate the strengths and weaknesses of a particular procedural system in an international context.[67] Such comparative research may, of course, result in a certain approximation since it may give rise to the adoption of successful procedural rules and models from abroad.

States may be interested in attracting litigation for various reasons. One reason might be that they want cases that are in one way or another linked to their own jurisdiction litigated before their national courts. Another reason might be related to attracting businesses. A preference by the international business community for the courts of a particular State may be held to indicate that this community regards this State as an attractive place, not only from the perspective of litigation, but also from the perspective of doing business.[68] Most likely, businesses that choose the forum of a particular State trust the proper functioning of the organs of that State in general, i.e. not only that of the courts. Another reason for a State's interest in attracting international litigation is that such litigation may be an incentive for the development of the national legal services market, or for the development of case law for a large number of situations, and there may be many other reasons.

One step States may take in improving their competitiveness in the international litigation market is to change their rules of procedure, both for domestic cases and for international litigation. However, this is a very drastic step which – apart from its unpopularity[69] – may not be effective, since different litigants may have different preferences. Another approach is introducing some flexibility in the application of procedural rules, allowing litigants a certain choice in the applicable procedural regime, for example by allowing them to opt for the application of alternative – domestic or foreign – procedural rules as regards certain aspects of their case or packages of such rules. Especially offering a limited number of packages of rules (i.e. procedural models) at the national level is, in my opinion, an interesting option, since a choice of individual rules may result in an unworkable situation due to the high number of combinations of rules that are available, and also because it may result in a choice that is only beneficial for the economically stronger party while being detrimental to his opponent. Additionally, offering packages allows the national legislator to achieve certain policy aims, e.g. by offering combinations that are at the same time attractive to international litigants and beneficial from the perspective of these policy aims. Rules allowing the judge to be an active case manager could, for

67 In a European context, the various reports of the European Commission for the Efficiency of Justice (CEPEJ) are of interest <www.coe.int/en/web/cepej/> accessed 1 November 2018). See P Albers, 'Judicial Systems in Europe Compared' in Van Rhee and Uzelac (eds), *Civil Justice between Efficiency and Quality: From Ius Commune to the CEPEJ* (Intersentia 2008) 9-28. See also P Albers, 'Quality Assessment of Courts and the Judiciary: From Judicial Quality to Court Excellence' in A Uzelac and C H Van Rhee (eds), *Access to Justice and Judiciary: Towards New European Standards of Affordability, Quality and Efficiency of Civil Adjudication* (Intersentia 2009) 57-74.

68 In this respect the *Doing Business* Reports of the World Bank are of interest. Part of the comparison made by the World Bank concerns the national justice systems of the various economies. See <www.doingbusiness.org/> accessed 1 November 2018).

69 E.g. G Walter and S Baumgartner, 'Utility and Feasibility of Transnational Rules of Civil Procedure: Some German and Swiss Reactions to the Hazard-Taruffo Project' (1998) Texas International Law Journal 463-476.

example, be combined with extended discovery mechanisms in order to cater for both the international litigant who wants an efficient administration of justice and for national policy makers aiming at litigation based on the substantive truth as opposed to the truth as fabricated by the parties.

It may even be possible to allow the parties a certain flexibility as regards the choice of some of the rules that are offered within each package. Allowing a choice of the applicable procedural rules (e.g. domestic or foreign rules or rules based on the ALI/Unidroit Principles of Transnational Civil Procedure) within the various packages might not be as problematic as it may seem, since not all procedural rules are closely related to the overall procedural model of a country, to the system of substantive private law or have, e.g., constitutional significance. An example is the rules on the computation of time, but also various rules as regards conciliation, the commencement of the proceedings and the subject-matter of the litigation.[70] In my opinion, a distinction should be made between rules that are either closely related to substantive law or the procedural system, or that have constitutional significance – such as those concerning the available means of recourse against judgments which impact on judicial organization, i.e. a constitutional issue – and rules that can be viewed in isolation and that do not have such significance. It is unlikely that States would be willing to subject the former procedural rules to the parties' preferences. However, the story may be different regarding the latter rules.

An early example of a trend towards flexibility as regards procedural rules may be witnessed in the Nordic countries. According to Laura Ervo, in these countries '[t]he state delegates more and more disposition power to the parties concerning matters of action.' Based on the writings of P.H. Lindblom, she observes that '[i]n Sweden, parties already have quite a lot of power to decide procedural matters and, for instance, the possibility to choose written or oral preparation to some extent.' It is held by this author that the dominating trend in Swedish civil procedure is expanding flexibility and the same kind of large freedom on procedural forms has according to her been suggested for Finland. The author states that this freedom is viewed as positive for the competitiveness of courts.[71]

4. INTENDED HARMONISATION[72]

One of the major reasons for the recent growth of interest in comparative civil procedure are attempts to harmonize civil procedural law in various parts of the world or even on a global scale. Two such harmonization attempts that are invariably mentioned in comparative procedural studies are the Storme Report[73] and the Principles

70 See, e.g., the various proposals for harmonisation in M Storme (ed), *Approximation of Judiciary Law in the European Union/ Rapprochement du Droit Judiciaire de l'Union européenne* (Kluwer, Dordrecht 1994).

71 L Ervo, 'Party Autonomy and Access to Justice' in Ervo, Gräns and Jokela (eds), *Europeanization of Procedural Law and the New Challenges to Fair Trial* (Europa Law Publishing 2009) 26.

72 This chapter is based on parts of C H van Rhee, 'Civil Procedure in a Globalizing World: A Historical Perspective' in Faure and Van der Walt (eds), *Globalization and Private Law: The Way Forward* (Edward Elgar 2010) 343-367.

73 M Storme (ed), *Approximation of Judiciary Law in the European Union/ Rapprochement du Droit Judiciaire de l'Union européenne* (Kluwer, Dordrecht 1994).

of Transnational Civil Procedure of the American Law Institute and Unidroit.[74] The Storme Report is the result of such a development on a European scale, whereas the Transnational Principles are the result of a similar development in the area of commercial disputes on a world-wide scale. Currently, there is a third project, i.e. the project aiming at Rules of European Civil Procedure within the context of the European law Institute and Unidroit. Early results of this project are expected later this year (2019).

4.1. Harmonization on a European scale

Harmonization and even unification of civil procedural law may be required for various reasons. Although litigants may, in several cases, opt for a court with their preferred procedural regime, this is not always possible. Apart from legislation prescribing the litigants to conduct their lawsuit before the courts of a specific jurisdiction (e.g., where the case concerns immovable property), a choice of forum may not be feasible for financial reasons. In an economic area as the European Union, this may create problems from the perspective of the four freedoms (free movement of persons, goods, capital and services). Citizens may, for example, decide to abstain from purchasing certain goods outside their own jurisdiction because of (perceived) problems when litigation should become necessary. Additionally, businesses may be influenced by differences in procedural law in deciding to produce and market products in the various Member States. Although the impact of differences in procedural law in this particular area may be limited, they nevertheless contribute to a fragmented market and not to the creation of the single internal market that is the objective of European cooperation.[75] Additionally, the result of this is differences as regards access to justice which, within the context of the European Union– or the wider context of the Council of Europe – may be considered undesirable.[76]

To start with the Council of Europe: due to Article 6 of the European Convention on Human Rights (ECHR) (which is comparable to Article 14 International Convenant on Civil and Political Rights and Article 47 of the Charter of Fundamental Rights of the European Union) and especially the case law of the European Court of Human Rights, Member States of the Council must guarantee the observance of some fundamental procedural guarantees, in the area of both criminal and civil litigation (obviously, I will only discuss civil litigation here). The case law of the European Court of Human Rights on Article 6 has been instrumental in laying down the minimum requirements each national procedural regime of the Member States should meet. On the basis of this case law, it has appeared that Article 6 prescribes the following guarantees:[77]

74 ALI/UNIDROIT, *Principles of Transnational Civil Procedure* (Cambridge University Press 2006). Another example is the *Código Procesal Civil Modelo para Iberoamérica* (1994). The text may be found at the website of the 'Centro de Estudios de Justicia de las Americas' <http://cejamericas.org/>, accessed 1 November 2018. I will not discuss various initiatives as regards Arbitration and the Hague Conventions on civil procedure in the present paper.

75 See Arts 26 ff Treaty on the Functioning of the European Union.

76 E Storskrubb, *Civil Procedure and EU Law. A Policy Area Uncovered* (Oxford University Press 2008) 1-3, 78.

77 See also Andrews (n 34) 54-55.

1. Access to justice;[78]
2. A fair hearing (trial), which includes:[79]
a. the right to adversarial proceedings;
b. the right to equality of arms;
c. the right to be present at the trial;
d. the right to an oral hearing
e. the right to a fair presentation of evidence;
f. the right to a reasoned judgment;
3. A public hearing, including the public pronouncement of judgment;
4. A hearing within a reasonable time;
5. A hearing before an independent and impartial tribunal established by law.

Although Article 6 does not necessarily lead to unification as regards procedural rules *sensu stricto*, some 'approximating' effects of the fundamental principles of Article 6 have been witnessed during the last decades, for example as regards legal aid or other measures increasing access to justice, the reasonable time requirement, the rise of the oral element in civil litigation and the admissibility of the parties as witnesses.[80] These effects are also important within the context of the European Union, since all Member States are a party to the ECHR and because Article 6 ECHR and the case law based on it are part of the *acquis communautaire*,[81] something which is also reflected by Article 47 of the Charter of Fundamental Rights of the European Union.[82]

Even though Article 6 ECHR has had an approximating effect, this is not necessarily the aim of this Article: it only aims at laying down some fundamental guarantees. In actual fact, the need for harmonization for a group of 47 European countries[83] that are rather diverse may not be felt as urgently as within the context of an entity such as the European Union. This is not surprising, taking into consideration that even within the European Union harmonization of procedural law is a controversial issue. In actual fact, apart from the fundamental procedural principles of Article 6 ECHR that should be observed in all Member States, the harmonization that has been achieved in the European Union is rather limited and expressly focused on international cases, leaving purely national cases often outside the discussion (see below).

Within the context of the European Union, Article 81 of the Treaty on the Functioning of the European Union (former Article 65 of the Treaty Establishing the

78 *Golder v. UK,* 4451/70, judgment of 21 February 1975.

79 P van Dijk et al, *Theory and Practice of the European Convention on Human Rights* (Intersentia 2006) 578-596.

80 M Freudenthal, *Schets van het Europees civiel procesrecht* (Kluwer 2007) 269-270.

81 I.e. the total body of European Union law accumulated this far.

82 Art 6(2) Treaty on European Union (TEU); Charter of Fundamental Rights of the European Union *(Official Journal C 364, 18/12/2000, 1-22)*, Art 47: Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article. Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented. Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.

83 Nearly all European countries are a member of the Council of Europe, with the exception of the Vatican, and of Belarus because of this country's lack of respect for human rights and democratic principles.

European Community),[84] introduced by the Treaty of Lisbon in 2009, is of utmost importance from a civil procedural point of view. It states that:

1. The Union shall develop judicial cooperation in civil matters having cross-border implications, based on the principle of mutual recognition of judgments and of decisions in extrajudicial cases. Such cooperation may include the adoption of measures for the approximation of the laws and regulations of the Member States.

2. For the purposes of paragraph 1, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall adopt measures, particularly when necessary for the proper functioning of the internal market, aimed at ensuring:
(a) the mutual recognition and enforcement between Member States of judgments and of decisions in extrajudicial cases;

(b) the cross-border service of judicial and extrajudicial documents;
(c) the compatibility of the rules applicable in the Member States concerning conflict of laws and of jurisdiction;
(d) cooperation in the taking of evidence;
(e) effective access to justice;
(f) the elimination of obstacles to the proper functioning of civil proceedings, if necessary by promoting the compatibility of the rules on civil procedure applicable in the Member States;
(g) the development of alternative methods of dispute settlement;
(h) support for the training of the judiciary and judicial staff.

3. [family law]

Many of the fields mentioned in this Article have already resulted in European legislation[85] (applicable to all Member States, usually with the exception of Denmark), by way of either Regulations or Directives.[86] As stated, however, the harmonization

84 Former Article 65 European Community Treaty: Measures in the field of judicial cooperation in civil matters having cross-border implications, to be taken in accordance with Article 67 [Article 67 ECT lays down the procedure for the adoption of legislation under, amongst other Articles, Article 65. See Storskrubb (n 76) 47-48] and in so far as necessary for the proper functioning of the internal market, shall include:
(a) improving and simplifying:
- the system for cross-border service of judicial and extrajudicial documents,
- cooperation in the taking of evidence,
- the recognition and enforcement of decisions in civil and commercial cases, including decisions in extrajudicial cases;
(b) promoting the compatibility of the rules applicable in the Member States concerning the conflict of laws and of jurisdiction;
(c) eliminating obstacles to the good functioning of civil proceedings, if necessary by promoting the compatibility of the rules on civil procedure applicable in the Member States.

85 I will not discuss the European Judicial Network here, nor judicial training and some other measures. See Storskrubb (n 76) 233 ff.

86 For non-European lawyers, it may be useful to know that a Regulation is a legislative act which becomes immediately enforceable as law in all Member States simultaneously. Regulations can be distinguished from Directives, which need to be transposed into national law by the Member States. Directives may give rise to different national legislative solutions in order to reach the aim

resulting from these instruments only concerns international cases. This means that purely national cases continue to be governed by the rules of civil procedure of the Member State where the case is brought. In my opinion, this is unfortunate, especially since it would have been possible to interpret Article 81(2)f (former Article 65 sub c ECT) broadly, in the sense that it may form the basis of an alignment of the civil procedural laws of the Member States irrespective of the national or international character of litigation. After all, it could be claimed that differences between the procedural laws of the Member States always have cross-border implications, e.g. in the sense that businesses may be affected by these differences when deciding where to produce and market their products. The free movement of persons, goods, services and capital within the EU and, consequently, the proper functioning of the internal market are affected by a restrictive interpretation. In my opinion, the differences in civil procedural law can often only be removed by Union action and not by action at the respective national levels and, consequently, the principle of subsidiarity of Article 5 Treaty on European Union (former Article 5 ECT) does not prevent the Union from using its powers. Also, the principle of proportionality mentioned in the same Article 5 does not seem to hinder Union action. Nevertheless, this interpretation of Article 81 TEU is currently politically unacceptable for the Member States.[87]

Although the European approach excludes purely national cases, a debate on the 'approximation' of the national procedural laws of the Member States of the European Community was launched already in the late 1980s, i.e. before the introduction of Article 81 and its predecessor, Article 65 ECT. As is widely known, the initiative was taken by a working group chaired by Professor Marcel Storme from Ghent (Belgium). The report this working group produced does not distinguish between national and international cases and was aimed at the then 12 Member States of the European Community.

In his introduction to the Report, Professor Storme states that harmonization of civil procedural law is more feasible than harmonization of other fields of law. The author claims that this is the result, amongst other things, of the fact that in the area of procedure many of the rules are not interrelated with other rules, either procedural or substantive[88] (apart from some procedural rules which are, e.g., closely interwoven with substantive law, such as those concerning marriage and divorce, areas for which the current Article 81(3) of the Treaty on the Functioning of the European Union contains specific provisions).[89] Consequently, an immediate overall overhaul of the system is not needed and harmonization may proceed on a piecemeal basis.[90]

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of the Directive. All Regulations and Directives mentioned in this paper can be found on the website of the European Union: <http://europa.eu/> (accessed 2 October 2018).

87 Storskrubb(n 76) 39, 272-273. The European Small Claims Procedure, for example, was originally envisaged as also being applicable in purely national disputes. At a late moment in the drafting process, however, it was decided that it would only cover international cases, leading to a discrimination as regards purely domestic cases in jurisdictions where the national rules are less favorable than the European rules. See Storskrubb (n 76) 220-221.

88 Storme (n 73) 53 ff.

89 Storme (n 73) 57-58.

90 Storme (n 73) 54.

The original idea of the Storme Group was to produce a model code, to be implemented by way of a Directive.[91] However, it was soon realized that there were still too many differences between the procedural systems of the 12 Member States to make a generally acceptable, all-encompassing proposal possible. Therefore, the Working Group concentrated on 16 separate issues which, in their view, were fit for approximation: (1) Conciliation, (2) Commencement of the Proceedings, (3) Subject matter of litigation (pleadings, i.e. statements of case), (4) Discovery, (5) Witnesses, (6) Technology and Proof, (7) Discontinuance, (8) Default, (9) Costs, (10) Provisional Remedies, (11) Order for Payment, (12) Enforcement, (13) *Astreinte*, (14) Computation of time, (15) Nullities and (16) some general rules concerning judges and judgments (appeal and disqualification of judgments). In the Report, the rules as regards some of these issues are very detailed (e.g. commencement of the proceedings), whereas other issues are regulated in a rather sketchy manner (e.g. witnesses). Although the rules themselves are available in both French and English, the accompanying explanatory memorandum, comments and recitals are only available in either French or English (depending on the language skills of the person responsible for a certain part of the memorandum or the other documents), which is due to the limited means available to the Working Group.[92]

Criticism was soon to come. To mention but one example, in the *European Review of Private Law*, Professor Per Henrik Lindblom discussed various issues which in his opinion showed the weaknesses of the Storme report.[93] He claimed that the report did not make clear whether it meant to lay down only minimum requirements or standard rules.[94] Professor Lindblom stated that if the report was meant to formulate standard rules, it might not give rise to an improvement in countries that have higher quality rules.[95] At the same time, the author held that if only minimum rules were given, it might be questioned whether this would lead to harmonization or approximation.[96] Additionally, Professor Lindblom observed that several of the rules suggested by the Report were rather general and often did not address the real problems in the area of civil procedural law. He demonstrated this, amongst other things, by mentioning that the Report contains only one article (Article 5) concerning witnesses, an article which in his view states the obvious, since it only lays down that '[a]ny person duly summoned in accordance with the law of a Member State to give evidence before a court of that State shall be under a duty to appear before that court and give evidence.'[97]

Although the criticism may be justified, the significance of this first attempt to provide a model for the approximation of procedural law in the European Union, involving the leading experts in the field at the time, should in my perspective not be underestimated.[98] One of its achievements is that it has triggered the debate on the pos-

91 Storme (n 73) 61 For a definition of a Directive, see footnote 55.

92 Storme (n 73) 62-63.

93 Lindblom (n 38).

94 Lindblom (n 38) 32, 45.

95 Lindblom (n 38), 45.

96 Lindblom (n 38) 32.

97 Lindblom (n 38) 36.

98 For some very derogative remarks, see e.g. A Biondi, 'Minimum, Adequate or Excessive Protection? The Impact of EC Law on National Procedural Law' in Trockner and Varano (eds), *The Reforms of*

sibility and the pros and cons of procedural harmonisation and has been a source of inspiration for other projects, notably a project initiated by the American Law Institute and later also sponsored by Unidroit, i.e. the Principles of Transnational Civil Procedure,[99] and later the European Rules of Civil Procedure mentioned above (and about which later).

4.2. Harmonization on a world-wide scale: The Principles of Transnational Civil Procedure

In the comparative study of civil procedure, the Principles of Transnational Civil Procedure are of considerable importance. According to one author, disregarding the Principles 'might be declared a form of procedural illiteracy'.[100] They are a major achievement, considering that the majority of comparatists are of the opinion that harmonization of civil procedure on a world-wide scale was not possible.[101] As was to be expected, the project met with fierce criticism, especially in the initial stages. The most amusing book in this respect is in my opinion a volume edited by Philippe Fouchard, *Vers un procès civil universel. Les règles transnationales de procédure civile de l'American Law Institute* (Paris, Panthéon-Assas 2001), where various French authors show themselves in a rather parochial manner, to put it mildly.

The initiators of the project, Geoffrey Hazard Jr. and Michele Taruffo, originally intended to draft a code of *rules* for national courts that would set aside domestic procedural rules: (1) when litigation between parties from different States would take place or (2) whenever property in one State would be the object of litigation by a party from another country. These rules would form a code acceptable both from the Common Law and the Civil Law perspective.[102] In 1997 the American Law Institute adopted the project[103] and in 2000 Unidroit joined.[104] This gave rise to a change,

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Civil Procedure in Comparative Perspective (Giappichelli Editore 2005) 233: 'The rather ponderous project (127 articles!), as it is otherwise known, was soon pilloried (complex, adding complexity to quote the kindest) and did not produce any practical effects. Its lasting notoriety is due to the fact that it is invariably quoted in any articles that deal with procedural law and European law.' It should, however, be remembered that complexity (meaning a large number of articles) is not felt by everyone as a negative aspect of procedural legislation, taking into consideration the contribution in the same volume of Díez-Picazo Giménez, entitled 'The Principal Innovations of Spain's Recent Civil Procure Reform' (33-66), who highly praises the new Spanish Code of Civil Procedure. On the basis of his contribution, however, the least that can be said about this new Code is that it is complex (it contains 827 articles although it does not even cover many of the areas which in other Civil Law countries are usually part of the Code of Civil Procedure) and, according to the author, in various instances unclear. Sometimes the so-called 'innovations' of this new code are even medieval in character. The following quote is rather interesting for someone with some knowledge of the history of civil procedure: 'A special device has been established [by the new code] for issues related to jurisdiction and proper venue of the court: the so called *declinatory plea (declinatoria)* … Exceptions of lack of jurisdiction and proper venue have to be raised by the defendant prior to filing his answer …' It suffices to know that the declinatory plea already figures in the 13th century *Speculum Iudiciale* of Durantis.

99 ALI/UNIDROIT (n 74) 3. See for an extensive bibliography on the Principles: ALI/UNIDROIT (n 74) 157 ff.

100 Andrews (n 34) 52.

101 R Stürner, *The Principles of Transnational Civil Procedure: An Introduction to their Basic Conceptions* (Rabels Zeitschrift 2005) 203.

102 Stürner (n 101) 204.

103 ALI/UNIDROIT (n 74) xxxi.

104 ALI/UNIDROIT (n 74) 4.

since Unidroit did not feel that civil procedure rules of some detail would be acceptable to different cultures. It was of the opinion that it was better to develop a set of general *Principles*.[105] Finally, only the Principles were adopted by the American Law Institute and Unidroit, although it was felt that the rules represent a possible example of implementation of the Principles.[106]

The final draft of the Principles of Transnational Civil Procedure dates from 2004. It was published in 2006 by Cambridge University Press in English and French.[107] The publication also includes a commentary.

According to their drafters, the Principles must be seen as best practices and a benchmark for national procedures.[108] Consequently, they are not necessarily only aimed at international cases, but may also be used within a national context, e.g. in national reform projects (see below). They are a blend of elements from the Civil Law and the Common Law:[109] discovery is, for example, limited in nature,[110] but this is corrected by a liberal approach towards shifting the burden of proof.[111] Additionally, the hearing of the case is concentrated, but this does not necessarily mean that there should only be a single trial.[112] The hybrid character of the Principles may also be viewed slightly less favourably. According to Neil Andrews, '[e]verywhere the restraining hand of the Civil Law is visible and robust Common Law tendencies are curbed.'[113]

The Principles aim in the first place at transnational commercial litigation.[114] This approach was adopted in order to increase the chances that the Principles would be acceptable to lawyers from various jurisdictions. After all, in commercial litigation there is no jury and the existence of the jury in civil cases is a major issue separating the US from most other jurisdictions. By only focusing on commercial litigation, the whole subject of the jury could be excluded from consideration.[115] Additionally, it was felt that international commercial litigation is less subject to national legal traditions than other types of litigation because the existence of a body of well-developed rules of commercial arbitration offered a good common starting point.[116]

Apart from transnational commercial litigation being a field where harmonization is feasible, there are also intrinsic reasons for concentrating on this area. In the introduction to the Principles we find the following comment: 'The explosion in transnational commerce has changed the world forever. International commerce and investment

105 Stürner (n 101) 205-206. On the three types of Principles that may be distinguished, see Storskrubb (n 76) 290.

106 ALI/UNIDROIT (n 74) 4; Stürner (n 101) 205-209, 215.

107 ALI/UNIDROIT (n 74) 9.

108 ALI/UNIDROIT (n 74) xxix.

109 ALI/UNIDROIT (n 74) 11.

110 ALI/UNIDROIT (n 74) Principle 16.

111 ALI/UNIDROIT (n 74) Principle 21.

112 ALI/UNIDROIT (n 74) Principle 9.

113 Andrews (n 34) 53.

114 ALI/UNIDROIT (n 74) 'Scope and Implementation', 16. The terms 'transnational' and 'commercial' are not defined precisely. See ALI/UNIDROIT (n 74), Comment P-B and P-C.

115 ALI/UNIDROIT (n 74) xxvii; Stürner (n 101) 209-210.

116 Stürner (n 101) 210.

are increasing at an enormous rate and the rate of change is continuing to accelerate. The legal procedures applicable to the global community, however, have not kept pace and are still largely confined to and limited by individual national jurisdictions.'[117] Consequently, there is a need for initiatives in this area, since the current situation is said to diminish international trade and investment. In the opinion of the drafters, the existing international conventions (Hague Conventions) on civil procedure and related topics are not an answer to the problems, since they only address aspects of civil litigation (e.g. commencement and recognition) and say little about the actual procedure to be followed.[118] From this perspective, they may also be highly relevant from an European Union perspective, as many of the existing European Regulations on civil procedure show the same limitations as the Hague Conventions (see above).

Even though the Principles aim at transnational commercial litigation, this does not mean that they are without use in other fields. On the contrary, they may, for example, (1) influence the further development of the rules of national and international arbitration (to which they are themselves indebted),[119] (2) be used by national law reformers as an example of world-wide accepted guidelines and standards of procedural law,[120] and (3) be consulted by national judges in the interpretation of national procedural rules and international conventions that are formulated in a way which leaves the necessary room for judicial interpretation.[121] Finally, (4) they may be used as standards against which foreign judgments and arbitral awards may be measured when a decision has to be taken as regards their recognition and enforcement.[122] The use of the Principles under (2) and (3) may give rise to spontaneous harmonisation or harmonisation as a side-effect as mentioned above.

The procedural model suggested by the Principles aims to avoid favouring national parties in international litigation.[123] It is a flexible model, which accommodates all of the existing national procedural models. Nevertheless, the Principles suggest a preferred model.[124] This model consists of three stages: the pleading stage (statements of case), an interim stage (scheduling) and a final stage (main hearing).[125] This model is popular in many European countries such as Germany, England and Spain. Stürner calls it the 'main hearing model'.[126] The Principles assume an active judge[127] and in this respect they take the German-Austrian model as an example (see above).[128] This active stance of the judge means that the court is also responsible for determin-

117 ALI/UNIDROIT (n 74) xxix.

118 G C Hazard et al, 'Introduction to the Principles and Rules of Transnational Civil Procedure' (2001) 769 New York University Journal of Law and Politics 770-771.

119 ALI/UNIDROIT (n 74) 10-12. See also ALI/UNIDROIT (n 74) Comment P-E.

120 ALI/UNIDROIT (n 74) 10-11; Idem, 'Scope and Implementation', 16.

121 ALI/UNIDROIT (n 74) 4.

122 ALI/UNIDROIT (n 74) Comment P-A, 16; Stürner (n 101) 210 ff.

123 ALI/UNIDROIT (n 74) 1-4.

124 Stürner (n 101) 223, 226.

125 ALI/UNIDROIT (n 74) Principle 9.

126 Stürner (n 101) 224-226.

127 ALI/UNIDROIT (n 74) Principle 14.

128 Stürner (n 101) 226-227.

ing issues of law, including foreign law.[129] On the other hand, the Principles lay down that the court is never permitted to introduce new facts not previously advanced or at least briefly mentioned by the parties to litigation.[130] It is, however, again the court's responsibility to ensure that justice is administered promptly,[131] a responsibility that is to some extent shared with the parties.[132] There is no notice pleading like in the US, which means that the assertion of detailed facts and the submission of exactly specified means of evidence during the pleading phase is required.[133] All contentions of the parties should be considered by the court.[134] The principle of finality is adhered to.[135] The Principles do not follow the American rule as regards costs, i.e. they do not follow the rule that each party pays his own expenses.[136] However, they do recognise the *amicus curiae*.[137] Appeal is not a new hearing, but limited to re-evaluating the judgment of first instance.[138] The Principles discuss sanctions on parties, lawyers and third persons for failure or refusal to comply with the obligations concerning the proceeding.[139]

According to Neil Andrews, several issues are not (sufficiently) addressed by the Principles. The author mentions (1) pre-action co-ordination of exchanges between the potential litigants (pre-action protocols as known in England since the Woolf reforms) and (2) multi-party litigation. Andrews also states that greater attention could be given to the interplay of mediation and litigation, costs and funding, evidential privileges and immunities and transnational and protective relief.[140] For these and other reasons, the Principles should not be seen as the final stage in the development of procedural harmonization on a global scale, but as an initiative which will certainly witness various follow-ups in the years to come. One of these follow-ups is the European Rules of Civil Procedure of the European Law Institute and Unidroit, which I will briefly introduce in the next section.

4.3. The ELI/Unidroit European Rules of Civil Procedure

As stated, the project on European Rules of Civil Procedure is one of the latest initiatives in the field of the intended harmonization of civil procedure. The idea is to develop soft law that may be instrumental in law reform in the Member States of the European Union. The aim is to provide rules based on best practices within the European Union, and in this respect the initiative differs considerably from the Storme Project, which only tried to make an inventory of rules that would be acceptable in all of the then twelve Member States of the European Union. The following topics are addressed: (1) Service and Due Notice of Proceedings; (2) Provisional and Protective Measures; (3) Access to

129 Stürner (n 101), 228.
130 ALI/UNIDROIT (n 74) Principle 10; Stürner (n 101) 229.
131 ALI/UNIDROIT (n 74) Principle 7.1; Stürner (n 101) 227.
132 ALI/UNIDROIT (n 74) Principle 11.2.
133 ALI/UNIDROIT (n 74) Principle 11.3; (n 101) 233.
134 ALI/UNIDROIT (n 74) Principle 22.
135 ALI/UNIDROIT (n 74) Principle 26.
136 ALI/UNIDROIT (n 74) Principle 25; Stürner (n 101) 251.
137 ALI/UNIDROIT (n 74) Principle 13.
138 ALI/UNIDROIT (n 74) Principle 27.
139 ALI/UNIDROIT (n 74) Principle 17.
140 Andrews (n 34) 57.

Information and Evidence; (4) Res Judicata and Lis Pendens; (5) Obligations of Parties, Lawyers and Judges; (6) Costs; (7) Judgments; and (8) Parties. Currently, an overarching working group on structure is bringing together the various rules that have been developed under the above 8 headings in order to present a coherent and consolidated set of rules. These rules will most likely become available later this year (2019).[141]

5. FINAL REMARKS

Attempts to harmonise civil procedure have made the study of comparative civil procedure (including the history of this area of the law) an exciting field of study during the last few decades. Although the comparative study of civil procedure was originally the domain of national law reformers, busy with drafting new or amended codes of civil procedure in a national context, mainly focusing on nearby jurisdictions, globalisation has made it a field of study for a wider audience. It is a promising area of study, for example where national procedural systems are seen to compete with each other for litigation business. Comparative civil procedure allows these systems to evaluate their strengths and weaknesses in the international playing field when taking into consideration the preferences of litigants who have become ever more mobile where it concerns choices of forum. As has been stated in this paper, especially businesses have certain preferences as regards the procedural model for litigation, to which jurisdictions who aim at attracting litigation before their various state courts should be aware. Additionally, attempts to approximate civil procedural law in an international context benefit tremendously from this field of study. Although successes in this field are limited, especially the Principles of Transnational Civil Procedure of the American Law Institute and Unidroit and the European Rules of Civil Procedure of the European law Institute and Unidroit show us the way ahead. Parochial criticism in this field is of course possible, but as in other areas in today's world, it will quickly become apparent that parochialism is not the way ahead to survive in our modern times in which the world is becoming smaller and smaller. It is to be hoped that the Transnational Principles and the European Rules will trigger further in-depth studies of civil procedure, and I am convinced that in this particular area the study of comparative law, including the study of the history of civil procedure, will continue to add new insights and show the way ahead. In this respect, the comparative study of civil procedure in action could be further developed, whereas the relationship between civil procedure and (procedural) culture and the extent to which procedural reform is implicitly influenced by foreign procedural models should be focused on.

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141 For more information, see <https://europeanlawinstitute.eu/projects-publications/current-projects-feasibility-studies-and-other-activities/current-projects/civil-procedure/> (accessed 30 October 2018).

JUSTICE IN COMMERCIAL MATTERS: HISTORY OF DEVELOPMENT AND NOVELTIES OF UKRAINIAN REFORM

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Summary: 1. Introduction. – 2. The History of Ukrainian Commercial Courts Development. – 3. Novels of Commercial Procedure in the Context of Judicial Reform. – 4. Concluding Remarks.

1. INTRODUCTION

The judicial system of commercial (arbitration) courts of Ukraine has undergone a difficult path of formation and approval. An active process of creating the system of arbitration courts in Ukraine began in 1991, with the adoption by the Verkhovna Rada of Ukraine of the Law of Ukraine 'On the Arbitration Court'. This law defined the prerogatives of the arbitration court as one of the branches of the judiciary designed to administer justice in commercial relations. The main peculiarity of the arbitration court as a part of the judiciary was its specialization. Today we are the witnesses of the final stage of the reform of commercial courts and commercial justice as a whole within the adoption of the Law of Ukraine 'On the Judiciary and Status of Judges' in 2016.

Within current judicial reform in Ukraine, not only the organization of the courts itself, but also the procedure for reviewing commercial cases has changed. The main novels of commercial justice, analysed in this paper, are the following: reflection of the main purpose of the CPC and the basic principles, among which there are new ones: proportionality and case management; more complete implementation of the principles of publicity and openness, etc.; introduction of electronic justice; differentiation of proceedings; determining the written statements of the participants of the case and the written form of the proceedings; improvement of the procedure of proof in the case, as well as distribution of court costs in the case, taking into account the main elements of case management and the need to ensure the principle of cooperation between the court and the parties in the case; as well as the prevention of confusion with procedural rights in the process and the settlement of a dispute with the participation of a judge.

2. THE HISTORY OF UKRAINIAN COMMERCIAL COURTS DEVELOPMENT

2.1. The Origins of Commercial Courts' Establishment in Ukraine and Constitutional Basis for Justice Administration by Courts

The adoption of the Law of Ukraine 'On the Arbitration Court' and the Arbitration Procedural Code of Ukraine (APC of Ukraine) was only the first step in the legislative provision for the organization and activities of such specialized courts as arbitration courts.

Important directions for improving the organization and functioning of arbitration courts were contained in the 'The concept of judicial reform in Ukraine', adopted by the Verkhovna Rada of Ukraine on 28 April, 1992, which, according to V. Stashys, 'played a generally positive role both in determining the main directions of the courts' reform, and in establishing a range of associated problems without which it is impossible to establish a judiciary as an independent branch of state power'. The practical implementation of certain components of the judicial and legal reform was the adoption on 15 December, 1992 of the Law of Ukraine 'On the Status of Judges', which, for the first time in the history of Ukrainian legislation, stipulated that judges are the sovereigns of the judiciary and administer justice regardless of legislative and executive power (Item 1 of Article 1). This Law established important guarantees of the independence of judges, provided for their political and business neutrality. With the adoption of new laws relating to the judiciary, the issue of the affiliation to this power of the arbitral courts was unambiguously resolved. Thus, on 2 February, 1994, the Verkhovna Rada of Ukraine adopted two laws that were of fundamental importance from the point of view of assigning arbitration courts to the judiciary. These are the Laws of Ukraine 'On bodies of judicial self-government' and 'On qualification commissions, qualification attestation and disciplinary responsibility of judges of Ukraine'.

Thus, within a few years after the proclamation of the independence of Ukraine in 1991, a certain legal basis was created to support the activity of arbitration courts.

The new Constitution of Ukraine, adopted by the Verkhovna Rada of Ukraine on 28 June, 1996, established a fundamental legal framework aimed at ensuring the further development of judicial reform in Ukraine. Section VIII 'Justice' of the Constitution has established that: justice in Ukraine shall be administered exclusively by the courts; delegation of functions of courts or appropriation of such functions by other bodies or officials shall be prohibited; the jurisdiction of the courts shall extend to all legal relations that arise in the state; judicial proceedings shall be performed by the Constitutional Court of Ukraine and courts of general jurisdiction; people shall directly participate in the administration of justice through people's assessors and jurors; court decisions shall be adopted by the courts in the name of Ukraine and shall be mandatory for execution throughout the entire territory of Ukraine (Article 124). Article 125 of the Constitution of Ukraine stipulates that: the system of courts of general jurisdiction in Ukraine shall be formed in accordance with the territorial principle and the principle of specialization; the highest judicial body in the system of courts of general jurisdiction is the Supreme Court of Ukraine; the respective high courts shall be the highest judicial bodies of special-

ized courts; courts of appeal and local courts shall operate in accordance with the law; establishment of extraordinary and special courts shall not be permitted. The Constitution of Ukraine really 'defined specific benchmarks for the construction of a new judicial system that could effectively fulfil its primary function of protecting the rights and freedoms of a person and a citizen'.

Certainly, it took time to bring the judicial system in line with the Constitution of Ukraine. Therefore, in accordance with Clause 12 of the 'Transitional Provisions' of the Constitution of Ukraine, the system of general, military and arbitration courts valid at the time of adoption of the Fundamental Law should have been reformed within five years into a single system of courts of general jurisdiction provided for by Article 125 of the Constitution. That is, the transition period ought to have such chronological limits: June 1996 – June 2001.

After the adoption of the Constitution of Ukraine, a number of measures were taken to improve the organization and functioning of arbitration courts. Thus, on 20 February, 1997, the Verkhovna Rada of Ukraine adopted the Law of Ukraine 'On Amendments to the Law of Ukraine "On the Arbitration Court"'. By this law, in particular, consideration of cases of bankruptcy was assigned to the jurisdiction of arbitration courts. Amendments were made to Article 4 of the Law of Ukraine 'On the Arbitration Court', which contained the principles of the organization and activities of the arbitration court. This article was supplemented by a very important for the activity of such a court provision indicating that the arbitration court shall administer justice based on a principle of 'adversary procedure between parties and the freedom of parties to provide the arbitration court with their evidence and to prove their credibility'. Articles 20-29 of Section III 'The Status of Arbitrators of the Arbitration Court' were replaced with Articles 20-22, the content of which was radically different from the content of Articles 20-29. In addition, according to paragraph 10 of the Law of Ukraine of 20 February, 1997, the words 'arbitrator', 'arbitration panel', 'Republic of Crimea' in all cases were replaced with the words 'judge', 'judicial panel', 'Autonomous Republic of Crimea' in corresponding cases in the text of the Law of Ukraine 'On the Arbitration Court'. The replacement of the words 'arbitrator', 'arbitration panel' with the words 'judge', 'judicial panel' further emphasized the legal nature of the arbitration courts as specialized judicial bodies for the administration of justice in commercial affairs.

In 1993-2001 a number of amendments and additions were made to the Arbitration Procedural Code of Ukraine. On the basis of the Constitution of Ukraine, the legislation of Ukraine on the arbitration court, arbitration proceedings, other legislative acts of Ukraine, international treaties, the consent to be bound by which was provided by the Verkhovna Rada of Ukraine, the organization and operation of bodies of commercial jurisdiction was carried out during the decade (from 1991 to the middle of 2001).

The power of arbitration courts to define the range of issues which are under their jurisdiction is secured by Article 12 of the Arbitration Procedural Code (hereinafter – APC). This article stipulates that arbitration courts shall settle disputes, which arise during the conclusion, modification, termination and execution of commercial agreements, etc, as well as disputes concerning the invalidation of acts on the

grounds, specified in the legislation; issues concerning bankruptcy; cases upon requests of the bodies of Antimonopoly Committee of Ukraine on matters which are placed under their jurisdiction by acts. It should be noted that, based on the nature of arbitration court as a body for the administration of justice in commercial issues, the legislator quite rightly expanded the range of commercial disputes for consideration by arbitration courts. For example, previously state arbitration courts had no right to consider disputes concerning taxes and non-taxable payments charged to the state budget, disputes for the value of less than 100 karbovanets, disputes between enterprises, organizations and institutions that arose in connection with the implementation of bank financial control over non-use of funds for capital contributions. These categories of disputes were considered by the executive authorities. Before the adoption of the Arbitration Procedural Code some categories of commercial disputes were considered by the general courts. Such disputes included disputes involving foreign legal entities, joint ventures, international associations and organizations of the USSR and other countries not members of the CMEA; disputes arising from contracts for the carriage of goods in direct international rail and air freight traffic between public enterprises, institutions, organizations, on the one hand, and railway or air transport authorities, on the other hand; disputes involving collective farms, inter-farm enterprises, organizations or their associations.

It is quite natural that these disputes, having objectively commercial characteristics, were attributed by the APC of Ukraine to the jurisdiction of arbitration courts. Consequently, in the person of arbitration courts, the judiciary received specialized judicial bodies, which had prerogatives to resolve commercial disputes previously considered by general courts, as well as by executive authorities.

At the same time, it should be noted that Article 12 of the Law of Ukraine 'On Arbitration Court' had earlier provided the Supreme Arbitration Court of Ukraine with the right of legislative initiative to the Verkhovna Rada of Ukraine. However, the Constitution of Ukraine of 1996 did not grant the Supreme Arbitration Court of Ukraine such a right.

In accordance with Article 5 of the Law of Ukraine 'On the Arbitration Court', the Supreme Arbitration Court of Ukraine, the Arbitration Court of the Autonomous Republic of Crimea, the arbitration courts of regions, the cities of Kyiv and Sevastopol acted in Ukraine, forming a single harmonious system of arbitration courts of Ukraine. The entire system of arbitration courts of Ukraine was headed by the Supreme Arbitration Court of Ukraine, which was the supreme body in resolving commercial disputes and overseeing decisions, rulings, decisions of arbitration courts in Ukraine and controlling their activities. According to the Law of Ukraine 'On the Arbitration Court', the Supreme Arbitration Court of Ukraine issued guidance clarifications on the basis of the generalization and analysis of the judicial practice of the application of the rules of substantive and procedural law that were binding for arbitration courts and enterprises, organizations, state and other bodies and officials. Such explanations were approved by the resolutions of the Plenum of the Supreme Arbitration Court of Ukraine and were brought to the attention of interested persons through the mass media, as well as by other means established by the legislation. The Supreme Arbitration Court of Ukraine consisted of the Head of the Supreme

Arbitration Court, the First Deputy Head, Deputies Head and Judges, and acted as part of the Plenum of the Supreme Arbitration Court of Ukraine, the Presidium of the Supreme Arbitration Court of Ukraine, the Judicial Panel on Dispute Resolution and the Judicial Board on Reviewing Decisions, decrees, rulings. Based on the Resolution of the Verkhovna Rada of Ukraine 'On the Enforcement of Courts' of 24 February, 1992, the Supreme Arbitration Court of Ukraine established the Research Centre, which was to deal with the complex problems of the organization and competence of the jurisdictional authorities in resolving commercial disputes and improving the qualifications of judges and specialists of arbitration courts of Ukraine.

In order to provide a qualified review of the most relevant categories, necessary structural changes were made in arbitration courts. According to the Decree of the President of Ukraine dated 21 April, 1998, special boards of bankruptcy proceedings were formed in the composition of the arbitration courts, and on 13 August, 1999, the board for consideration of cases of collection of taxes and fees (compulsory payments) was established. This contributed to the increase of the effectiveness of judicial protection of economic legal entities, including the state as a guarantor for the implementation of social programs.

The full implementation of the principles of arbitration provided by the Law of Ukraine 'On the Arbitration Court' was approved by the APC of Ukraine, adopted on 6 November, 1991, which defined the jurisdiction of the arbitration courts, clearly defined the procedural rights and obligations of the participants in the arbitration process, regulated the procedure of reviewing the disputes, making decisions concerning them, checking the legality of the latter. The practice of resolving commercial disputes in accordance with the norms of the Arbitration Procedural Code of Ukraine (in force since 1 March, 1992 (with subsequent amendments and supplements) as a whole confirmed their objective viability, since the number of amended and cancelled procedural documents during 1992-2000 did not exceed 1.7 per cent from the total number of cases considered.

Since the adoption by the Verkhovna Rada of Ukraine of the Law 'On the Arbitration Court' and until the middle of 2001, the Ukrainian Arbitration Courts had passed the period of establishment and development and confidently occupied their place in the system of justice, carrying out the function entrusted to them for the protection of rights and interests of the participants of commercial legal relations, contributing to the development of cooperation between them, making proposals aimed at improving the legal regulation of commercial activity. Arbitration courts have accumulated experience of 'collaboration that takes into account the specific and independent character of the procedural status of judges and prosecutors, to strengthen the rule of law in the commercial sphere, protect the interests of the state and society, the legitimate rights and interests of business entities.' For the system of arbitration courts, common features such as simplicity of construction in accordance with the administrative-territorial division, availability for plaintiffs, hierarchy of structure, the unity of the system of arbitration courts, conditioned by the unity of their tasks, the sole principles of the organization and operation of these courts have become common. The multifaceted activity of the arbitration courts of Ukraine during the decade of their operation proved convincingly that they have

really become 'specialized courts for the administration of justice in commercial relations, as part of a unified system of bodies of the judiciary.' During this period of time, the bodies of arbitral proceedings as a specialized system of judicial authorities have considered about one million cases, the vast majority of which were associated with property relations. Arbitration courts of Ukraine actively influenced the formation of new economic relations in the state.

One of the most important directions of the activity of arbitration courts was to improve the legal regulation of economic legal relations. Proposals for the improvement of the legislation introduced by the Supreme Arbitration Court of Ukraine for the entire period of existence of the system of arbitration proceedings covered the most important aspects of economic activity: privatization processes, lease, foreign economic and cooperative activities, crediting, bankruptcy of business entities, conclusion of intergovernmental economic agreements and others.

2.2. As Arbitration Courts Became the Commercial Courts of Ukraine

In June 2001 expired the five-year term of the item 12 of the 'Transitional Provisions' of the Constitution of Ukraine of 1996 on the functioning of the old judicial system. The rejection of legislative acts on the development of the provisions of Article 125 of the Constitution created, as V.V. Komarov rightly observes, the threat of the removal of the judicial system and legal proceedings 'from the constitutional field.' Therefore, on 21 June, 2001, the Verkhovna Rada of Ukraine promptly adopted the following laws: "On Amendments to the Law of Ukraine 'On the Judiciary of Ukraine', 'On Amendments to the Criminal Procedure Code of Ukraine', 'On Amendments to the Law of Ukraine "On the Status of Judges"', 'On Amendments to the Law of Ukraine "On Judicial Self-Government Bodies"', 'On Amendments to the Law of Ukraine "On Qualification Commissions, Qualification Certification and Disciplinary Liability of Judges of the Courts of Ukraine"', 'On Amendments to the Law of Ukraine "On the Arbitration Court"', 'On Amendments to the Arbitration Procedural Code of Ukraine', 'On Amendments to the Civil Procedure Code of Ukraine.' The purpose of adopting these laws was, first of all, ensuring compliance with the requirements of paragraph 12 of the 'Transitional Provisions' of the Constitution of Ukraine. In deputy journalist circles, as well as scholar circles, amendments, introduced by the said laws to the judicial system and judicial proceedings, received the name 'small judicial reform.' This reform brought a number of significant changes both to the court procedure and to the Ukrainian judicial system. These changes also touched upon the arbitration courts of Ukraine.

At present, according to Article 20 of the Law of Ukraine 'On the Judiciary of Ukraine', in the wording of 21 June 2001, the system of courts of general jurisdiction, in accordance with the Constitution of Ukraine, consisted of 'local courts, appellate courts, higher specialized courts, and the Supreme Court of Ukraine.' According to paragraph 1 of the Law of Ukraine of 21 June, 2001 'On Amendments to the Law of Ukraine "On the Arbitration Court"', the title of this Law was set forth in the following wording: 'The Law of Ukraine on Commercial Courts.' According to paragraph 26 of the Law of Ukraine 'On Amendments to the Law of Ukraine "On the Arbitration Court"' of 21 June, 2001, in the text of the Law of Ukraine 'On the

Arbitration Court' the word 'arbitration' in all cases was replaced with the word 'commercial' in the corresponding cases. Thus, commercial courts began to enforce justice in commercial relations. The system of these courts was enshrined in Article 5 of the Law of Ukraine 'On Commercial Courts', which stated that 'commercial courts are specialized courts in the system of courts of general jurisdiction. Commercial courts constitute a unified three link system of specialized courts, consisting of: local commercial courts; appellate commercial courts; Supreme Commercial Court of Ukraine.' The following articles of the Law of Ukraine 'On Commercial Courts' specified and detailed the organization and procedure of the activities of all sections of commercial courts of Ukraine. The Final and Transitional Provisions of the Law of Ukraine 'On Amendments to the Law of Ukraine "On the Arbitration Court"' defined the procedure for the implementation of this Law.

According to the Law of Ukraine 'On Commercial Courts', the Commercial Court of the Autonomous Republic of Crimea, commercial courts of regions, cities of Kyiv and Sevastopol were envisaged in the system of local commercial courts of Ukraine. According to the proposal of the Head of the Supreme Commercial Court of Ukraine, the President of Ukraine could form other local commercial courts (city, inter-district, of special (free) economic zones, etc.). Extremely important functions in the administration of justice in commercial relations were relied on appeal commercial courts. According to Article 91 of the Law of Ukraine 'On Commercial Courts', appellate commercial courts were declared to be courts of appellate instance. They were formed by the President of Ukraine on the proposal of the Head of the Supreme Commercial Court of Ukraine with defining the territory to which the powers of appellate commercial courts apply and their location. Article 10 of the Law of Ukraine 'On Commercial Courts' stated that 'the Supreme Commercial Court of Ukraine is the highest judicial body of commercial courts of Ukraine in the administration of justice in commercial relations.' The Supreme Commercial Court of Ukraine consisted of the Head, the First Deputy Head, deputy heads and judges, and was to act as a member of the panel of judges. The Supreme Commercial Court of Ukraine established a Presidium as an advisory body to the Head of the Supreme Commercial Court of Ukraine. Undoubtedly, the introduction of appellate commercial courts has become one of the most important innovations in the system of commercial courts of Ukraine. They were formed in July 2001 by the Decree of the President of Ukraine 'On the Establishment of Appeal Commercial Courts of Ukraine' in the number of seven courts, namely: Dnipropetrovsk, Donetsk, Kyiv, Lviv, Odesa, Sevastopol and Kharkiv Commercial Courts of Appeals, with the definition of the territory to which the powers of appellate commercial courts were distributed.

The Law of Ukraine 'On Commercial Courts' expired with the entry into force of the Law of Ukraine 'On the Judiciary of Ukraine' on 1 June, 2002, which can be considered as the completion of the first stage of judicial reform. In general, it had a positive influence, since it secured the status of specialized courts, outlining the powers of their heads, the procedure for appointing judges to administrative positions, etc, the three link system of specialized commercial courts was approved: local commercial courts (commercial courts of the Autonomous Republic of Crimea, regions, cities of Kyiv and Sevastopol), appellate commercial courts and

the Supreme Commercial Court of Ukraine. In March 2003 in accordance with the Law of Ukraine 'On the Judiciary of Ukraine', the Supreme Commercial Court of Ukraine established court chambers for the consideration of certain categories of cases: the court chamber for the consideration of cases arising from tax and other relations concerning state regulation of activities of commercial entities; the court chamber for the consideration of cases in commercial disputes related to the protection of the right to intellectual property; the court chamber for the consideration of cases in disputes between business entities; the court chamber for the consideration of cases of bankruptcy.

The next stage of the reform of the commercial court system was marked by the adoption on 7 July, 2010 of the Law of Ukraine 'On the Judiciary and Status of Judges', which defined the organization of the administration of justice, the system of courts of general jurisdiction, the status of judges, the procedure for the implementation of judicial self-government, etc. The adoption of the abovementioned law can be considered a significant step towards the creation of an accessible and efficient judicial system in accordance with the Constitution of Ukraine and international standards in the field of justice. In order to enforce the provisions of this Law and for the proper provision of effective work in the new conditions, the specialization of judges and, on the proposal of the Head of the Court, their distribution among the four newly created chambers of courts was determined on the meeting of judges of the High Commercial Court of Ukraine.

2.3. Modern Reform of the Courts of Commercial Jurisdiction

The final stage of the reform of commercial courts and commercial justice as a whole was the adoption of the Law of Ukraine 'On the Judiciary and Status of Judges', the Law of Ukraine 'On Amendments to the Commercial Procedural Code of Ukraine, the Civil Procedural Code of Ukraine, the Code of Administrative Legal Proceedings of Ukraine and Other Legislative Acts' of 3 October 2017, the Decree of the President of Ukraine No. 454/2017 'On Liquidation of Appellate Commercial Courts and Establishment of Appellate Commercial Courts in Appellate Circuits', the Decree of the President of Ukraine №453/2017 'On Liquidation of Local Commercial Courts and the Formation of Circuit Commercial Courts'.

Thus, according to Part 2 of Art. 21 of the Law of Ukraine 'On the Judiciary and Status of Judges'. local commercial courts are district commercial courts[142]. In addition, according to Part 3 of Art. 26 of the same Law, the appellate courts for consideration of commercial cases, and the appellate courts for consideration of administrative cases are the appellate commercial courts and the appellate administrative courts respectively, created in respective appellate circuits [143].

In the procedure for reviewing the decisions of local and appellate commercial courts,

142 The Decree of the President of Ukraine 453/2017 'On the Liquidation of Local Economic Courts and Establishment of Economic Courts in Circuits' < www.president.gov.ua/documents/4532017-23370> accessed 3 November 2018

143 The Decree of the President of Ukraine 454/2017 'On Liquidation of Appelate Economic Courts and Establishment of Appelate Economic Courts in Appelate Circuits' <https://www.president.gov.ua/documents/4542017-23366> accessed 3 November 2018

the Cassation Commercial Court was determined as a part of the Supreme Court by the cassation instance. In addition to the constant three-stage system of commercial courts, there are instances when the case during the consideration by the Court of Cassation may be referred to the Grand Chamber of the Supreme Court. Thus, according to Art. 303 of the Civil Code of Ukraine, the issue of referral of a case to the Chamber, the Joint Chamber or the Grand Chamber of the Supreme Court is decided by the court on its own initiative or at the request of the party to the case.

The issue of referral of a case to the Chamber, the Joint Chamber or the Grand Chamber of the Supreme Court shall be decided by the majority of the composition of the court hearing the case. The court shall rule on the transfer of the case to the Chamber, the Joint Chamber or the Grand Chamber of the Supreme Court, stating reasons for the need to deviate from the conclusion on the application of the law in similar legal relationships set forth in the decision specified in the first to fourth paragraphs of Article 302 of this Code, or with the justification of the grounds, specified in parts five or six of Article 302 of this Code.

According to statistics of the Supreme Court, during the first half of 2018, 10,723 cassation complaints were considered by the Commercial Court of Cassation; 168 cases were transferred to the Grand Chamber of the Supreme Court; 8,544 cases were considered overall; 1134 cases were refused to be opened in cassation proceedings; 1,628 cassation appeals were returned; 4,278 cassation appeals were refused to be satisfied and the court decision was left unchanged; 1,369 cassation appeals were satisfied and the court decisions were revoked; 2,011 cassation appeals remain to be considered by the end of the period[144].

Analysing the statistics one can see a significant load on the Court of Cassation. These statistics of the court of cassation are impressive, looking at the number of judges who are considering commercial cases. Thus, in the composition of the Court of Cassation, today, justice is administered by 27 judges, which are divided between the court chamber for the consideration of bankruptcy cases, the court chamber for the consideration of cases on the protection of intellectual property rights, as well as those related to anti-monopoly and competition law, the court chamber for consideration of cases on corporate disputes, corporate rights and securities, the court chamber for consideration of cases concerning land relations and property rights, and 4 judges elected to the Grand Chamber.

3. NOVELS OF COMMERCIAL PROCEDURE IN THE CONTEXT OF JUDICIAL REFORM

3.1. New Approaches in Determining the Purpose and General Principles of Commercial Legal Proceedings

In connection with the adoption of the new wording of the Commercial Procedural Code, a norm regarding its appointment appeared for the first time. Thus, accord-

144 Statistics of the Supreme Court of Ukraine for the First Half of 2018 <https://supreme.court.gov.ua/supreme/pokazniki-diyalnosti/sud_statistika/> accessed 3 November 2018

ing to Art. 1 of the CPC of Ukraine, the Commercial Procedural Code of Ukraine defines the jurisdiction and powers of commercial courts, and establishes the procedure for the execution of legal proceedings in commercial courts.

The unification of procedural legislation was a result of the introduction of European standards of legal proceedings, which both directly and indirectly derive from Art. 6 of the European Convention on Human Rights and Fundamental Freedoms, which enshrined that everyone in the determination of his/her civil rights and obligations or in any criminal charge against him/her, has the right to a fair and public hearing of a case within a reasonable time by an independent and impartial court created on the basis of law. As the European Court of Human Rights has pointed out, "the Convention seeks to protect not theoretical or illusory, but specific and effective rights. This comment concerns, in particular, the right of access to justice, taking into account the prominent place that holds the right to a fair trial in a democratic society."[145]

Thus, in the process of harmonization of the commercial procedural legislation, the basic ideas (principles) have undergone some changes, and, in some cases, were introduced for the first time in commercial legal proceedings.

The principle of transparency of the court process and the openness of information on the case are more widely disclosed (Article 8-9 of the CPC of Ukraine). Such an approach to the implementation of the principle of transparency was mainly the practice of the EHRC. In accordance with paragraph 56 of the ECHR judgment in the case of '*Shagin v Ukraine*', the court reiterates that ensuring the openness of a trial is a fundamental principle enshrined in Article 6 paragraph 1. Such a public nature of the trial guarantees the parties to the case that justice will not be enforced secretly, without public control; it is also one of the means of maintaining trust in the courts and the administration of justice, as the trial acquires legitimacy through publicity. By ensuring transparency in the administration of justice, publicity contributes to the realization of the objective of Article 6, paragraph 1, namely, to a fair trial, the maintenance of which is one of the fundamental principles of a democratic society within the meaning of the Convention.

The principle of proportionality in commercial legal proceedings was introduced for the first time. Thus, under the proportionality of the commercial procedure, it is proposed to understand the following: the court determines, in the limits established by this Code, the category of proceedings in accordance with the principle of proportionality, taking into account the problems of commercial justice, the peculiarities of the subject of the dispute, the price of the claim, the complexity of the case, the importance of the consideration of the case for the parties, the time required for commission an action, the amount of legal expenses and other expenses of the parties related to the corresponding procedural actions. Without denying the importance and expediency of consolidating such a principle of commercial justice in general, it seems necessary to note several aspects of its implementation.

145 M De Salvia, *Test Cases of the European Court of Human Rights: Guiding Principles of the Jurisprudence Relating to the European Convention for the Protection of Human Rights and Fundamental Freedoms: Judicial practice from 1960 to 2002* (Jurid Center Press 2004) 284.

It is worthwhile to support the opinion that not the court, but the will of the applicant should be the driving force of civil justice. Empowering the court to determine the category of proceedings in the case infringes the principle of discretion and the applicant's right to choose the procedure for the protection of his rights. A simplified procedure for reviewing cases should be an effective alternative to the general way of resolving them, but it is the applicant who chooses to use it, rather than the court. We are also biased in regards to proposals for the definition of specific categories of cases, for which a mandatory simplified procedure has been defined (Article 247 of the CPC of Ukraine) [146]. Such a mechanism was provided in national legislation by introducing the differentiation of proceedings and the presence of simplified procedure for the consideration of specific categories of cases along with the general procedure. Among the most well-known examples of the rational mechanisms for reducing the cost and length of litigation are the order proceedings, which are now in the law of almost every state. With this in view, we support the proposed differentiation of the order, simplified and general procedure of commercial proceedings.

3.2. Introduction of E-justice

One element of modernization, which is reflected in the civil, administrative, as well as commercial legal proceedings, is the introduction of the Single Judicial Information and Telecommunication System, the essence of which is disclosed in Art. 6 of the CPC of Ukraine. Thus, statements of claim and other applications, appeals and other statutory procedural documents which are submitted to the commercial court and may be subject to judicial review, are subject to mandatory registration in the Single Judicial Information and Telecommunication System on the day of receipt of the documents in the order of their receipt.

The appointment of a judge or panel of judges (judge-rapporteur) for the consideration of a particular case is carried out by the Single Judicial Information and Telecommunication System in the manner determined by this Code (automated division of cases).

The single judicial information and telecommunication system, in accordance with the law, provides for the exchange of documents (sending and receiving of documents) in electronic form between courts, between the court and the participants in the trial, between the participants in the judicial process, as well as the recording of the trial in video conference mode.

The court shall forward court decisions and other procedural documents to the participants of the court process at their official electronic addresses, perform other procedural actions in electronic form using the Single Judicial Information and Telecommunication System in accordance with the procedure established by this Code and the Regulation on the Single Judicial Information and Telecommunication System.

Attorneys, notaries, private executives, arbitrage managers, court experts, state bodies, local governments and commercial entities of the state and municipal sectors

146 Iryna Izarova, 'Principle of proportionality in the EU civil process and prospects for its introduction in the civil process of Ukraine' (2016) 37 (1). Scientific Bulletin of Uzhgorod National University. Series: Law 127-130 <http://nbuv.gov.ua/UJRN/nvuzhpr_2016_37%281%29__33> accessed 3 November 2018

of the economy register official electronic addresses in the Unified Judicial Information and Telecommunication System in a mandatory manner. Other persons register their official electronic addresses in the Unified Judicial Information and Telecommunication System on a voluntary basis.

For persons who have registered official electronic addresses in the Single Judicial Information and Telecommunication System, the court shall hand over any documents in cases in which such persons participate, exclusively in electronic form, by sending them to the official electronic addresses of such persons, which does not deprive them of their right to receive a copy of the court decision in paper form on a separate application.

Registration in the Single Judicial Information and Telecommunication System does not deprive the right to submit documents to the court in paper form.

Persons who registered official electronic addresses in the Single Judicial Information and Telecommunication System may file procedural and other documents, perform other procedural actions in electronic form solely with the help of the Single Judicial Information and Telecommunication System, using their own electronic digital signature, equivalent to a personal signature in accordance with the Law of Ukraine 'On Electronic Digital Signature', unless otherwise is provided by this Code.

The peculiarities of the use of electronic digital signature in the Single Judicial Information and Telecommunication System are determined by the Regulation on the Single Judicial Information and Telecommunication System.

The court conducts consideration of the case on the materials of the court case in electronic form. Procedural and other documents and proofs in paper form shall be converted into electronic form not later than three days from the date of their receipt to the court and will be attached to the materials of the electronic court case in accordance with the procedure established by the Regulation on the Single Judicial Information and Telecommunication System.

If it is impossible for the court to consider the case in electronic form for technical reasons for more than five days, which may prevent the consideration of the case within the terms established by this Code, the case shall be considered on the basis of the materials in paper form, for which the materials of the case are immediately converted into a paper form in the order, established by the Regulation on the Single Judicial Information and Telecommunication System.

Procedural and other documents and evidence in paper form are stored in the annex to the case in the court of first instance and, if necessary, may be inspected by the participants in the case or by the court of first instance or requested by the court of appeal or cassation after receipt of the corresponding appeal or cassation appeal.

3.3. Differentiation of Commercial Legal Proceedings

Another novel of the commercial procedural legislation is the approval of the forms of commercial proceedings. Thus, according to Art. 12 of the CPC of Ukraine, commercial legal proceedings are carried out according to the rules pro-

vided for in this Code, in particular, under: 1) order proceedings; 2) action proceedings (general or simplified).

Regarding the consideration of the case under order procedure, the legislation stipulates that the court order may be issued only on the basis of the requirements for collecting monetary debts under a contract concluded in writing (including electronic), if the amount of the claim does not exceed one hundred subsistence minimums for able-bodied persons.

A person has the right to apply to the court with the requirements specified in part one of this article under simplified procedure on his or her choice.

The general proceedings are intended for consideration of cases which due to complexity or other circumstances are inappropriate to be considered in simplified proceedings. According to Part 3 of Art. 12 of the CPC of Ukraine, simplified order proceeding is intended for consideration of small claims, cases of low complexity and other cases, for which the priority is a quick solution to the case.

The conditions, under which a court has the right to consider claims for recovery of money in the order proceedings, and consider cases in general or simplified proceedings, are determined by the CPC. The following cases are to be considered under simplified procedure:
1) small claims which value does not exceed one hundred sizes of subsistence minimums for able-bodied persons;
2) cases of low complexity, which are recognized as cases to be considered under simplified procedure by court, except cases that are to be considered only in accordance with the rules of general proceedings, and cases where the value of a claim exceeds five hundred subsistence minimums for able-bodied persons.

Differentiation of the categories of cases of general and simplified proceedings is specified in Article 244 of the CPC of Ukraine, according to which any case that is subject to the jurisdiction of commercial court, with the exception of cases specified in part four of this article, may be considered in simplified proceedings.

When deciding on the consideration of a case under simplified or general procedure, the court shall take into account:
1) the price of the claim;
2) the significance of the case for the parties;
3) the method of protection chosen by the plaintiff;
4) the category and complexity of the case;
5) the scope and nature of the evidence in the case, including whether it is necessary to appoint an expert examination, to summon witnesses, etc.;
6) the number of parties and other participants in the case;
7) whether the consideration of the case is a significant public interest;
8) the opinion of the parties on the need to consider the case under the rules of simplified proceedings.

The following cases cannot be considered in simplified proceedings:
1) on bankruptcy;

2) on applications for approval of plans to reorganize the debtor before opening of proceedings in the bankruptcy case;
3) on disputes arising out of corporate relations, and disputes concerning transactions in respect of corporate rights (shares);
4) on disputes concerning the protection of intellectual property rights, in addition to cases of collection of a monetary amount which does not exceed one hundred subsistence minimums for able-bodied persons;
5) on disputes arising from relations concerning the protection of economic competition, restriction of monopoly in commercial activity, protection against unfair competition;
6) on disputes between a legal entity and its official (including an official whose powers have been terminated) on compensation for losses caused by such an official to a legal entity by his/her actions (inaction);
7) on disputes concerning the privatization of state or communal property;
8) in which the value of the claim exceeds five hundred subsistence minimums for able-bodied persons;
9) other requirements combined with the requirements in the disputes specified in paragraphs 3-8 of this part.

The court refuses to consider the case under simplified procedure or decides to hear a case under the rules of general proceedings, if, after the court has chosen to consider the claim of the plaintiff to increase the amount of claim or change the subject of the claim, the respective case cannot be considered under the rules of simplified summary proceedings.

3.4. Definition of Written Statements of Participants in the Case and Written Form of Proceedings in the Case

The clear definition of statements concerning the case is a no less important novelty of commercial proceedings. In accordance with Art. 161 of the CPC of Ukraine, when considering a case by a court under action procedure, the participants of the case shall lay down their claims, objections, arguments, explanations and arguments regarding the subject of the dispute exclusively in statements concerning cases specified by this Code in writing.

Statements concerning the case are: a statement of a claim; a statement of defence (defence) ; a reply to a statement of defence (replication); objection; explanation of a third party regarding a claim or a defence.

Each of these applications provides for appropriate requirements and the consequences of non-compliance with such requirements.

A) Statement of a claim. A statement of a claim is submitted to the court in writing and signed by the plaintiff or his/her representative or another person who has the right to apply to the court in the interests of another person.

A statement of a claim shall contain, in addition to already established items, indication of the price of the claim, if the claim is subject to monetary evaluation;

reasonable calculation of the amounts collected or disputed; information on taking measures of pre-trial settlement of a dispute - if the law establishes a mandatory pre-trial procedure for settling a dispute; information on taking measures to provide evidence or a claim before filing a statement of claim, if any; preliminary (indicative) calculation of the amount of court costs incurred by the plaintiff and expected to be incurred in connection with the consideration of the case; confirmation of the plaintiff that he or she has not filed another claim (claims) to this same defendant (defendants) with the same subject and for the same reason.

A statement of a claim shall be accompanied, in addition to the traditional ones, by documents confirming the sending of copies of the statement of claim and the documents attached thereto to other participants of the case; as well as payment of court fees in the established order and amount, or documents confirming the grounds for exemption from payment of court fees in accordance with the law.

The plaintiff is obliged to add all evidence available to him/her to the statement of claim that confirms the circumstances on which the claims are based (if a written or electronic evidence is submitted, the plaintiff can attach a copy of the relevant evidence to the claim statement).

In case of necessity, a claim application for the appointment of an examination, recourse to evidence, etc. is attached to the statement of claim.

B) Statement of defence. According to Art. 165 of the CPC of Ukraine, the defendant lays out objections to the claim in a statement of defence.

A statement of defence is signed by the defendant or his/her representative.

In case of full or partial recognition of claims, a statement of defence must contain claims that are recognized by the defendant; circumstances that are recognized by the defendant, as well as legal assessment of the circumstances provided by the plaintiff, with which the defendant agrees; objections (if any) to the circumstances and legal grounds of the claim, which the defendant does not agree with, with reference to relevant evidence and law; a denial (if any) regarding the amount of legal expenses claimed by the plaintiff, which the plaintiff has incurred and pending before the end of the consideration of the case on merits; preliminary (indicative) calculation of the amount of court costs incurred by the defendant and which is expected to incur in connection with the consideration of the case.

If the statement of defence does not contain an indication of the defendant's disagreement with any of the circumstances on which the claims are based, the defendant will be deprived of the right to object to such a circumstance during the consideration of the case on the merits, except cases where the disagreement with such a circumstance is apparent from the evidence, substantiating his/her objections in essence to the claims, or the defendant will prove that he/she has not objected to any of the circumstances on which the claims are based on grounds that are not under his control.

A copy of a statement of defence and the documents attached thereto must be filed (provided) to the other participants of the case at the same time as sending (providing) a statement of defence to the court.

The following are added to a statement of defence:
1) Evidence confirming the circumstances on which the defendant's objections are based, if such evidence is not provided by the plaintiff;
2) documents confirming the sending (provision) of the statement of defence and the evidence attached thereto to other participants of the case.

To the statement of defence, signed by the representative of the defendant, a power of attorney or other document confirming the powers of the representative of the defendant is attached. The statement of defence is submitted within the time limit set by the court, which may not be less than fifteen days from the date of the order to open the proceedings. The court should set a deadline for the submission of a statement of defence, which will allow the defendant to prepare it and the relevant evidence, and to other participants of the case to receive a statement of defence no later than the first preparatory meeting in the case. In case of failure to provide the defendant with a revocation within time determined by the court without valid reasons, the court will settle the case on merits.

C) Reply to statement of defence. According to Art. 166 of the CPC of Ukraine, the plaintiff sets out his/her explanations, arguments and arguments regarding the respondent's statement of defence to the objections and the reasons for their recognition or rejection in a reply to a statement of defence. A reply to a statement of defence is signed by the plaintiff or his representative. . A reply to a statement of defence is submitted within the time limit set by the court. The court should set a deadline for filing a reply, which will allow the plaintiff to prepare his/her arguments and relevant evidence, and it will allow other participants of the case to receive a reply to a statement of defence in advance of the beginning of the consideration of the case on merits, and the defendant will be able to provide the participants with the objection in advance of the commencement of consideration of the case on merits.

D) Objection. In an objection the defendant sets out his/her explanations and arguments regarding the answers given by the plaintiff in a reply to a statement of defence, reasoning and argument, and the reasons for their recognition or rejection. The objection is signed by the defendant or his/her representative. The objection is filed within the time limit set by the court. The court should set a time limit for filing an objection, which would allow other participants to receive an objection in advance of the commencement of consideration of the case on merits (Article 167 of the CPC of Ukraine).

E) Explanation of a third party regarding a claim or a defence. In the explanations of a third person regarding a claim or a statement of defence, a third person who does not declare independent claims regarding the subject of the dispute, sets out his/her arguments and thoughts in support or objection to the claim. Explanations of a third person are signed by a third party or its representative. Explanations of a third person are filed within the time limit set by the court. The court should set a term that allows a third person to prepare his/her arguments and relevant evidence, and to provide an explanation to the claim or to the statement of defence, while other parties to the case will be able to respond to such explanations in advance of the commencement of the consideration of the case on merits (Article 168 of the CPC of Ukraine).

6. As for the disclosure of the legal status of other participants in the trial, the Commercial Procedural Code allocates such a new subject of commercial legal relations as a legal expert. To be involved as a legal expert, a person shall have a degree and be recognized as a professional legal expert. The decision on the admission to participation in the case of a legal expert and the attachment of his/her conclusion to the case file is made by the court.

A legal expert is obliged to appear in court on its summons, to answer questions put by the court, to provide clarification. In the absence of objections of the participants in the case, a legal expert can participate in the court session in the video conference mode.

A legal expert has the right to know the purpose of his or her summons to court, to refuse to participate in the trial, if he/she does not have the relevant knowledge, as well as the right to payment for services and compensation of costs associated with a summons to a court.

In accordance with Art. 108 of the CPC of Ukraine, participants in the case have the right to bring to court the expert opinion in the field of law regarding:
1) application of the analogy of the law, the analogy of the judiciary;
2) the content of the rules of foreign law in accordance with their official or generally accepted interpretation, practice of application, doctrine in the relevant foreign state.

The conclusion of a legal expert cannot contain an assessment of evidence, indications of the authenticity or unreliability of a particular evidence, the merits of one evidence over others, which decision should be taken on the outcome of the case.

The expert's conclusion is not taken as evidence, has a subsidiary (advisory) character and is not binding on the court.

The court can refer in its decision to the opinion of a legal expert as the source of the information contained therein, and must make independent judgments on relevant issues.

3.5. Improvement of the Procedure of Proof in the Case

The current CPC of Ukraine regulates a new approach to evidence and means of evidence in accordance with the requirements of case management. In accordance with Art. 73 of the CPC of Ukraine, evidence is any data on the basis of which the court establishes the presence or absence of circumstances (facts) justifying the claims and objections of the participants in the case, and other circumstances that are relevant for the resolution of the case.

The outcome of the case depends on what the participants in the case substantiate their claims and objections with. It is in the courtroom during the decision of the court where the court gives a complete assessment of all the evidence during the consideration of the case. An example is the following practice of the Supreme Court. In refusing to comply with the cassation appeal, the Cassation Commercial Court in its ruling of 6 July 2018 in the case No. 4/428 on the appeal of the State Enterprise of Re-

gional Electric Networks "R. E. M." represented by the Luhansk Branch of 7 July 2017 against action of the Division of Decisions Enforcement of the Department of State Bailiff Service of the Ministry of Justice of Ukraine noted that, following the decision of the European Court of Human Rights dated 18 July, 2006 in the case of "Pronin versus Ukraine", analysing the completeness of the investigation by the courts of the circumstances of the case, the Court notes that Article 6 paragraph 1 of the Convention does not bind the national courts to provide a detailed answer to every argument put forward by the applicant (parties to the case). Courts have a duty to justify their decisions, but this cannot be taken as a requirement to provide a detailed answer to every argument. The boundaries of this duty may vary, depending on the nature of the decision. The question whether the court fulfilled its obligation to submit a substantiation arising from Article 6 of the Convention may be determined only in the light of the particular circumstances of the case. By analysing, in the light of the above mentioned conclusions of the ECHR, the completeness of investigation by the courts of the circumstances of the case and the justification the court decisions, the Court agrees with the performing by the courts of first and appellate instances of their duty to substantiate their conclusions and does find a violation of the substantive and procedural law that could result in the abolition of the adopted decisions by the courts[147].

Thus, in accordance with the norms of the current commercial procedural law, the data of the parties, by which they substantiate their claims and objections, are established by the following means: 1) by written, substantive and electronic evidence; 2) by expert opinions; 3) by testimony of witnesses.

Thus, evidence of witnesses and electronic evidence are among the means of proof that are new to commercial justice.

A witness's testimony is a statement about circumstances known to him/her that are relevant to the case. Evidence of a witness who cannot name the source of his/her knowledge, or evidence based on other people's statements is not considered to be facts of evidence.

Circumstances (facts) that, in accordance with the legislation or business practices, are to be reflected (recorded) in relevant documents cannot be established based on the testimony of witnesses. The law may specify other circumstances that cannot be established on the basis of witness testimony.

Parties, third parties and their representatives, with their consent, including on their own initiative, unless otherwise provided by this Code, may be questioned as witnesses on circumstances known to them that are relevant to the case.

The testimony of a witness based on the reports of other persons is not taken into account by the court.

The participant in the case has the right to put in the first statement concerning the case or in the annex to it not more than ten questions to another party to the case about the circumstances relevant to the case.

147 Decree of the Supreme Court in the Name of Ukraine 6 July 2018 Case 4/428 <http://reyestr.court.gov.ua/Review/75637076> accessed 3 November 2018

The participant of the case, who is asked by the other party to the case, is obliged to provide an exhaustive answer separately for each question on the merits.

If the participant of the case is a legal entity, the answer to questions is provided by its head or other official on its behalf.

Answers to the questions shall be submitted to the court by the participant of the case: an individual, a manager or other official of the legal entity in the form of a statement of the witness not later than five days before the preparatory meeting, and in the case considered in the simplified proceedings – five days before the first court hearing.

A copy of such a statement of the witness within the same period shall be sent to the party to the case who has submitted written questions.

According to Art. 96-97 of the CPC of Ukraine, *electronic evidence* is data in electronic (digital) form, which contains information about circumstances relevant to the case, in particular, electronic documents (including text documents, graphic images, plans, photographs, video and audio recordings etc.), websites (pages), text, multimedia and voice messages, metadata, databases and other data in electronic form. Such data can be stored, including on handheld devices (memory cards, mobile phones, etc.), servers, backup systems, elsewhere in electronic form (including the Internet).

Electronic evidence is filed in the original or in electronic copy, certified by an electronic digital signature, equivalent to a personal signature in accordance with the Law of Ukraine "On Electronic Digital Signature". The law may provide for another procedure for certifying an electronic copy of electronic evidence.

The participants in the case have the right to file electronic evidence in paper copies certified in accordance with the procedure provided for by law. A paper copy of electronic evidence is not considered to be a written evidence. The participant of the case, who submits a copy of the electronic evidence, shall indicate that he/she or the other person has the original electronic evidence.

If a copy (paper copy) of electronic evidence is filed, the court may, at the request of the participant in the case or on its own initiative, request the original of the electronic evidence from the relevant person. If the original of the electronic evidence is not filed and the participant or the court questions the conformity with the submitted copy (paper copy) of the original, such evidence is not taken into account by the court.

Originals or copies of electronic evidence are kept by the court in the case file.

At the request of the person who provided the court with the original electronic evidence on a material carrier, the court returns such material carrier containing the original evidence to that person after examining the said electronic evidence, if possible, without prejudice to the consideration of the case, or after the entry of a judicial decision into force. In the case file, a copy of the electronic evidence or an extract from it is certified by a judge.

3.6. New Approaches to the Distribution of Court Costs in the Case

Apart from the above-mentioned novel procedural institutes, the preliminary payment of court expenses and its provision are also the relevant ones. Thus, according to Art. 124-125 of the CPC of Ukraine, together with the first statement on the merits of the dispute, each party submits to the court a preliminary (indicative) calculation of the amount of legal expenses that it incurred and which is expected to incur in connection with the consideration of the case.

In the event that the party fails to make a preliminary calculation of the court costs, the court may refuse to reimburse the party for the corresponding legal expenses, except for the amount of the court fee paid by the party.

The preliminary calculation of the court costs does not restrict the party from the substantiating of another actual amount of court costs, which is subject to division between the parties on the outcome of the proceedings.

The court may pre-determine the amount of court costs (except for the cost of professional legal assistance) related to the consideration of a case or a certain procedural action. Such a court's pre-determined amount does not limit the court to the final determination of the amount of court costs that are subject to division between the parties on the outcome of the proceedings.

The court may require the parties to deposit a pre-determined amount of court costs related to the consideration of a case or a certain procedural action on a deposit account of a court, as decided by the court (provision of legal expenses).

The court may oblige the participant who filed a claim for a witness summon, appointment of an expert, the involvement of a specialist, translator, provision, reclamation of evidence or evidence examination at its location, to pay in advance the costs associated with the relevant procedural act.

If several parties have filed a motion, the necessary amount of money in advance shall be paid in equal shares by the respective participants of the case, and in cases where the relevant procedural act is carried out on the initiative of the court, the parties shall pay in equal shares.

If the court costs are not paid in the time period defined by the court, or if the court does not receive the relevant sum in advance in the defined time period, the court is entitled to reject the application for a witness, the appointment of an expert examination, the involvement of a specialist, an interpreter, provision, reclamation or review of evidence, and to make a decision on the basis of evidence submitted by other participants in the case or cancel a previously issued decision on the call of a witness, the appointment of an expert examination, the involvement of a specialist, translator, provision, reclamation of evidence or examination of evidence at its location.

As a measure to secure the court costs, the court, having regard to the particular circumstances of the case, has the right, at the request of the defendant, to oblige the plaintiff to deposit a sum of money on the deposit account of a court in order to ensure that the defendant may receive future compensation for the professional

legal assistance and other expenses incurred by the defendant in connection with the consideration of the case (provision of expenses for professional legal assistance).

Such security for court costs apply if:
1) the claim has signs of knowingly groundless or other signs of abuse of the right to sue;
2) the plaintiff has no place of residence (stay) or location on the territory of Ukraine and property registered on the territory of Ukraine in the amount sufficient to cover the court costs of the defendant in case of refusal of the claim.

Such security for court costs can also be applied if evidence is provided to the court that the property of the plaintiff or his/her actions in relation to the alienation of property or other actions may complicate or make it impossible to enforce a court decision to reimburse the defendant's court costs in the event of a refusal of the claim.

The amount of provision for expenses for professional legal assistance is determined by the court, taking into account the requirements of part four of Article 126, part five of Article 127 and part five of Article 129 of this Code, as well as their documentary substantiation.

Thus, in the ruling of the Cassation Commercial Court of 24 October, 2018, in case No. 910/19576/17, on the claim of the private transport enterprise "D." to the public joint stock shipping company 'S.K.U.' on collection of 244,579.94 UAH, it is stated that when determining the amount of compensation, the court should proceed from the criterion of the reality of lawyer's expenses (establishing their validity and necessity), as well as the criterion of reasonableness of their size, based on the particular circumstances of the case and the financial situation of both parties. The European Human Rights Court applies the same criteria when appointing legal costs under article 41 of the Convention, in particular, according to its practice, the applicant has the right to compensation for court and other expenses only if it is proved that such expenses were actual and inevitable and their amount was justified ('*East/West Alliance Limited v Ukraine*' judgment, application no. 19336/04)[148].

In case of failure to deposit the funds for the provision of expenses for professional legal assistance in a set term the court, at the request of the defendant, has the right to leave the claim without consideration.

In case of satisfaction of a claim, the court decides on the return of the amount paid to the plaintiff, and in case of refusal of the claim, closure of the proceeding or abandonment of the claim without consideration the court decides on compensation of the defendant fully or in part at its expense in the manner prescribed by Articles 129, 130 of this Code. The unused amount deposited by the plaintiff is returned to the plaintiff not later than five days from the day the issues referred to in this part are resolved, for which the court makes the decision.

148 Decree of the Supreme Court in the Name of Ukraine of 24 October 2018 Case 910/19576/17 < http://reyestr.court.gov.ua/Review/77431906> accessed 3 November 2018

3.7. Prevention of Abuse of Procedural Rights in the Process

An important novelty of the new version of the CPC of Ukraine for commercial legal proceedings is the inadmissibility of abuse of procedural rights and liability for such abuse. According to Art. 43 of the CPC of Ukraine, participants in the trial and their representatives shall use procedural rights in good faith; abuse of procedural rights is not allowed.

Depending on the specific circumstances, the court may recognize the abuse of procedural rights of action that contradicts the task of commercial legal proceedings, in particular:

1) submission of an appeal to a court decision that is not subject to appeal, is not valid or expired, submission of a petition (application) to resolve a matter already decided by the court in the absence of other grounds or new circumstances, a statement of a knowingly unjustified withdrawal or the commission of other similar actions aimed at unjustifiably delaying or obstructing the consideration of a case or execution of a court decision;
2) filing several claims to one and the same defendant (defendants) on the same subject and on the same grounds or filing several lawsuits with a similar subject and for similar reasons or commiting other acts which purpose is to manipulate the automated division of cases between judges;
3) submission of a knowingly unreasonable claim, a claim in the absence of the subject matter of the dispute or in a dispute that is obviously artificial;
4) unreasonable or artificial association of claims in order to change the jurisdiction of the case, or knowingly unreasonable involvement of the person as a defendant (co-respondent) for the same purpose;
5) the conclusion of a peace agreement aimed at harming the rights of third parties, the deliberate failure to report the persons to be involved in the case.

If filing of an appeal, a statement, a petition is considered an abuse of procedural rights, the court, having regard to the circumstances of the case, has the right to leave without consideration or to return an appeal, a statement, a petition.

The court is required to take measures to prevent the abuse of procedural rights. In the event of abuse of procedural rights by a participant in a court proceeding, a court shall apply the measures specified in this Code to him/ her.

As the Cassation Commercial Court correctly states in its Resolution of 17 October.2018 in the case No. 911/1595/18 on the results of consideration of the cassation appeal of LLC 'Inter-GTV' to the decisions of the courts of first and appellate instances regarding the provision of a claim for filing a statement of claim, in paragraph 40 of Judgment of the European Court of Human Rights in case '*Hornsby v Greece*' of 19 March 1997 it is stated that the execution of a judgment made by any court should be regarded as an integral part of the 'trial proceedings.' In addition, the Court has already accepted this principle in matters relating to the duration of proceedings (see cases '*Di Pede v Italy*' and '*Zappia v Italy*', judgment of 26 September 1996, Reports of Judgments and Decisions 1996-IV, pp 1383-1384, paragraphs 20-24 and pp 1410-1411, paragraphs 16-20, respectively).

In paragraph 37 of '*Derkach and Palek v Ukraine*' judgment of 21 December 2004, final since 06 June 2005, the European Court of Human Rights reiterated that article 6, paragraph 1, guarantees everyone the right to file in a court or tribunal any lawsuit relating to his/her civil rights and obligations. Thus, the paragraph provides for 'the right to a court', one of the aspects of which is the right of access to a court, that is, the right to institute proceedings in a court in order to resolve a civil dispute. However, this right would be illusory if the national legal system of the High Contracting Party allowed the final, compulsory execution of the judgment to remain unenforced to the detriment of one of the parties. It is hard to imagine that paragraph 1, article 6 would describe in detail the procedural guarantees given to the parties: fairness, openness and speed of proceedings, and would not provide for guarantees of enforcement of judgments. Interpretation of Article 6 as a provision that only guarantees the right to apply to the court and to conduct a trial could lead to a situation incompatible with the rule of law that the High Contracting Parties undertook to respect when ratifying the Convention. Consequently, execution of a judgment shall be regarded as an integral part of the "trial" for the purposes of Article 6 (see '*Burdov v Russia*', application No. 589498/00, paragraph 34).

For abuse of procedural rights or other actions that cause violation of the terms of consideration of the case, the court may apply measures of procedural coercion. Thus, according to Art. 135 of the CPC of Ukraine, a court may rule on the collection of a revenue to the state budget from the person concerned as a fine in the amount of one to ten times the subsistence minimums for able-bodied persons in cases of:

1) failure to perform procedural duties, in particular, evasion from the commission of actions imposed by a court on a participant in a judicial process;
2) abuse of procedural rights, commission of acts or inactivity in order to interfere with legal proceedings;
3) failure to inform the court of the impossibility of submitting evidence demanded by the court, or failure to submit such evidence without good reason;
4) failure to comply with the decision on the securing of the claim or evidence, failure to provide a copy of the request for revocation, appeal or cassation appeal, the response to the reference, the objection to another party of the case within the time limit prescribed by the court;
5) violation of prohibitions established by part ten of Article 188 of this Code.

In the case of repeated or systematic non-compliance with procedural obligations, repeated or systematic abuse of procedural rights, repeated or systematic failure to submit evidence requested by the court without good reason or without notice, the continuous non-execution of the decision to secure a claim or evidence, the court, taking into account the particular circumstances, seizes a fine in the amount of from five to fifty subsistence minimums for able-bodied people into the state budget from the relevant participant in the court proceeding or another person concerned.

In case of non-compliance with procedural obligations, abuse of procedural rights by a representative of a party to a case, the court may, with due account of the particular circumstances of the case, recover a fine from both the party's case and his/her representative.

The decision on the recovery of a fine may be appealed in the court of higher instance. An appeal against such a decision does not preclude the consideration of the case. The decision of the court of appellate instance on the results of the review of the decision on the imposition of a fine is final and not subject to appeal.

The Supreme Court's decision on the prosecution of a fine is not subject to appeal.

The decision to impose a fine is an executive document and shall comply with the requirements of the executive document, established by law. The collector for such an executive document is the State Judicial Administration of Ukraine.

The court may revoke its resolution on the imposition of a fine if the person in respect of which it has been resolved has corrected the perceived violation and (or) provided proof of the reasons for not fulfilling the relevant requirements of the court or of his/her procedural duties.

3.8. The Settlement of a Dispute with the Participation of a Judge

The development of alternative dispute resolution (ADR) methods in Ukraine, as in any other country, is a complex and lengthy process. The possibility of reconciling the parties to the dispute in the courts through the achievement of a mutually acceptable solution with the assistance of a judge has always been known both to the domestic and foreign civil processes, while the way of settlement of disputes is not the main task of civil proceedings. Thus, part 1 of article. 2 of the CPC of Ukraine specifies that the task of commercial legal proceedings is a fair, impartial and timely resolution by the court of disputes related to commercial activity and the consideration of other cases assigned to the jurisdiction of a commercial court with the purpose of effective protection of violated, unrecognized or challenged rights and legitimate interests of individuals and legal entities and the state. It becomes clear that the main purpose of commercial justice is to protect the rights and interests of individuals and legal entities, as well as the state. It should be emphasized that the main purpose of mediation as an alternative way of resolving a dispute is to assist in resolving the conflict, taking into account the interests of all its parties.

Back in the 80's of the twentieth century, Italian processualist Mauro Cappelletti developed and scientifically substantiated the so-called 'three-wave' concept of development of access to justice. Under this concept, any state undergoes three stages of reform or 'waves' in order to develop access to justice. All three stages ('waves') are interdependent and aim at achieving one goal, which is the ability of various groups and categories of the population as well as individual citizens and organizations to safely restore justice. Particular attention in this study deserves a third stage ('wave') of reforms, which is associated with the introduction of various conciliatory procedures for settling disputes. A prerequisite for this is the need to eliminate the lack of conformity of the court process with the requirements of the accessibility of justice[149] .

149 Mauro Cappelletti, *Access to Justice and the Welfare State* (Publications of the European University Institute1981) 4–11.

Previous studies identified mediation as a structured, voluntary and confidential procedure for out-of-court settlement of a dispute (conflict) in which the mediator assists the parties in understanding their interests and finding effective ways to reach a mutually acceptable solution[150]. The analysis of this definition and the norms of the Draft Law of Ukraine 'On Mediation' of 17 December 2015 No. 3665 gives grounds to assert that mediation is possible during the trial.

Let's pay attention to the latest civil procedural legislation related to the settlement of a dispute with the participation of a judge, provided for by Chapter 4 of the CPC of Ukraine. All articles of this chapter of the CPC of Ukraine require answers to numerous questions, such as the theory of commercial procedural law, and the practice of its application. By the time the amendments to the CPC of Ukraine were introduced within the framework of commercial procedural relations the formal possibility of a peaceful settlement of a dispute within the framework of legal proceedings was foreseen; and it is now becoming an actual reality that requires the development of a mechanism for its implementation in practice.

Settlement of a dispute with the participation of a judge is carried out with the consent of the parties before the beginning of the consideration of the case on the merits.

However, in accordance with the rules of the current commercial procedural legislation, the settlement of a dispute with the participation of a judge is not allowed in disputes (cases):
1) on the restoration of solvency of the debtor or recognition of it as a bankrupt;
2) on applications for approval of plans to reorganize the debtor before the opening of proceedings in the bankruptcy case;
3) in the case of a third party stating an independent claim regarding the subject matter of the dispute.

The court shall issue a ruling on conducting a dispute resolution procedure with the participation of a judge which simultaneously suspends the proceedings.

In the event when the parties fail to reach a peaceful settlement of the dispute, it is not allowed to re-conduct the dispute settlement with the participation of a judge.

The settlement of a dispute with the participation of a judge is conducted by a judge-reporteur alone, regardless of the composition of the case.

The settlement of a dispute with the participation of a judge is carried out in the form of joint and (or) closed meetings. The parties shall have the right to participate in such meetings in a videoconference mode in accordance with the procedure established by this Code.

Joint meetings are held with the participation of all parties, their representatives and the judge.

150 O S Mozhaykina, 'Concepts and Contents of the Basic Principles of Mediation in Civil-Law Relations' (2017) 5 Actual questions of domestic jurisprudence. 55-58.

Closed meetings are held on the initiative of a judge with each of the parties separately.

The judge directs the settlement of a dispute with the participation of a judge to make the parties reach the resolution of the dispute. Taking into account the specific circumstances of the meeting, the judge may announce a break within the deadline for the settlement.

At the beginning of the first joint dispute settlement meeting, the judge shall explain to the parties the purpose, the procedure for settling the dispute with the participation of the judge, the rights and obligations of the parties.

In the course of joint meetings, the judge finds out the grounds and subject of the claim, the grounds for objection, clarifies to the parties the subject of evidence regarding the category of the dispute being considered, invites the parties to submit proposals on ways of peaceful settlement of the dispute and carries out other actions aimed at peaceful settlement of the dispute by the parties. The judge may offer the parties a possible way of peaceful settlement of the dispute.

During closed meetings, the judge has the right to draw the parties' attention to court practice in similar disputes, to offer the party possible ways of peaceful settlement of the dispute.

During the settlement of a dispute, the judge has no right to provide legal advice and recommendations to the parties, to provide an assessment of the evidence in the case.

The information received by any of the parties, as well as the judge during the settlement of the dispute, is confidential. During the settlement of a dispute with the participation of a judge, the protocol of the meeting is not held and not fixed by technical means.

If required, an interpreter is involved in the meetings. The interpreter is warned about the confidential nature of the information obtained during the settlement of the dispute with the participation of a judge.

When settling a dispute with the participation of a judge, it is prohibited to use portable audio equipment, as well as to perform photo, video and audio recording.

Settlement of a dispute involving a judge is terminated:
1) in the case of submission by the party of an application for the termination of the settlement of a dispute with the participation of a judge;
2) in the case of expiration of the term of the dispute settlement with the participation of a judge;
3) upon the initiative of a judge in the case of delaying the settlement of a dispute by any of the parties;
4) in the case of the conclusion of the agreement by the parties and appeal to the court with a statement on its approval or petition of the plaintiff in court with a statement on leaving the claim without consideration, or in the event of the applicant's refusal from the claim or recognition of the claim by the defendant.

A decision is passed on terminating a dispute with the participation of a judge, which is not subject to appeal. At the same time, the judge decides on resuming the proceedings.

The judge shall give a ruling on termination of dispute settlement with participation of a judge on the grounds provided for in paragraph 1 of this Article not later than the next working day after the receipt of the relevant application of the party, and on the grounds, established by paragraph 2 of the same part not later than the next day from the day of termination of a dispute settlement with the participation of a judge.

In case of termination of the settlement of a dispute with the participation of a judge on the grounds provided for in paragraphs 1-3 of part one of this Article, the case shall be submitted for consideration to another judge, determined in accordance with the procedure established by Article 32 of this Code.

4. CONCLUDING REMARKS

Today Ukraine makes significant efforts building a really constitutional democratic state on the way to the EU. The Association Agreement signed in 2014 demonstrates the desire of Ukrainian society for movement towards the European Community, particularly, ensuring access to justice and right protection according to the European Convention`s requirements. The reforms of 2015-2017 and the new legislation in the field of judicial system, legal proceedings and enforcement of judgments, adopted in Ukraine, were inspired by the high European standards.

Despite this, traditional approaches and institutions, which have been substantially updated, have to combine with the new effective mechanisms, which have been introduced into national legislation. In particular, we should preserve the effective court system, which includes general courts and commercial courts and has been established in Ukraine since its independence. Additionally, we have to contribute to a more efficient implementation of the judicial power. General and simplified procedures have been introduced in the sphere of commercial procedure, which aims and to simplify access and speed up the resolution of cases where claims are small. Idea of proportionality and case management, which is a novel in Ukrainian legislation, will provide real protection of the rights of persons. We also welcome the introduction of electronic justice, which will definitely help to solve problems of long terms and high fees of litigation, two of the weakest points in our procedure. As well as the settlement of a dispute with the participation of a judge we should create more effective and peaceful ways to ensure the rights protection.

We should admit that it is possible to estimate the achievements of reforms only from a viewpoint of their implementation, however, they need to be analysed in terms of their complexity and validity as well as in the view of attention from the side of the Ukrainian and the European society.

SIMPLIFIED ACTION PROCEEDING: NEW EXPERIENCE. GENERALIZATION OF COURT PRACTICE: A CASE STUDY OF OBOLONSKYI DISTRICT COURT OF KYIV

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1. INTRODUCTION

Simplified action proceeding is a novelty of the Civil Procedure Code of Ukraine (hereinafter – CPC) in the wording of 3 October, 2017. The introduction of such institutions as small cases, the principle of proportionality of legal proceedings, simplified action proceeding, written form of case consideration, cases of low complexity, etc., requires a detailed study and generalization of the application practice.

The introduction of simplified action proceedings is a positive step that is in line with the global trends in the regulation of simplified action proceedings. Its task is a timely consideration of certain categories of civil cases established by law or assigned to such by a court, without the obligatory representation by a lawyer and, if possible, without parties' notification on the basis of the materials available in the case.

The question of assigning a case to a category which can be considered under simplified procedure directly affects the rights of the parties which they can realize in the course of consideration and resolution of the case, participation in the court session, as well as appeals against decisions made by the court and, therefore, is extremely important for the proper realization of the right of persons to justice and the right to be heard by the court.

Kyiv Obolonskyi District Court has generalized the court practice on the topic '*Simplified action proceeding: new experience*' for the period from 15 December, 2017 and the first half of 2018. Some of these results we are going to discuss in this paper.

According to statistical data for the first half of 2018, 6,035 civil cases and materials were handled by judges (including 65 cases arising from labour relations), 3,206 cases/materials were received during this period (among which 31 cases), 3,164 civil cases (including 27 cases arising from labour relations) and materials were considered.

At the same time, it is not possible to provide statistics on the number of cases considered under the rules of simplified action proceedings, compared to the total number of cases pending to be considered under action procedure, as well as the number of decrees on transition to consideration of the case under the rules of general proceedings, since Kyiv Obolonskyi District Court does not hold the records, which, in our opinion, is a disadvantage, which in future will not allow a more detailed generalization of the judicial practices.

2. PROBLEMS OF APPLICATION OF CRITERIA FOR DETERMINING CASES TO BE CONSIDERED IN A SIMPLIFIED ACTION PROCEEDING

Changes to the CPC stipulate that civil proceedings shall be conducted in the order proceedings, the action proceedings (general or simplified) and separate proceedings. Separate provision is made for procedures for consideration of recognition of foreign courts` decisions, international commercial arbitrations in Ukraine, etc.

The general proceedings are intended for consideration of cases which due to complexity or other circumstances are inappropriate to be considered in simplified action proceedings.

In accordance with Art. 19 of the CPC of Ukraine, simplified action proceeding, is intended for consideration of:

1) insignificant cases;
2) cases arising from labour relations;
3) cases concerning the granting by the court of the permission to temporarily take the child abroad to a parent who lives separately from a child, who does not have an arrears for alimony payment and who has been denied by the other parent the provision of a notarized consent for such departure;
4) cases of low complexity and other cases, which priority is a quick resolution of the case.

All these cases, which are considered in simplified proceedings, can be divided into two categories: those that are defined by law and those that are assigned to such by the court.

In particular, according to Part 6 of Art. 19 of the CPC of Ukraine, so called insignificant cases are: cases in which the value of a claim does not exceed one hundred subsistence minimums for able-bodied persons; cases of low complexity, which

were recognized by the court as insignificant, except for cases which are subject to consideration only under the rules of general proceedings, and cases where the value of the claim exceeds the size of five hundred subsistence minimums for able-bodied persons.

In accordance with Part 4 of Art. 274 of the CPC of Ukraine the following cases cannot be considered in simplified proceeding: cases arising from family relations, except for disputes on the recovery of alimony and the division of property of the spouses; cases regarding inheritance; cases of privatization of the state housing stock; cases regarding the recognition of assets as unsubstantiated and claims of them in accordance with chapter 12 of this section; cases in which the value of the claim exceeds five hundred subsistence minimums for able-bodied persons; other demands combined with claims in the disputes specified in paragraphs 1 to 5 of this section.

The generalization made it clear that the court appoints civil cases for consideration under simplified procedure in such cases as collection of arrears under a loan agreement; debt collection under a credit agreement; collecting alimony; reduction of alimony; increase of alimony; recognition of a person as a such who has lost the right to use a housing facility; compensation for damage caused by a road accident; reimbursement of expenses related to studying at a higher educational institution; determining the procedure for using an apartment that is in common partial ownership; recognition of the contract as invalid; marriage annulment; cases of the collection of average earnings during the delay of payment of wages making an employee redundant; cases on eviction and removal from the registration; etc.

At the same time, the generalization showed cases when, during studying the lawsuit and resolving the issue of opening a case and appointing a hearing under simplified or general procedure, the problems arose concerning the fact that the CPC of Ukraine clearly stipulates that such cases should be considered in simplified proceedings, however, taking into account certain features (in particular, taking into account the provisions of Articles 11 and 3 of Article 274 of the CPC of Ukraine), in the opinion of the court they should be appointed for consideration under general procedure.

Thus, in the opinion of the court, labour disputes are to be considered under general action procedure, as exemplified by a civil case in the lawsuit of F. to Kyiv City Employment Centre on the recognition as unlawful and the cancellation of orders for bringing to disciplinary liability and the order of dismissal, renewal at work and the recovery of average earnings during forced unemployment. The claims are motivated by the fact that during September 2018 the defendant had declared two reprimands to the plaintiff, which she considered illegal. By order of the Director of Kyiv City Employment Centre of 11 September, 2018, the plaintiff is dismissed from the post of deputy director of Obolonskyi District Branch of Kyiv City Employment Centre. The said order is considered unlawful by the plaintiff. In the court's opinion, it is not reasonable to consider the dispute under the rules of simplified procedure, as in this case, it is necessary to conduct preparatory proceedings for clarification, in particular, for the final determination of the subject of the dispute and the nature of the litigious legal relationships, claims and the composition of the participants of the case.

Also, the CPC of Ukraine determines that disputes regarding the payment of alimony should be considered under simplified procedure. Thus, according to Part 1 of Art. 161 of the CPC of Ukraine, a court may issue a court order if a claim is filed for a claim for the payment of maintenance for a single child in the amount of one quarter, for two children - one third, for three and more children - half the earnings (income) of the alimony payer, but not more than ten subsistence minimums for a child of the appropriate age for each child if this requirement is not related to the establishment or contest of paternity (motherhood) and the need to involve other interested persons; or if a claim for child support has been claimed in a solid monetary amount of 50 per cent of the subsistence minimum for a child of the appropriate age, if this requirement is not related to the establishment or contest of paternity (maternity) and the need to involve other interested persons.

A person has the right to apply to the court with the requirements specified in section one of this article, in order or in simplified proceeding on his or her choice.

Obolonskyi district court of Kyiv appoints for consideration under general procedure some disputes about the recovery of alimony, where claims are different from those specified in Part 1 of Art. 161 of the CPC of Ukraine.

One more vivid example which can illustrate this problem are the cases of appointment of alimony.

For example, the plaintiff appealed to a court on 12 September, 2018, in a suit to charge the defendant alimony in favour of her maintenance, in the amount of ¼ of all types of his earnings on a monthly basis, starting with the collection from the day the claim was filed and until 3 July, 2021. Her claims are motivated by the fact that she was in the registered marriage with the defendant until 4 July, 2018. They have two children from the marriage. The son, RG, born in 2012, is suffering from autism and is a disabled person. The plaintiff is constantly with her son, cares for him and has the right to be detained from her former husband. The court, having considered the materials of this statement of claim, came to the conclusion that opening of general proceedings in this case is required and appointed a preparatory trial, taking into account the circumstances of the case and its significance for the plaintiff.

In another case, the decision of Obolonskyi district court of Kyiv opened a general procedure and appointed a preparatory trial in a civil case on the claim of V. to B. on the collection of arrears on alimony, taking into account inflationary losses, penalties and alimony for maintenance during the period of adulthood, where the claimant appealed to the court with a suit on 5 September 2018, in which she asks to recover the arrears on alimony from the defendant, taking into account inflationary losses, penalties and alimony on the maintenance during the period of adulthood in the amount of 719,289.13 UAH. Her claim is motivated by the fact that the decision of Obolonskyi district court of Kyiv dated 13 May, 2005 approved to recover from the defendant in support of the plaintiff the alimony for the maintenance of two children in the amount of 1/3 of all types of his earnings. The decision was not executed and as of 3 September, 2018, arrears have been created. In addition, she asks to collect the alimony for the maintenance of an adult daughter for the period from 13 October 2016 to 30 June 2017 in connection with the education of the latter. The

motive for the court to make such a decision was the price of a claim that exceeded one hundred subsistence minimums for able-bodied persons.

The CPC of Ukraine states that disputes concerning the division of property of spouses should be considered under simplified proceedure. However, it is impossible to agree with such a legislative position. Since, if the price of a claim exceeds one hundred subsistence minimums for able-bodied persons, the court cannot recognize such a case as insignificant.

This can be exemplified by the suit of S.O. to S.A. on the recognition of immovable property and money resources as personal property. The claims are motivated by the fact that the plaintiff had been registered in the marriage with the defendant since 1980. The plaintiff purchased an apartment, worth 1,193,400.00 UAH, with the funds belonging to her personally. She asks to acknowledge the right of private personal property to the apartment on Heroiv Dnipra Street in Kyiv for the plaintiff S.O. Also, she asks to acknowledge the right of private personal property to money resources in the amount of 9,046.04 USD and 180,000.00 UAH. The court, in this case, came to the conclusion that the case requires to be considered in general proceedings because the value of the claim exceeds one hundred subsistence minimums for able-bodied persons.

Proceeding from the fact that the simplified action proceeding is intended to deal with the simplest cases, in proportion to the requirements claimed, the priority of the written form, as well as in the absence of mandatory representation, it is necessary to clearly define in the law which cases can be considered in simplified proceedings. Taking into account the above, in our opinion, the court practice should develop clear, transparent, understandable criteria for assigning particular categories of cases to insignificant ones, and accordingly, to consider these cases under simplified procedure.

3. FEATURES OF THE SIMPLIFIED ACTION PROCEEDING IN CIVIL PROCEEDINGS

One of the peculiarities of consideration of cases in simplified proceedings is that the court examines cases in the form of simplified proceedings within a reasonable time, but not more than sixty days from the date of opening of proceedings in the case.

Also, the peculiarities of consideration of cases in simplified proceedings are, in particular: the consideration of the case on the merits under simplified procedure begins with the opening of the first court session or thirty days from the day the proceedings are opened, unless a court hearing is held; preparatory meeting in case of simplified proceedings is not conducted; the first court hearing in the case shall be held not later than thirty days from the date of opening of the proceeding; no litigation is conducted (Article 279 of the CPC of Ukraine).

According to the current CPC, there is no mandatory representation of the participants in the case by a lawyer in the simplified proceedings (Part 2 of Article 60 of the CPC of Ukraine). Also, as seen from the provisions of Art. 279 of the CPC of Ukraine, consideration of the case under simplified procedure may take place without notice to

the parties, meaning the priority is given to the written proceedings in the case, which is a novelty of the CPC of 2017.

An important feature of simplified proceedings is also that, according to Part 3 of Art. 389 of the CPC of Ukraine, court decisions in insignificant cases are not subject to appeal in cassation. There are exceptions only when: a) the cassation appeal concerns a right that is fundamental to the formation of a single law enforcement practice; b) the person submitting the cassation appeal, in accordance with this Code, is not able to refute the circumstances established by the contested court decision in the course of consideration of another case; c) the case represents a significant public interest or is of exceptional importance to the party who filed the appeal; d) the court of first instance has classified the case as insignificantone by mistake (this is the reason for the mandatory cancellation of the decision and referral of the case for a new consideration - item 7 art 1 article 411 of the CPC).

Also, in accordance with item 7, part 3 of Art. 376 of the CPC of Ukraine, if the court considered under simplified procedure a case that was subject to review in accordance with the rules of the general proceedings, it is considered a violation of the rules of procedural law and is a compulsory basis for the annulment of the court decision of the court of first instance and the adoption of a new decision.

In view of this, the question of choosing a procedure for reviewing a case in a simplified or general proceedings is extremely important.

The court decides on the consideration of the case under simplified procedure in the decision on opening of proceedings. In particular, following the results of consideration of the relevant petition of the plaintiff, the court, taking into account the specific circumstances of the case, may: 1) satisfy the petition and determine the term for the defendant to submit an application with objections regarding the consideration of the case under simplified procedure; or 2) refuse to satisfy the petition and to consider the case according to the rules of the general proceedings.

If the court after consideration of the petition of the plaintiff comes to a conclusion on the consideration of the case under simplified procedure, it indicates this in the decision to open the proceedings.

If the defendant within the defined by the court term submits a statement of objections against the consideration of the case under simplified procedure, the court, depending on the reasonableness of the objections of the defendant, decides to: 1) leave the defendant's application without satisfaction; 2) consider the case according to the rules of the general proceedings and replace of the meeting for consideration of the case on the merits with the preparatory meeting.

If the defendant fails to file such objections within the term established by the court, he/she has the right to initiate the transition to the consideration of the case according to the rules of the general proceedings only if he/she proves that he/she missed the term for valid reasons.

If the court had decided to consider the case under simplified procedure, but made the subsequent decision to consider the case according to the rules of the general proceedings, the consideration of the case begins with the stage of opening the proceedings. In such a case, the return to the case under the rules of simplified proceedings is not allowed.

The court may refuse to satisfy a party's request to hear a case in a court session with the notification of the parties provided the simultaneous existence of the following conditions: 1) the subject of the claim is the collection of a monetary amount not exceeding the size of one hundred subsistence minimums for able-bodied persons; 2) the nature of the litigious legal relationship and the subject of evidence in the case do not require the holding of a court session with the notification of the parties for full and complete establishment of the circumstances of the case.

According to Art. 193 of the CPC of Ukraine in case of filing a counterclaim in a case considered under simplified procedure, the court decides on the transition to the consideration of the case by the rules of general proceedings.

In our opinion, it is worth paying attention to such a procedural moment when the court makes its decision to consider the case under a simplified procedure without notifying the parties, and then concludes that it is necessary to appoint a case for consideration under simplified procedure with the call of the parties to the case. As a general rule, according to Part 5 of Art. 279 of the CPC of Ukraine, the court examines the case in the form of simplified proceedings without informing the parties on the materials available in the case, in the absence of a contrary petition of either party. At the request of one of the parties or on its own initiative, the court proceedings are conducted in a court session with the notification (summoning) of the parties.

Thus, having considered the materials of the claim statement of V.S. to V.M. about the increase in alimony, the court gave the ruling on 29 January, 2018, which opened the proceedings and appointed the case for consideration under simplified procedure without notifying the parties. The plaintiff appealed to the court with a claim in which she requested to change the amount of alimony charged from the plaintiff in favour of the defendant for the maintenance of her daughter, V.Y., on 6 January, 2004, having increased their size to 1/3 of all kinds of earnings (income) but not less than 50% of the subsistence minimum for a child of the corresponding age on a monthly basis, starting from the day the decision is made and until the child is fully admitted. The claims are motivated by the fact that on 9 June, 2009, the decision of the Borodyanka district court of Kyiv region ordered to collect from the defendant in favour of the plaintiff for the maintenance of V.Y. in the amount of 1/3 of all types of earnings, but not less than 30% of the subsistence minimum for a child of the corresponding age on a monthly basis. The minimum subsistence allowance per child cannot be less than 50% of the subsistence minimum for a child of the appropriate age. After examining the materials submitted to the court, the court concluded that it was necessary to appoint a case for consideration under simplified procedure with the summons of the parties in the case, as decided by the resolution dated 13 April, 2018, since the defendant did not receive a ruling to open a simplified proceeding and did not send a reference to claim accordingly.

The court decision of 15 January, 2018 opened the proceedings and appointed a case on the claim of G. to the Limited Liability Company 'P', T., L., third person: Private Joint-Stock Insurance Company 'Y', on compensation for damage caused by a road accident to a simplified procedure without notifying the parties. The plaintiff appealed to the court in a suit to recover from the defendants the pecuniary damage caused to the plaintiff's property in the amount of 38,863.94 UAH, expenses for conducting an examination regarding the assessment of the amount of material damage in the amount of 890.00 UAH, the cost of legal aid of 5,000.00 UAH, as well as 640.00 UAH which is the cost of payment of court fees. The claim is motivated by the fact that on 10 April, 2017 as a result of an accident involving the car 'Volkswagen' belonging to the defendant T. and the car 'Mitsubishi' that belonged to the plaintiff at the time of an accident,, the property of the claimant was damaged. The amount of damage is confirmed by the conclusion of the automobile product examination. After examining the materials submitted to the court, the court reached the conclusion that it is necessary to appoint a case for consideration in the form of a simplified procedure with the summons of the parties in the case based on the submitted references and responses to the references, which was decided on the corresponding court order dated 13 April, 2018.

In the course of this generalization, several more cases were opened, the consideration of which was initiated under the rules of simplified proceedings, after which a decision was passed on the transition to the consideration by the rules of the general proceedings. In particular, simplified proceedings in the civil case on the claim of B.T. to B.S. for the recovery of alimony (case number 756/3133/18, proceedings number 2/756/3365/18) was opened by the decision of Obolonskyi district court of Kyiv dated 21 March 2018. The plaintiff appealed to the court with a claim, in which she asked to collect alimony from the defendant in favour of the plaintiff for the maintenance of a daughter in the amount of 1/3 of all kinds of earnings, justifying the claims by voluntarily failing to arrange for the child's maintenance. However, in the future, the court, by its ruling of 23 May, 2018, on the grounds for the full and comprehensive consideration of the case on merits, in order to fully clarify all the circumstances, the objective and proper assessment of the evidence, concluded that the said civil case is subject to review in the order of general proceedings. Thus, by the decision of Obolonskyi district court of Kyiv on 18 September, 2018, the suit is satisfied, alimony is taken from B. S.in favour of B. T.for the maintenance of the daughter in the amount of 1/3 part of all types of earnings (income) per month, but not less than 50% of the subsistence minimum for a child of the corresponding age, starting from 7 March 2018 and until the child reaches the age of majority.

Another example is the decision of Obolonskyi district court of Kyiv of 14 June, 2018, which appointed a case to the general action procedure of civil proceedings in a suit of the Public Joint-Stock Company Commercial Bank 'P.' to T. on debt collection under a loan agreement, with reference to the decision of Obolonskyi District Court of Kyiv dated 2 February2018 in a civil case in a suit of the Public Joint Stock Company Commercial Bank 'P.' to T. on the collection of debt under a loan agreement by which simplified action proceedings is opened. Due to the nature of the litigious legal relationship, the court opened a discussion on possibility of transition

case consideration to the general proceedings. Taking into account the opinion of the defendant's representative, the court decided to consider the said civil case under general procedure. By the decision of Obolonskyi district court of Kyiv on 14 August, 2018, the satisfaction of the claims of Joint Stock Company Commercial Bank 'P.' to T. on collection of debts was refused.

In another civil case the statement of the defendant Y. on the consideration of the case in the general proceedings was satisfied. The court decided in general action proceedings in a civil case under the lawsuit of the Union of the co-owners of the multi-apartment house 'Kvazar' to Y. on the collection of arrears for housing and communal services, with reference to the fact that by the decision of Obolonskyi district court of Kyiv of 1 February,2018 simplified action proceeding was opened in the civil case, however, on 16 February, 2018, a statement from the defendant was received through the court office with objections against the consideration of the case in simplified proceedings, since the consideration of the case under simplified procedure may be detrimental to the rights and interests of the defendant, and the reasons given in the statement of claim are ungrounded because they consist of incomplete clarifications of all circumstances, biased evaluation of the information that is available to the plaintiff and are made in the absence of appropriate and admissible evidence on the basis of which it is possible to come to unambiguous conclusion about implicit responsibility of the defendant. At present, the court decision in this case is not resolved.

By the decision of Obolonskyi district court of Kyiv of 2 December,2018 it was decided to accept the claim for consideration and open a simplified proceeding on the claim of commercial bank 'P.' to B. on collection of debt under a loan agreement. However, on 13 April, 2018, the defendant submitted a statement of objections to the consideration of the case in court in the form of simplified proceedings and requested that the case be considered on the merits under general procedure. In her statement, the defendant referred to the fact that she had doubts about a number of documents provided by the plaintiff, so she asks the court to examine the originals in the court session. Thus, by the decision of Obolonskyi District Court of Kyiv dated 4 May, 2018, a suit on the claim of commercial bank 'P.' to B. on the collection of arrears under a loan agreement was appointed to be considered under general procedure, and by the decision of 10 July,2018 the claims of commercial bank 'P.' were partially satisfied, reducing the amount of fines.

Also, it is worth to pay attention to the proceedings on the lawsuit of O.O. to O.A. on the recovery of alimony, where by the decision of Obolonskyi District Court of Kyiv of 21 March, 2018 in a civil case on a claim of O.O. to O.A. on the recovery of alimony simplified action proceeding was opened. The plaintiff appealed to the court in a suit, in which she asks to recover alimony from the defendant in favour of the plaintiff for the maintenance of her son O.A.O., born on 19 December, 2007, in the amount of 1/4 of all kinds of earnings (income), but not less than 50% of the subsistence minimums for a child of the corresponding age on a monthly basis, as well as for the maintenance of the daughter O.V., born on 5 July, 2005, in the amount of 1/4 of all kinds of earnings (income), but not less than 50% of the subsistence minimum for a child of the corresponding age on a monthly basis

starting collection from the day of filing the claim to the day when the children reach the age of majority. The demands are motivated by the fact that the children live with the plaintiff and are on her maintenance. The defendant does not provide assistance in the maintenance of children. Taking into account the circumstances of the case and the claims, the court considered that for the full and comprehensive consideration of the case on merits, in order to fully clarify all the circumstances, the objective and proper assessment of the evidence, the indicated civil case is subject to consideration under general proceedings. An out-of-court decision on the case satisfied the demands of the claim.

Taking into account the above, in our opinion, the court practice should develop an established procedure for determining in which cases the court can move from simplified proceedings to general proceedings, if the proceedings have been opened before the new edition of the CPC of Ukraine comes into force, but the parties wish to consider it in simplified proceedings etc.

During the generalization, it was established that the judges of Kyiv Obolonskyi District Court for the period from 15 December, 2017 and the first half of 2018 did not experience the problems and typical mistakes that usually arise during the consideration of civil cases under simplified procedure.

However, in our opinion, it is worthwhile to wait for the practice of courts of appeal and cassation to consider civil cases in the order of simplified and general proceedings to develop a clear practice of assigning cases to insignificant ones and those that should be considered under the rules of simplified proceedings.

PRACTICAL VALUE OF THE INSTITUTE OF INSIGNIFICANT CASES IN THE LIGHT OF CHANGES TO THE CPC OF UKRAINE

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1. INTRODUCTION

On 15 December, 2017, the Law of Ukraine No. 2147-VIII of 3 October, 2017 'On Amendments to the Commercial Procedural Code of Ukraine, the Civil Procedural Code of Ukraine, the Code of Administrative Legal Proceedings of Ukraine and Other Legislative Acts' (hereinafter referred to as Law No. 2147-VIII) came into force.

In accordance with part one of Article 2 of the Civil Procedural Code of Ukraine (hereinafter the CPC), the task of civil proceedings is fair, impartial and timely consideration and resolution of civil cases for the purpose of effective protection of violated, unrecognized or disputed rights, freedoms or interests of individuals, the rights and interests of legal entities, as well as interests of a state.

In this paper we underlined the current legislation as well as analysed new court practice. Some of reflections to conclude were made at the end of this report.

2. SMALL CLAIMS AND SIMPLIFIED PROCEEDINGS – THE LEGISLATION NOVELTIES

One of the novelties of the CPC is the introduction of such an institute as insignificant cases. The Law of Ukraine of 2 June, 2016, No. 1401-VIII 'On Amendments to the Constitution of Ukraine (on Justice)', supplemented the Constitution of Ukraine with Article 131-2, part 5 of which provides that the law may specify exceptions regarding representation in a court in labour disputes, disputes concerning the protection of social rights, elections and referendums, insignificant cases, as well as representation of infants or juveniles and persons recognized as incapacitated by the court or whose capacity is limited.

The relevance of the institution of insignificant cases is defined in part 2 of Article 60 of the CPC, according to which in consideration of disputes arising from labour relations, as well as insignificant cases, a person who has attained the age of eighteen years and has legal capacity to sue (with the exception of persons defined in Article 61 of this Code), may act as a representative. In addition, this Article envisages the possibility of considering these cases under simplified action procedure.

Also, the CPC states that the abovementioned institution of insignificant cases may be applied, with appropriate features and limitations, during both appeal (provided for in Article 369, Part 1 of the CPC) and cassation review of the case.

The new wording of the Civil Procedural Code of Ukraine also introduces the institute of simplified proceedings.

In order to find out the relation between the concepts of 'simplified' and 'urgent' proceedings, one should take into account the approaches applied by the Council of Europe.

Thus, CEPEJ notes that one way to improve the administration of justice in a reasonable time with the preservation of the quality of decisions is, firstly, urgent proceedings aimed at better satisfying the needs of those who appeal to the court, and secondly , simplified or reconciliatory procedures, designed for the consideration of insignificant or uncontested cases.

Accelerated proceedings often relate to pressing and urgent issues and are connected to: prevention of imminent danger or irreparable damage to the applicant; provision of evidence; disputes in which a preliminary or intermediate solution is required; labour disputes; protection of the applicant's property interests; disputes over monetary claims; bankruptcy cases; affairs relating to marriage relations, alimony obligations, affairs related to the protection of children's rights.

Instead, simplified procedures are often less costly, and require a shorter decision-making process.

Thus, simplified civil proceedings are used in most cases for unobjectionable cash collection (for example, *Mahnverfahren* in Germany or *Moneyclaim online* in England and Wales). Simplified proceedings may take various forms, for example, a decision without a court session, or with the latter being held in a judge's office, a decision made by judge alone, a simplified decision, etc. Moreover, in more than half of the states, simplified procedures in civil proceedings concern not only orders for payment, but also proceedings for small amounts.

With the entry of the amendments to the CPC into force, 'insignificant cases' has become a legal category, which is subject to the application with the relevant legal criteria. Therefore, adherence to such basic principles of civil proceedings, enshrined in paragraph 3 of Article 2 of the CPC, as the reasonableness of the terms of consideration of the case, proportionality, respect for honour and dignity, equality of all participants in the trial before law and court; ensuring the right to appeal and ensuring the right to appeal a court decision in a court of cassation

instance in cases established by law, as well as observance of the rule of law principle, which should be guiding principle in the course of consideration of cases in accordance with paragraph 1 of Article 10 of the CPC, depends on the correct application by judges of the new institution of insignificant cases.

The right to a case consideration means the right of a person to apply to a court and the right to have his/her case reviewed and resolved by a court. In this case, the person shall be given the opportunity to exercise the rights in question without any obstacles or complications. The ability of a person to freely receive legal protection is the content of the notion of access to justice.

In accordance with paragraph 4 of Art. 10 of the CPC of Ukraine, in the consideration of cases the court shall apply the Convention on the Protection of Human Rights and Fundamental Freedoms (hereinafter referred to as the 'Convention') of 1950 and its protocols, the consent to be bound by which was provided by the Verkhovna Rada of Ukraine and the practice of the European Court of Human Rights as a source of law.

Article 6 of the Convention guarantees the right to a fair and public hearing of a case within a reasonable time by an independent and impartial court established by law in determining the civil rights and obligations of a person.

The key principles of article 6 are the rule of law and the proper administration of justice. These principles are also fundamental elements of the right to a fair trial.

Given the fact that the right to a fair trial occupies a central place in the system of global values of a democratic society, the European Court offers rather broad interpretation of it in its practice.

In the case of *Bellet v France* the Court stipulated that 'Article 6 para 1 of the Convention contains guarantees of fair trial, one aspect of which is access to a court. The level of access provided by national legislation should be sufficient to ensure the right of a person to a court in the light of the rule of law in a democratic society. In order for access to be effective, a person shall have a clear practical opportunity to challenge actions that interfere with his/her rights.'

Consequently, taking into account the objective of civil justice for fair, impartial and timely consideration and resolution of civil cases in order to effectively protect the violated, unrecognized or disputed rights, freedoms or interests of individuals, the rights and interests of legal entities, the interests of the state, the legislator has chosen the best way introducing an institution of small cases.

3. GENERALIZATION OF THE COURT PRACTICE AND DEFINING SOME PROBLEMS OF THE NEW CPC IMPLEMENTATION

There is no definition of an 'insignificant case' in the civil procedural legislation of Ukraine. Para 6 of Art. 19 of the CPC determines the cases that are insignificant for the purposes of this Code. Similar provisions are contained in paragraph 5 of Art. 12 of the Commercial Procedural Code of Ukraine. In contrast

to these Codes, in paragraph 20, part 1 of Art. 4 of the Code of Administrative Justice of Ukraine the definition of the notion of an administrative case of low complexity (insignificant case) is given. This is an administrative case in which the nature of the disputed legal relationship, the subject of evidence and the composition of the participants, etc., do not require the conduct of preparatory proceedings and (or) court sessions for the complete and comprehensive determination of its circumstances. Despite the lack of a definition of this concept in the civil process, since the entry into force of the CPC of Ukraine, insignificant cases are a separate category of civil cases that need to be resolved in the manner prescribed by this Code.

According to Part 6 of Article 19 of the CPC of Ukraine, insignificant cases are:
1) cases in which the value of a claim does not exceed one hundred sizes of subsistence minimums for able-bodied persons;
2) cases of low complexity, which are recognized as insignificant by the court, except cases that are to be considered only under general procedure, and cases where the value of a claim exceeds five hundred subsistence minimum sizes for able-bodied persons.

It should be noted that the Supreme Court, in the composition of the Court of Cassation in case 127/22669/17 of 14 March, 2018, expressed its opinion and noted that, considering that the provisions of Article 19 of the CPC in the structure of a legislative act are among the General Provisions of this Code, the court has the right to classify the case as an insignificant one at any stage of its consideration. At the same time, according to the content of the rules of paragraph 1 of the sixth part of Article 19 of the CPC, cases specified in this provision, are insignificant due to the properties inherent in such a case, based on the price of the lawsuit and its subject, without the need for a separate court decision to assign this case to the appropriate category.

Thus, part 1 of Article 274 of the Civil Procedural Code provides that the following is to be considered under simplified action procedure: 1) insignificant cases; 2) cases arising from labour relations.

In accordance with Part 3 of Article 274 of the CPC, the court takes the following into account in the recognition of the case as an insignificant one:
1. the price of the lawsuit;
2. the meaning of the case to the parties;
3. the method of protection chosen by the plaintiff;
4. category and complexity of the case;
5. the scope and nature of the evidence in the case, including whether it is necessary to appoint an expert examination, to summon witnesses, etc.;
6. the number of parties and other participants of the case;
7. if the consideration of the case is of significant public interest;
8. the opinion of the parties on the need to consider the case under simplified procedure.

The term 'insignificant case' is used in the following articles of the CPC: parts 4 and 6 Art. 19, part 2 of Art. 60, paragraph 1, part 1 of Art. 274, part 3 of Art. 389.

Considering such criterion for defining an insignificant case as, in particular, the price of a claim, and based on a systematic interpretation of this notion, one can come to the conclusion that it is also used in the following articles of the CPC of Ukraine: para 7 part 1 of Art. 161, para 5, part 4 of Art. 274, part 1 of Art. 369, part 4 of Art. 394.

As noted above, the criteria for assigning a case to an insignificant one are given in Part 6 of Art. 19 of the CPC of Ukraine. Since Art. 19 of the CPC of Ukraine is placed in Section 1 of this Code, entitled 'General Provisions', it should be applied by the courts regardless of the stage of consideration of the case, unless otherwise is provided by the relevant articles of the Code, which regulate the peculiarities of consideration of the case at a certain stage. That means that both court of first instance and the court of appeal and/or cassation instance may recognize the case as an insignificant one and/or recognize the assignment of a case to a category of insignificant ones as incorrect.

At the same time, taking into account that insignificant cases are considered under the rules of simplified proceedings, and these rules are defined in the decision on opening of proceedings in the case, and in accordance with the requirements of Part 3 of Art. 3 of the CPC, proceedings in civil cases are carried out in accordance with the laws in force at the time of the commission of certain procedural actions, consideration and resolution of the case, and, taking into account the absence in the provisions of the CPC (in the wording of 2004) of such a proceeding as simplified proceedings, we consider that the case, in which proceedings are opened before 15 December, 2017, cannot be defined as a small and considered according to the rules of simplified proceedings by the court of first instance. The transitional provisions of the CPC of Ukraine also do not provide for the possibility of changing the procedure for reviewing the case from the general proceedings to a simplified, as opposed to the possibility of such a change from the action to the summary proceedings (paragraph 12 para 1 of the Transitional Provisions).

In Art. 19 of the CPC insignificant cases are defined as:
1) cases in which the value of a claim does not exceed one hundred sizes of subsistence minimums for able-bodied persons;
2) cases of low complexity, which are recognized by the court as small ones, except cases which are subject to consideration only under the rules of general proceedings, and cases where the value of a claim exceeds five hundred sizes of subsistence minimum for able-bodied persons.

The first category of insignificant cases includes cases of small claims of property character (property disputes), the value of which does not exceed one hundred subsistence minimums for able-bodied persons.

It should be kept in mind that the indication of the value of the claim is one of the requirements to the statement of a claim (paragraph 3 part 3 Article 175 of the CPC), the failure to comply with which will result in the application of the provisions of Part 1 of Art. 185 of this Code. The strict observance of these requirements by the plaintiff helps the court in deciding on the assignment of a case to a category of small cases.

In deciding on the assignment of a case under this criterion to a category of small cases, the court should first of all be guided by the provisions of Art. 176 of the CPC of Ukraine, as well as rationally use the possibilities of Part 2 of this article of the Code.

The application of these provisions by the court is carried out in conjunction with the provisions of Part 9 of Art. 19 of the CPC of Ukraine, according to which for the purposes of this Code, the subsistence minimum for able-bodied persons is calculated as of 1 January of the calendar year in which the corresponding application or complaint is filed, a procedural act is performed or a court decision is made.

For assigning, according to this criterion, of a case to a category of small cases, which can be conventionally called 'imperative (legal) basis', the court during the decision on the opening of proceedings shall verify only the value of the claim, as well as the absence of this case by category in the list specified in Part 4 of Art. 274 of the CPC, which excludes the possibility of considering certain categories of cases, including small cases, under simplified procedure. Violation of these prescriptions, in particular, as for the consideration of the case by the rules of simplified proceedings, is the basis for the abolition of the adopted court decisions in the appeal order with the adoption of a new decision (para 7 part 3 of Article 376 of the CPC) and the cassation order (para 7 part 1 Article 411 of the CPC). Instead, consideration of a small case under the rules of general proceedings is not a ground for cancellation of court decisions, but is a violation of the rules of procedural law by the court, which is not a compulsory basis for the annulment of a court decision (taking into account the exceptions provided for in paragraph 2 of Article 376 of the CPC), which can only testify to the violation by the court of the principle of 'procedural economy', which is inherent in this category of cases, in accordance with the provisions of Part 4 of Art. 19 and Art. 275 of the CPC.

If the case is insignificant in accordance with paragraph 1 part 6 of Art. 19 of the CPC, it is viable to restrict to the reference to it in the decision on opening of proceedings, indicating the category of the case and the value of the claim, as well as the indication of the consideration of the case under simplified procedure (Part 4 of Article 19, Part 2 of Article 187, Part 1, Article 274, Part 1, Article 277 of the CPC).

It should also be noted that the legislator has identified a list of cases that cannot be considered under simplified procedure: 1) cases arising from family relations, except for disputes regarding the payment of alimony and the division of property of the spouses; 2) cases regarding inheritance; 3) cases regarding the privatization of the state housing stock; 4) cases regarding the recognition of unsubstantiated assets and claims regarding them in accordance with chapter 12 of this section; 5) cases in which the value of the claim exceeds five hundred subsistence minimums for able-bodied persons; 6) other claims combined with the requirements in the disputes specified in paras 1 to 5 of this part.

Most typical insignificant cases in which the value of the claim does not exceed one hundred sizes of the subsistence minimum for able-bodied persons are cases arising from credit relations, the collection of alimony and compensation for damage.

Thus, by an extraordinary decision of the Kupiyanskyi District Court of Kharkiv Oblast as of 05 March, 2018 in case No. 628/3285/17 the claims of commercial bank 'P.' to Individual 1 on collection of loan debt in the amount of 19,877.85 UAH were satisfied.

On 3 January, 2018, proceedings were opened in the said case and it was decided to conduct a trial under simplified procedure, as the said case is considered to be insignificant.

Thus, the decision of the Frunzenskyi District Court of the city of Kharkiv dated 30 May, 2018, in case No. 645/689/18, satisfied the demands of the Communal Enterprise 'Kharkivvodokanal' and the arrears for the provided services for centralized water supply and drainage in the amount of 10,089,23 UAH was collected jointly from Person 1 and Person 2.

On 13 April, 2018, proceedings were opened in this case and it was decided to consider it under simplified procedure, as the said case is considered to be insignificant. Respondents did not provide a petition for a statement of claim, no requests regarding the consideration of the case with the parties` notification were received from the parties, and therefore, the case was considered without summons of the parties.

By the decision of the Kharkiv district court of Kharkiv Oblast of 13 March, 2018, in the case No. 635/7326/17, the claims of Person 1 were met, alimony for the child's maintenance from Person 2 was settled in a solid monetary amount of 2,000 UAH monthly, but not less than 50% of the subsistence minimum for a child of the corresponding age.

On 13 March, 2018, the proceedings were opened and it was decided to hear a case under simplified procedure.

According to Part 5, 6 of Art. 279 of the CPC, the court examines the case under simplified procedure without notice to the parties according to the materials available in the case, in the absence of a petition of any of the parties about the other. At the request of one of the parties or on its own initiative, the court proceedings are conducted in a court session with the notification (summoning) of the parties.

The court may refuse to satisfy a party's request to hear a case in a court session with notification of the parties in the case of simultaneous existence of the following conditions:
- the subject of a claim is the collection of a monetary amount, the size of which does not exceed one hundred subsistence minimums for able-bodied persons;
- the nature of the disputed legal relationship and the subject of evidence in the case do not require a court session with the notification of the parties for full and complete establishment of the circumstances of the case.

In accordance with part 8 of Art. 279 of the CPC, when considering the case under simplified procedure, the court examines the evidence and written explanations set forth in the statements on the merits of the case, and, if the case is considered with the notification (summons) of the participants of the case, also hears their oral explanations and testimony. Judicial debates are not held.

In view of the changes in the civil procedural legislation, namely the introduction of the institute of simplified proceedings, the legislator tried to resolve the issue of observance of reasonable time periods for consideration of court cases, in which the subject matter of claims is objectively not sufficiently significant for consideration in general proceedings. The criterion for defining cases of this category in addition to the size of claims of 100 amounts of the subsistence minimum for able-bodied persons is the significance of the case to the parties, the method chosen by the plaintiff, the category and complexity of the case, the scope and nature of evidence in the case, including the necessity of appointing expertise in the case, the necessity of summoning witnesses, etc., the number of parties and other participants in the case and whether the consideration of the case is of significant public interest. Thus, the concept of "insignificant of the case" provides for a simplified procedure for its consideration, depending on the size and nature of the claims.

As for the consideration of insignificant cases of low complexity with the value of a claim, which does not exceed five hundred subsistence minimum sizes for able-bodied persons, the courts have considered a small number of cases of the specified category.

Thus, the Suvorov District Court considered case number 523/1493/18 on the claim of Person 1 to Person 2 on the collection of funds in the amount of 300,000 UAH on the grounds of not fulfilling obligations. A statement of claim is filed to the claim on consideration of the case in the form of simplified proceedings. The case is considered in accordance with the requirements of paragraph 2 part 6 of Art. 19 of the CPC.

The cases arising from labour relations are imperatively appointed to this category of cases.

Thus, the Illichivsk city court of Odessa oblast considered the case on the claim of Person 1 to the SE Sea Commercial Port 'Chornomorsk' on the recovery of average earnings during forced unemployment in connection with execution of a court decision in the amount of 180,858.72 UAH. The claim cost exceeds five hundred sizes of subsistence minimum for able-bodied persons, but it concerns labour relations, and according to Art. 274 of the CPC it refers to cases that are considered under simplified procedure.

Part 2 of Art. 274 of the CPC states that any other case that is subject to the jurisdiction of the court may be considered under simplified procedure, except for cases specified in part four of this article. The decision on the consideration of such cases under simplified procedure is carried out by the court in accordance with the requirements of Part 2 of Art. 277 of the CPC of Ukraine. The above applies to the category of cases stipulated in Part 4 of Art. 19 of the CPC of Ukraine. Therefore, the notion of 'complexity of the case', 'a case of low complexity' should be used in assigning such a case to the category of insignificant cases on the basis of paragraph 2 of Part 6 of Art. 19 of the CPC of Ukraine, as well as when deciding on the possibility of considering a case under simplified procedure on the basis of the provisions of Part 2 of Art. 274 and Part 2 of Art. 277 of the CPC of Ukraine.

When deciding on the complexity of the case as a prerequisite for being able to be classified as insignificant, judges should also take into account the practice of

the ECHR, in particular, the cases of Fedin versus Ukraine of 2 September, 2010, *Smirnov v Ukraine* of 8 November, 2005, *Matika v Romania* of 2 November 2006, *Lithoselitis v Greece*, of 5 February, 2004, and others.

According to the established practice of this court, each case has a legal and factual complexity, the assessment of which takes into account, in particular, the presence of circumstances that hinder the consideration of the case; number of co-defendants, co-respondents and other participants in the process; necessity of conducting of expert reports and their complexity; the need to interrogate a large number of witnesses; participation in the case of a foreign element and the need to clarify and apply the rules of foreign law, etc.

In part, these circumstances are taken into account by the court in deciding on the consideration of a case under simplified or general procedure, which is provided, in particular, in paragraphs 4, 5, 6 part 3 of Art. 274 of the CPC.

However, this does not indicate that in resolving the issue of the recognition of a case as a case of low complexity by the court on the basis of paragraph 2 of Part 6 of Art. 19 of the CPC, the court shall take into account the circumstances envisaged in Part 3 of Art. 274 of the CPC, as these provisions are applied by the court on the basis of Part 2 of Art. 277 and Part 2 of Art. 274 of the CPC, and they are dispositive, and according to the provisions of paragraph 1, part 1 of Art. 274 and Part 7 of Art. 277 of this Code, which are imperative, all small cases, in particular, which are such on the basis of clause 2 of Part 6 of Art. 19 of the CPC are considered only under simplified procedure.

Taking into account the principles of civil proceedings, enshrined in Art. 2 of the CPC, the issue of considering small cases at the stage of appeal proceedings does not arise, as courts in most cases consider these cases in accordance with the rules of general proceedings.

Pursuant to paragraph 2 of the third part of Article 389 of the CPC, court decisions in small cases are not subject to appeal in cassation.

Regarding the consideration of these cases by the cassation court, the Supreme Court, in the composition of the Court of Cassation, noted that the rules introduced by the legislator concerning the limitation of the right of cassation appeal are complied with the Constitution of Ukraine, in accordance with Article 129 of which the basic principles of legal proceedings are, among other, the right to appeal review of the case and in cases determined by law - on a cassation appeal of a court decision.

The above is fully in line with the legal positions of the European Court of Human Rights in cases Levages Prestation Services v. France and Brualla Gomez de la Torre v. Spain, according to which the conditions for the admissibility of a cassation appeal may, in accordance with the law, be more restrictive than for a standard application. Given the special status of the court of cassation, procedures in the court of cassation may be more formal, especially if the proceedings are conducted by a court after their consideration by the court of first instance and then by the court of appellate instance.

The introduction of a new institution of insignificant cases enables the quick solution of minor conflicts and the observance by the courts of reasonable timeframes for cases.

SUMMARIES OF THE CONFERENCE "SMALL CLAIMS PROCEDURE: THE EUROPEAN AND THE UKRAINIAN EXPERIENCE"

by Iryna Izarova and Radoslaw Flejszar

The International Scientific and Practical Conference, devoted to the topic of simplified proceedings '**Small Claims Procedure: the European and the Ukrainian Experience',** was held on 23-24 November in Kyiv, Ukraine. This conference was a significant event, firs of all, because of the composition of the co-founders, among which were the best Ukrainian law high schools – Taras Shevchenko University of Kyiv, National University 'Kyiv-Mohyla Academy' and National University 'Yaroslav the Wise Law Academy'. Our partnership with the Jagellonian University, undoubtedly, contributed to sharing of the best European practice with Ukraine!

During the conference the discussion and sharing of the leading European countries` knowledge was held, particularly in the field of national small claims procedures and the European Small Claims Procedure.

The well-known academics were among the key-speakers of the conference from the leading universities of Europe – Jagellonian University, Maastricht University, Leuven University, Salzburg University, Pavia University and Vilnius University. The conference was attended by the representatives of ten countries – Ukraine, Poland, Lithuania, Croatia, Italy, Germany, Austria, the Netherlands, Belgium and Luxemburg, ten of them were from the Council of Europe and nine – from the European Union. This was a great opportunity to hold an international discussion for sharing knowledge and the best European practices related to small claims.

Among the reports, included in the conference book, there are significant researches, related both to national small claims procedure of various states and the European small claims procedure, such as *The European Small Claims Procedure and its place in the system of Polish separate Proceedings*, written by **Dr. Małgorzata Malczyk**, assoc. prof. of Civil Procedure Department, Jagiellonian University and **Dr. Joanna May**, assoc. prof. The Nicolaus Copernicus University in Toruń.

Some of the authors` conclusions are extremely important for science development, among which the idea that the European Small Claims Procedure can be included in simplified and accelerated proceedings, since the course of this proceeding, and, in particular, the possibility of considering a case at a secret sitting indicates common features with this group of separate proceedings. Definitely, we

should agree, that in the case when the claimant submits the application in electronic form of payment, while in the course of which there will be no grounds for issuing a payment order, or the court ex officio waives the payment order or there is an effective opposition against the order for payment, it is not permissible the use of the European Small Claims Procedure.

One of the brilliant essays is devoted to comparing the Ukrainian Small Claims Procedure and the German Small Claims (*Bagatellverfahren*), as well as the European Small Claims Procedure, written by **Dr. Nazar Panych**, Dr. jur., LL.M., Institute of East European Law, Christian-Albrechts-University zu Kiel. According to their conclusions, comparative analysis of Part 6 of Article 19 of the Civil Procedure Code of Ukraine and para 495a of the CPC of Germany testifies that today the Ukrainian procedural law establishes considerably wider - in comparison with the German procedural law - limits for assigning the relevant case to a category of small ones. Moreover, if take into account the powers of the Ukrainian court, the cases of low complexity are also small, the price of which exceeds approximately 28,850 Euros, then the differences between the minor cases according to Ukrainian and German law become apparent. And only in comparison with the norms of the EU law, in particular, part 1 of Article 2 of Regulation (EC) No 861/2007 concerning the aspect of margin of discretion, these differences lose their essential character.

The essential difference between the CPC of Ukraine and the CPC of Germany is the regulation of the powers of the court to decide whether the consideration of a minor matter is to be with the notification (call) of the parties or without it. While the German court should consider a minor case with the notification (challenge) of the parties in the presence of the relevant request, the Ukrainian court has the right – even if there is a corresponding request - to decline it. Although the CPC of Ukraine theoretically sets a high barrier for a court that should prevent its potentially arbitrary rejection of the relevant request, it is impossible to exclude the formal reference by the court to the lack of a need for a court session, given the nature of the controversial legal relationship and the subject of evidence. This clause, in opinion of **Dr. Panych**, creates preconditions for simplifying small cases by limiting the participation in the case of the parties to the case, thereby contributing to a potential imbalance between the interests of the court and the parties to the case and, thus, may be one of the prerequisites for their further recourse to the ECHR.

An extremely important and interesting study published in the conference book is *Jurisdiction of small claims in civil proceedings* written by **Dr. Roksolana Khanyk-Pospolitak,** Head of Private Law Department, Law Faculty, National University 'Kyiv-Mohyla Academy.' In particular, it is worthwhile to support the viewpoint of the author regarding the unjustified placement of a definition of cases, which are small, in the paragraph on jurisdiction in the CPC of Ukraine, on the basis that in this case the question of which court shall consider the case is not resolved. The definition of 'small' cases, as the author rightly points out, should be contained directly in the chapter on simplified proceedings. The absence in the CPC of Ukraine of special rules for determining the territorial jurisdiction in the categories of cases considered under simplified procedure shows that such provi-

sions are governed by the provisions on the definition of territorial jurisdiction contained in Articles 26-30 of the CPC of Ukraine.

The simplified proceedings in the post-reform process also became a universal procedure for the courts of appeal and cassation. In view of this, the report of **prof. Kostyantyn Gusarov**, Head of Civil Procedure Department, National University 'Yaroslav the Wise Law Academy', entitled '*Simplicity of Proceedings for the Revision of Court Decisions in Civil Procedure*" is very interesting. In his work, the author defends the position that the term 'simplified proceedings' does not correspond to rather complicated procedures by which cases are solved in the Court of Cassation. Such 'not summary justice' within the limits of the civil procedural law of simplified proceedings in the order of cassation may take place, under condition of the necessity to depart from the conclusion on the application of the rules of law in similar legal relations set forth in decisions previously passed by the colleges or chambers of the Supreme Court. A separate mandatory condition for the transfer of the case to the Grand Chamber of the Supreme Court is the appeal of court decisions on grounds of violation of the rules of substantive and subjective jurisdiction. According to the author`s belief, the possibility of verifying the validity and (or) legality of a court decision using simplified forms of proceedings is highly controversial, and an instantiated review of court decisions under the rules of simplified proceedings should take place only in the absence of multi-subjective substantive legal and procedural legal relations. At the same time, the price of the claim or the value of the subject of the claim should be taken into account if the claim is not subject to monetary valuation. It seems also inappropriate to review a court decision under in simplified proceedings in the case when the person initiating such review is a person who did not participate in the consideration of the case, under condition that the court decides on the question of his/her rights, freedoms, interests and / or responsibilities.

The problems of cassation appeal of court decisions in small cases are extremely relevant and repeatedly raised in the theses of reports of the participants of the conference. The work of **Dr. Natalia Sakara,** assoc. prof. of the Civil Procedure Department, National University 'Yaroslav the Wise Law Academy', is specifically devoted to the problems of implementing *the right to appeal against judicial decisions in minor cases*. As the author rightly justifies, the legislative imposition of restrictions on the implementation of the right to appeal against judicial decisions in small cases does not in itself violate clause 1 of Art. 6 The ECHR, however, the lack of the legislative criteria to be taken into account by the courts in classifying the case as a small one as well as the uncertainty of the stage at which this issue is to be resolved and, subsequently, of the authorized court, may indicate a lack of "predictability" of the restriction and lead to a violation of the right to access the court of cassation.

Moreover, the practical experience was discussed with the representatives of judicial power – judges from Ukraine, Poland and Germany. A few of the generalization of the court practice reports were included in the conference book.

In the report of **Maksim Tytov**, Judge, Vice-Head of the Forth Circuit Court of Kyiv, **Tetiana Korotenko**, a judge assistant entitled '*Simplified Action Procedure:*

New Practice and Experience for Ukrainian Judges' it is stated, that it is not possible to provide statistics on the number of cases considered under simplified action procedure, compared to the total number of cases pending to be considered under action procedure, as well as the number of decrees on transition to consideration of the case under the rules of general proceedings, since Kyiv Obolonskyi District Court does not hold the records, which, in our opinion, is a disadvantage, which in future will not allow a more detailed generalization of the judicial practices.

According to this generalization, the authors argued, that the simplified action proceeding is intended to deal with the simplest cases, in proportion to the value of the claim, the priority of the written form, as well as in the absence of mandatory representation, it is necessary to clearly define in the legislation which cases can be considered in simplified proceedings. Taking into account the above, in the authors opinion, the court practice should develop clear, transparent, understandable criteria for assigning particular categories of cases to small ones, and accordingly, to consider these cases under simplified procedure. According to this, the court practice should develop an established procedure for determining in which cases the court can transfer from simplified proceedings to general proceedings, if the proceedings are open before the new edition of the CPC of Ukraine comes into force, but the parties wish to consider it in an order of simplified proceedings etc.

In the other court report written by **Larysa Shvetzova**, Member of the High Council of Justice, Judge of the Kharkiv Region Appeal Court, *The Practical Value of Small Claims in the Light of the CPC Changes,* the issues of appeal in Small Claims raise. As author admitted, the introduction of a new institution of small cases enables the quick solution of minor conflicts and the observance by the courts of reasonable timeframes for cases. In view of this, and also in view of the special status of the court of cassation, according to the author, the procedures in the court of cassation may be more formal, especially if the proceeding is carried out by the court after their consideration by the court of first instance, and then by the court of appellate instance.

In conclusion, we wish to express our gratitude for all the colleagues from judiciary for their reports, and thank for the contribution to the conference book! We hope that it will contribute to the further development, cooperation and dissemination of knowledge and experience of the best European practices in Ukraine and Poland as well.

NEW ARBITRATION LAW IN THE UNITED ARAB EMIRATES (UAE): AN OVERVIEW

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The UAE are taking a further step towards becoming a model for free trade, openness and attractiveness to foreign investments. Recently his Highness Sheikh Khalifa bin Zayed Al Nahyan, the President of the UAE, has issued the New Arbitration Federal Law No. 6, which entered into force on 16th of June 2018. It now applies to all arbitral proceedings in the UAE.

The new Law is based on the UNCITRAL Model Law and follows its main principles. Thus, it is aligned with international best practice and standards for arbitration process.

While getting into details of the legal wording of the law, it should be noted that it introduces the principles of separability and competence-competence, as well as gives clarifications on the competent court and its powers. Both arbitral tribunals and courts (through the president of the court) now have the power to order interim and conservatory measures relating to ongoing or potential arbitrations; the fact that the court has ordered such measures does not mean that the parties have waived their right to arbitrate.

Moreover, the new Law confirms that electronic writings satisfy the requirement that the arbitration clause be in writing and now states that annulment (total or partial) must be initiated within 30 days of notification of the award to the parties.

A significant step is also taken towards enforceability of interim and partial awards. The new Law includes limited restrictions on the requirements of arbitrators, and does not require anymore an arbitration award to be physically signed by the arbitral tribunal in the seat. Furthermore, an application for annulment now does not automatically stay enforcement proceedings.

The UAE's legal community welcomes these positive developments in arbitration law and foresees a very bright future for the international and local arbitration in the UAE.

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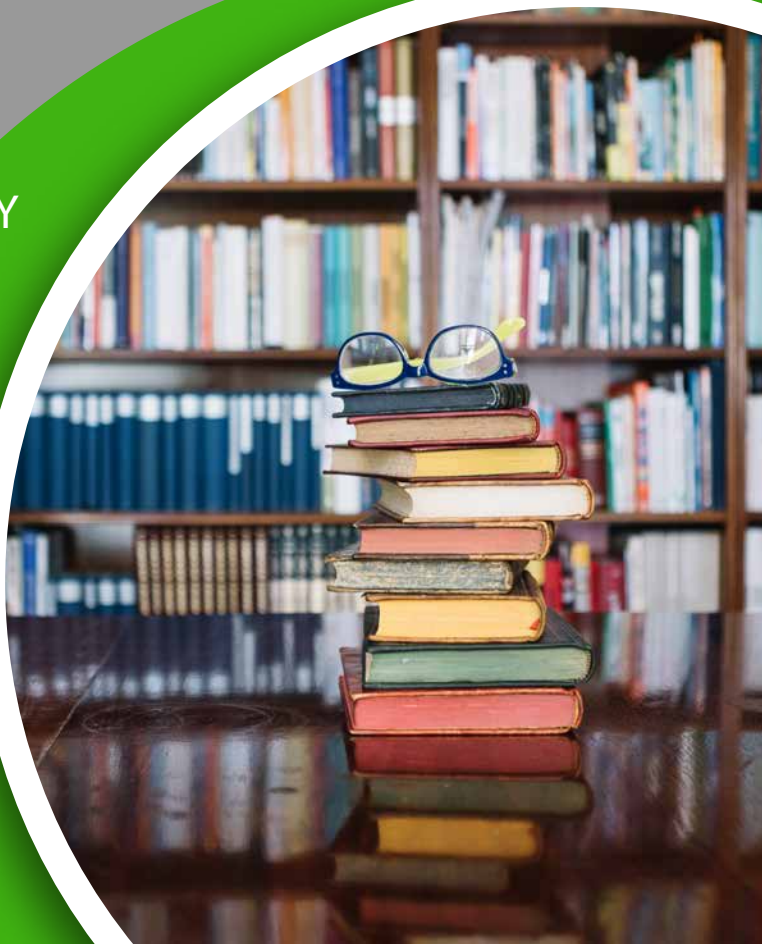

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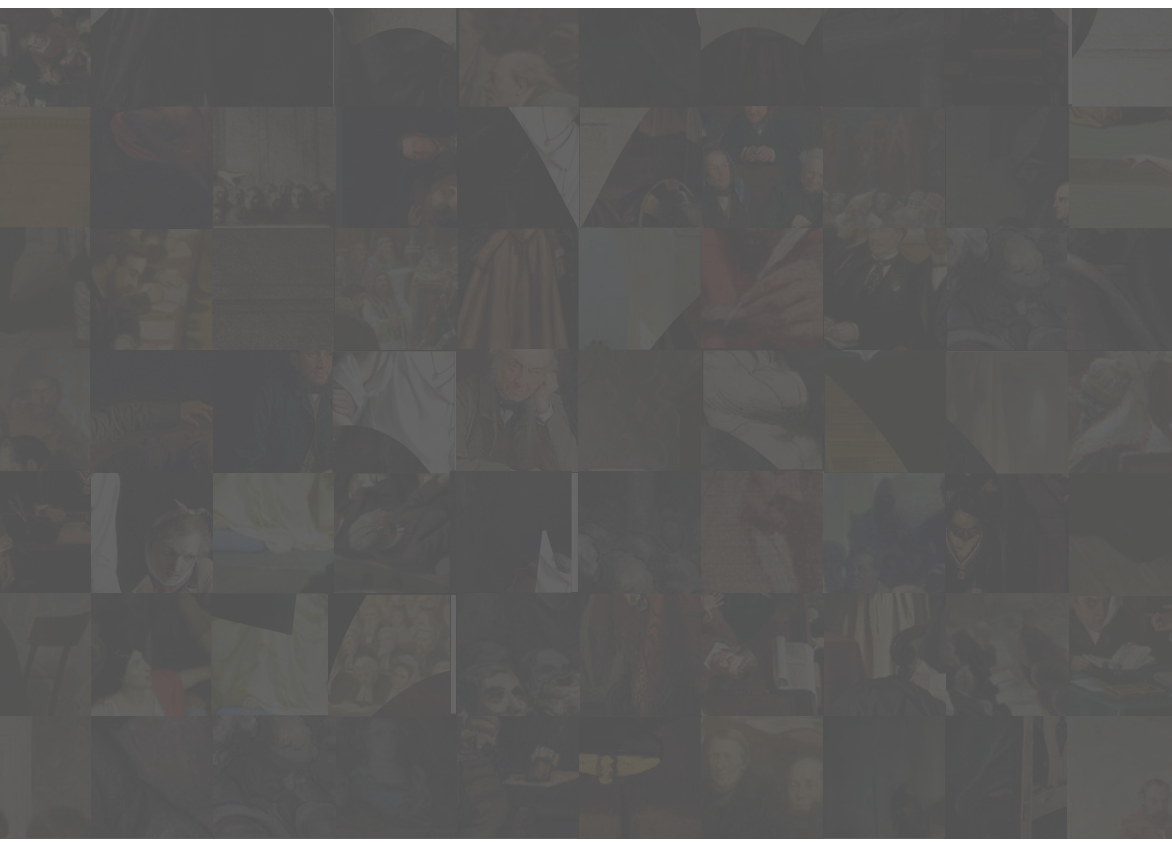

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