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ACCESS TO JUSTICE IN EASTERN EUROPE

Editorial
About Issue 1/2020

Articles

C.H. (Remco) van Rhee
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Tatjana Zoroska Kamilovska
Privatization of Civil Justice: Is it Undermining or Promoting the Rule of Law?

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Open Enforcement: New Approach of Ukraine in Access to Justice

ACCESS TO JUSTICE IN EASTERN EUROPE

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TABLE OF CONTENTS

Editorial
About Issue 1/2020 4

Articles
C.H. (Remco) van Rhee
Towards Harmonised European Rules of Civil Procedure:
Obligations of the Judge, the Parties and their Lawyers 6

Tatjana Zoroska Kamilovska
Privatization of Civil Justice:
Is it Undermining or Promoting the Rule of Law? 34

Agnieszka Gołąb
Recent Developments in Polish Civil Procedure
in the Field of Public Hearing 46

Conference Papers
Vladyslava Turkanova
Open Enforcement: New Approach of Ukraine in Access to Justice 58

ABOUT THE ISSUE 1/2020

In this year of 2020 two significant events will happen – an anniversary of the Convention for the Protection of Human Rights and Fundamental Freedoms, better known as the European Convention on Human Rights and the finalization of the European Rules of Civil Procedure, which is being produced jointly by the European Law Institute (ELI) and the International Institute for the Unification of Private Law (UNIDROIT).

The role and meaning of these two events for the European and worldwide civil justice evolution is noteworthy: the European Convention on Human Rights is the cornerstone for a just and fair trial worldwide. The project 'From Transnational Principles to European Rules of Civil Procedure' started in 2013 and now has approached the most final stage. It is referred to as one of the most ambitious attempts to execute a common vision of contemporary civil justice, which is presently facing the challenges across Europe.

I am truly grateful to our artist, who has surprised and delighted us with a new inspiring cover design of AJEE 2020, helping to express all the most current legal science trends, in particular, the idea of unity and diversity in contemporary civil justice, which grew in national states of the XIX-XX centuries within their vision of unique peculiarities of litigation. Now the sustainable development of humanity requires a new vision of access to justice, which gives us a proper ground for reflection: what does a right to a fair trial mean in a sustainable world? How to avoid differences and inequality in a trial?

Taking these into consideration, in the current issue of AJEE we are happy to announce an excellent article of professor *C. H. van Rhee* related to one of the most disputable questions of the obligations of the judge and the parties in litigation. In this essay, you may find the background of these ideas and proper arguments with all necessary proofs for bringing them into life within the ELI-UNIDROIT project.

Despite the traditional vision of justice as a fundamental public commitment, we may discover a new approach of private justice in *Tatjana Zoroska Kamilovska's* essay titled 'Privatization of Civil Justice: Is it Undermining or Promoting the Rule of Law?'.

The Polish civil procedure and judiciary have been significantly striking in recent years by continuing to discover new features. In this Issue we acknowledge the new public hearing issues in Poland in the article written by of *Agnieszka Gołąb*.

The Ukrainian reforms of the judiciary and related institutions are still ongoing and we are delighted to introduce the conference paper of a young researcher, *Vladyslava Turkanova*, concerning a new glance at a never-ending problem of enforcement in Ukraine – the probability of openness and transparency in organizing enforcement aimed to check and control its effectiveness.

On behalf of the Editorial team I express our sincere gratitude to our authors for their substantial contribution! My unreserved appreciation to all the talented and helpful team members, hawk-eyed reviewers, editors and our publisher, who surround us.

We are *proud* to share an announcement of the Special Issue on the occasion of 70 years of the European Convention on Human Rights we are preparing. The deadline for submissions is 1 August 2020.

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TOWARDS HARMONISED EUROPEAN RULES OF CIVIL PROCEDURE: OBLIGATIONS OF THE JUDGE, THE PARTIES AND THEIR LAWYERS

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Summary: 1. Introduction – 2. General Part: Overriding Objective – 3. Management of the Procedure – 4. Determination of Facts – 5. Findings of Law – 6. Consensual dispute resolution – 7. Conclusion

1 * The author serves as chair of the Working group on the obligations of the judge and the parties and their lawyers established by the European Law Institute and UNIDROIT. Professor Alan Uzelac serves as co-chair. Members of the working group are professors Emmanuel Jeuland, Bartosz Karolczyk, Walter Rechberger, Elisabetta Silvestri, John Sorabji and Magne Strandberg. The draft rules and commentary below are their joint work.

This article explains in detail the rules on the obligations of the judge, the parties and their lawyers in civil litigation, prepared by a working group that was established within the context of a project on European Rules of Civil Procedure of the European Law Institute and UNIDROIT. These rules are grouped into several parts devoted to the overriding objective of the proposed rules, management and planning of the proceedings, the determination of facts, findings of law, and consensual dispute resolution. The suggested rules reflect best practices in European civil procedure.

Keywords: civil litigation, obligations of the judge, obligations of the parties, obligations of lawyers, management of the proceedings, consensual dispute resolution

1. INTRODUCTION

The first modern attempts to harmonise rules of civil procedure in Europe date back to the 1980s. At that time, the author served as a young assistant in a project initiated by the late Professor Marcel Storme from Ghent, where representatives of the then 12 member states of the European Community (now the European Union) made attempts to develop rules of civil procedure that would be acceptable in all member states.[2] Such rules are necessary given the fact that Europe does not have a system of federal courts like the United States of America. It is consequently dependent on the national courts of the member states for the correct implementation of harmonised European law, whenever legal disputes arise.

Unfortunately, the Storme project was flawed, amongst other things because rules that are acceptable to all member states are all but impossible to formulate (especially where the civil law tradition of the European continent is confronted with the common law tradition of the British Isles). If such rules can be formulated at all, they will not be very revolutionary. This is proven by the Storme Rules, for example in the very important area of evidence where the Storme Group produced few rules, one of them stating the obvious, that those who are duly summoned to court to give evidence in civil proceedings are under a duty to give evidence.[3] For the Swedish law professor P.H. Lindblom, this rule and related rules were proof of the fact that the Storme Project was unsatisfactory.[4] And indeed, very little has come from the rules that the Storme Group published in 1994.[5]

Even though the Storme Group did not produce a set of rules that would change the civil procedural landscape in Europe, the project was important since it served to put the topic of procedural harmonisation on the European legislative agenda from the 1990s. As such, the Group inspired later attempts at harmonisation, one of them being the 2006 Principles of Transnational Civil Procedure of the American Law Institute

2 Marcel L Storme (ed), *Approximation of Judiciary Law in the European Union* (Kluwer & Martinus Nijhoff 1994).

3 Storme (n 1) Art. 5.

4 PH Lindblom, 'Harmony of Legal Spheres. A Swedish View on the Construction of a Unified European Procedural Law' (1997) 5 European Review of Private Law 11-46.

5 See Storme (n 1).

(ALI) and UNIDROIT[6] which aimed at providing model rules (soft law) for the world at large. The project of the European Law Institute (ELI) and UNIDROIT focusing on the development of model rules for the member states of the European Union is another example. The results of the latter project, which started in 2013, will hopefully be published in 2020. At the time of writing, this had not yet happened.

The ELI/UNIDROIT project does not primarily aim at developing procedural rules that will be acceptable in all European member states. On the contrary, it takes best European practices as its guiding star. This means that those involved in drafting the Rules concentrate on those rules that can be qualified as 'best' from the perspective of predefined goals such as fairness, efficiency, speediness and proportionality. The project takes the relatively sophisticated 2006 Principles of Transnational Civil Procedure mentioned above as its starting point. It is felt that these Principles can serve as a source of inspiration for European rules. European rules can, however, be more elaborate and detailed than the Principles, given the fact that unlike the Principles they are not aimed at international commercial litigation globally, but at civil litigation in the relatively restricted area of the member states of the European Union.

At the time the project was initiated, it could not be expected that the United Kingdom would decide to leave the European Union and therefore the Rules also contain elements of the procedural heritage from especially England and Wales. Currently, this would not have been necessary anymore from a political perspective, but taking into consideration that English civil procedure has, in the opinion of the author, improved the quality of the new rules. Taking into consideration the common law heritage may also be beneficial for the acceptance of the Rules in the Republic of Ireland.

Although the common law influence is noticeable, many of the proposed rules find their origin in civil law jurisdictions. This means that the history of various rules can be traced back to the Romano-canonical procedure of the medieval period, i.e. the ancestor of most modern systems of civil procedure on the European Continent.[7] The Romano-canonical procedure was a scholarly type of procedure, something that can for example be noted when taking into consideration its sophisticated rules on evidence. One of the aims of the Romano-canonical procedure was to avoid arbitrary judgments and for that reason rules of procedure were developed, which enhanced the chances that the final judgment would be just and based on the true facts and the correct legal basis. Consequently, the distribution of tasks amongst the various participants in the legal process (judges, parties and lawyers) was a central issue.

Traditionally, the role of the judge in the Romano-canonical procedure was more prominent than his/her role in the common law. On the Continent, the judge not only made sure that the procedural rules were observed, but he/she was also in charge of establishing the correct legal basis of the case (*iura novit curia*) and he/she would develop various activities in establishing the relevant facts, for example when hearing witnesses (a task that is left to the parties and their lawyers in the common law systems). Obviously,

6 ALI/UNIDROIT, *Principles of Transnational Civil Procedure* (CUP 2006).

7 See e.g. KW Nörr, *Romanisch-Kanonisches Prozessrecht. Erkenntnisverfahren Erster Instanz in Civilibus* (Heidelberg 2012).

the parties and their lawyers also had far-reaching responsibilities in this respect. In the national procedures that developed since medieval times on the foundations of the Romano-canonical procedure, the division of tasks between judge and parties is still an important matter. It is therefore not a surprise that judicial activity and the division of tasks between judge and parties are also central topics where it concerns the European Rules of Civil Procedure developed within the context of the European Law Institute and UNIDROIT.

In the present contribution we will only concentrate on the role of the judge, the parties and their lawyers in the ELI/UNIDROIT Rules. Unfortunately, the final text of the Rules cannot be taken into consideration, since this text is still under preparation and has not yet been published. We will therefore focus on a text that was prepared by a working group that was established within the context of the ELI/UNIDROIT project and that is tasked with drafting the rules on the obligations of the judge, the parties and their lawyers in civil litigation. This working group is chaired by the author of the present contribution and Professor Alan Uzelac from Zagreb in Croatia. Members of the working group are Emmanuel Jeuland (France), Bartosz Karolczyk (Poland), Walter Rechberger (Austria), Elisabetta Silvestri (Italy), John Sorabji (United Kingdom) and Magne Strandberg (Norway). The text below contains the rules and parts of the explanatory notes produced by the working group.[8] It is unclear to what extent the ideas of the working group will be incorporated in the final, consolidated draft of the Rules, in which all rules produced by the various working groups[9] will be integrated, but it is hoped that many of our ideas will survive.

The rules developed by our working group are based on a variety of sources. The starting point are the ALI/UNIDROIT Principles of Transnational Civil Procedure, especially (but not only) Principles 11 (Obligations of the Parties and Lawyers) and 14 (Court Responsibility for Direction of the Proceeding). Furthermore, Council of Europe Recommendations (especially Recommendation No. R (84) 5 on civil procedure), case law of the Court of Justice of the European Union and the European Court of Human Rights, the Storme Project on the Approximation of Judiciary Law in the European Union, model codes such as the *Codigo modelo Iberico-americano*, the national laws of the Member States of the European Union and other European countries and various professional codes of conduct have been taken into consideration.

Our rules deal, as stated, with the obligations of the judge, the parties and their lawyers in civil litigation. The proposed rules use the word 'obligations' in a broad sense.

8 Here it should be underlined that this text has been drafted by the members of the working group jointly. The selection of the relevant parts of this text reproduced in the present contribution and the way texts have been grouped together is the responsibility of the author. Some minor textual changes in the commentary have been introduced. The text of the Rules themselves is identical to the ones submitted to the European Law Institute and UNIDROIT. Permission to make the work of the working group public was obtained at the annual conference of the European Law Institute in Vienna in September 2019. It should be noted that our draft rules are subject to modification by the working group responsible for the consolidated draft containing the rules of all working groups.

9 There are 9 working groups dealing with different procedural topics, and one structure working group. See ELI, Projects: Civil Procedure <https://www.europeanlawinstitute.eu/projects-publications/current-projects-feasibility-studies-and-other-activities/current-projects/civil-procedure/> accessed January 2020.

This expression encompasses both duties in the strict sense of the term (in German: *Pflichten*) and duties, which are only indirectly sanctioned (mere obligations, in German: *Lasten*).[10] The focus of our rules is, however, on effectiveness: there should be both adequate means and motivations to ensure that all obligations in the proceedings are respected effectively.

Obligations may be either positive or negative. Positive obligations require actions to be undertaken in order to contribute to fair, efficient, speedy and proportionate resolution of the dispute. Negative obligations are those which require parties to ensure that they treat other participants in proceedings fairly i.e., obligations to refrain from acting in bad faith, in particular by not undertaking steps that unduly delay the proceedings or otherwise qualify as procedural abuse.

Our rules provide a modern approach to civil litigation in that they put the emphasis on loyal cooperation between the judge, the parties and their lawyers. The rules are written from the perspective that judges, parties and their lawyers have a shared responsibility in putting an end to disputes in a fair, efficient, speedy and proportionate manner, either by way of settlement or by way of a court decision based on the true facts and right law. This means that the adversarial-inquisitorial divide is intentionally avoided. The underlying idea of the proposed rules is that there is no mutually exclusive division of labour between the various participants in a civil lawsuit; there are only shared obligations. This means that apart from the parties, the court also has certain obligations regarding facts and evidence, whereas parties share the responsibility for the assessment of the pertinent legal issues with the judge. It is the duty of the lawyers to support the parties in the execution of their obligations. Lawyers' duties, however, go further than that, as they also have to observe professional duties normally found in codes of conduct, to which our rules refer, where necessary.

It should be noted that rules referring to the court (as opposed to judges) include the powers and responsibilities of all existing court structures, which ensure the good administration of justice in particular cases. Furthermore, the judges' obligations are shared by those who perform activities related to those of the court such as, for example, an *amicus curiae*.

The rules proposed by our working group are grouped under five headings. Part 1 is the general part and deals with the duty of loyal cooperation. All rules have to be interpreted within the context of this general duty and therefore this duty serves as a kind of overriding objective. Part 1 is followed by four specific parts, each part having a similar structure: every part contains separate rules on the obligations of the parties, their lawyers and judges, as well as a section on sanctions for the breach of procedural obligations. As a result, sanctions are mentioned in all parts of our rules. This is due to the fact that no single and uniform rules on sanctions are appropriate, as various actors and elements of the procedural obligations require various types and forms of sanctions. Sanctions can either be negative consequences as regards the manner in which the case is litigated, or positive consequences such as fines.

10 CH van Rhee, 'Obligations of the Parties and their Lawyers in Civil Litigation', in J Adolphsen et al (eds), *Festschrift für Peter Gottwald zum 70. Geburtstag* (Beck 2014) 669-679.

2. GENERAL PART: OVERRIDING OBJECTIVE

Part 1 of our draft contains 4 rules:[11]

Rule 1. Obligations of the Parties

(1) Parties have a duty to promote the fair, efficient, speedy and proportionate resolution of their dispute. This duty includes their conduct before starting court proceedings, during all stages of litigation and, if necessary, in the stages after the proceedings. In particular, the parties are obliged to:

(i) contribute to the proper management of the proceedings;

(ii) present facts and evidence and assist in the proper determination of the facts;

(iii) assist in the determination of the applicable law;

(iv) undertake all reasonable efforts to settle disputes amicably.

(2) When dealing with the court and other parties, parties must cooperate in good faith. They must avoid any delaying tactics and refrain from procedural abuse.

(3) These obligations also apply to other interested persons, who participate in proceedings as well as they apply to parties.

Rule 2. Obligations of the Lawyers

(1) When representing parties, lawyers must act in accordance with the duty of loyal cooperation and assist the parties in observing their procedural obligations.

(2) These obligations apply accordingly to other persons who assist parties.

Rule 3. Obligations of the Court

(1) The court shall promote the fair, efficient, speedy and proportionate resolution of disputes. It is responsible for active and effective case management. Throughout proceedings it shall monitor whether parties, lawyers and other participants referred to in these Rules observe their obligations.

(2) The court shall undertake such steps as are necessary to establish and maintain procedural cooperation, prevent procedural abuse and/or avoid the negative consequences of violations of procedural obligations. Wherever appropriate, it shall promote the consensual settlement of disputes.

(3) Judges shall implement the court's obligations in individual proceedings. These obligations apply accordingly to other professionals who assist the court.

Rule 4. Sanctions

(1) Breach of the obligations referred to in these Rules are subject to sanctions.

(2) Sanctions have to be effective and proportionate. They may include:

11 This part of the rules was originally drafted by Walter Rechberger and Remco van Rhee.

(i) the proceedings continuing without the defaulting party's participation;

(ii) negative inferences as to facts;

(iii) the right to dismiss or reject incomplete or unsubstantiated statements of a case or other procedural acts of the parties;

(iv) cost sanctions;

(v) fines;

(vi) disciplinary and other professional sanctions.

(3) Unless an order or direction specifies the contrary, sanctions imposed take effect automatically. Orders imposing sanctions may only be subject to appeal in exceptional circumstances.

(4) Sanctions may be imposed either by the court or by the relevant professional organisation.

Rule 1 uses the terms 'fair', 'efficient', 'speedy' and 'proportionate'. A precise definition of this terminology is hard to provide and may, in any event, even be dangerous. The terminology is flexible and should be interpreted in light of modern procedural standards. It should be read in the light of the procedural model that is envisaged by these rules. (1) 'Fair' includes the observance of modern procedural principles such as the duty of the parties to cooperate with each other and the court and the avoidance of manifestly ill-founded proceedings or the abuse of procedural rules for illegitimate purposes, (2) 'efficient' refers, amongst other things, to the use of resources in the least wasteful manner, (3) 'speedy' includes a time-frame which is reasonable, given the nature, value and complexity of the case, whereas (4) 'proportionate' to a certain extent covers similar grounds as the terminology 'efficient' and 'speedy' taken together. 'Proportionate' is added in order to emphasise that different types of cases may require different use of resources and time. The obligations mentioned under (a)-(d) are four important obligations, which result from the duty of the parties mentioned in this rule. Where the rules do not address the particular obligations of the parties, the requested procedural behaviour should be such that the fair, efficient, speedy and proportionate resolution of the dispute is promoted.

Parties should observe their obligations not only during litigation but even before the case is brought to court (the pre-action stage) and also after litigation e.g., in the enforcement stage or when exercising the right to use special remedies such as a request to reopen the proceedings. In the pre-action stage the parties should cooperate in such a manner that the facts and the law underpinning their dispute are stated sufficiently, that available evidence is exchanged and that sufficient settlement attempts are undertaken before court action is initiated. Obviously, sanctions for non-observance of these obligations are not available in the pre-action stage, but they may be imposed when the case actually reaches the court (cf. the English pre-action protocols). In the enforcement stage, the judgment debtor should cooperate loyally in the identification of relevant assets and also provide further assistance in order to allow enforcement to be executed in the required manner.

Rule 2 deals with the obligations of lawyers. Lawyers are the most important individuals who assist the parties and undertake actions in the proceedings on their behalf. The notion of 'lawyer' is not defined, but is meant in the sense of the definition provided in Council of Europe Recommendation Rec(2000)21 on the freedom of exercise of the profession of lawyer, where the term 'lawyer' is defined as a person qualified and authorised according to national law to: plead and act on behalf of his or her clients; to engage in the practice of law; and, to appear before the courts or advise and represent his or her clients in legal matters.

Assisting parties in the observance of their procedural obligations means, amongst other things, that lawyers should inform the parties of these procedural obligations as expressed in our rules and of the consequences of non-compliance. Lawyers should not knowingly cooperate in any non-compliance with these obligations. If necessary, they should actively promote compliance by the parties. If a party persists in being non-compliant, this may ultimately mean that a lawyer has to terminate his relationship with that party.

In addition to their obligation to assist the parties to comply with their procedural obligations, lawyers have common professional obligations that arise from various national and international codes and rules of professional ethics. These obligations may be considered to be incorporated in our rules. Obviously, where one is dealing with national codes and rules of professional ethics, differences may arise depending on the jurisdiction where the lawyer practises.

The obligation of lawyers to assist the parties to carry out their duty to contribute to the fair, efficient, speedy and proportionate resolution of disputes apply analogously as legal and professional obligations to experts appointed by the parties ('expert witnesses', where they exist), to their advisers (other than lawyers, if they exist in a particular jurisdiction) and other professionals assisting the parties, even if no rules or codes of professional ethics apply to them or if such rules or codes of conduct differ in certain respects. Court-appointed experts are addressed in Rule 3 (see below) since their obligations are analogous with the obligations of judges.

While Rule 2 principally deals with professionals who assist the parties, it should be noted that under various national jurisdictions, parties may be represented by other persons, such as close relatives, other persons whom they trust, or by consumer protection organisations, labour unions etc. To the extent that such persons do not act in a professional capacity i.e., in the course of business, they are not bound by professional rules, but they are subject to the common procedural obligation to contribute to good administration of justice.

Rule 3 deals with the obligations of the court. The court (here understood as an administrative entity), just like the parties, has a duty to promote the fair, efficient, speedy and proportionate resolution of disputes. The comments made above regarding the definition of fair, efficient, speedy and proportionate apply, mutatis mutandis, to the present rule.

The court can implement this obligation by organising work processes in such a way that sufficient time and resources are available to decide individual cases. It should also ensure that no more time and resources than are necessary or proportionate

are expended on any case, so that enough time and resources are available for other cases i.e., the court should ensure that there is effective resource allocation across all cases before it.

Moreover, the court must monitor whether other participants in the lawsuit observe their obligations. Monitoring is a continual duty in so far as the court ought to ensure that procedural obligations are observed and that voluntary compliance with the professional obligations is secured throughout the entire course of the proceedings. Of course, continual monitoring does not imply that the court needs to check the progress of the case on a daily basis. It only means that throughout the proceedings the court should establish whether procedural timetables and procedural steps and actions, which were agreed or determined by the court, are being complied with, taking appropriate enforcement action if necessary.

In individual cases the court's duties have to be implemented by individual judges or panels of judges. This is an aspect of their judicial case management function. It is suggested that, in implementing this function, judges are monitored by the court: monitoring of adequate performance of this function does not touch upon the independence and impartiality of judges in decision-making. The courts themselves could be monitored by a Council for the Judiciary or a similar body, which is independent of the Ministry of Justice.

Those other professionals who assist the court, mentioned at the end of Rule 3, may, for example, be court appointed experts, assessors, jurors etc. (to the extent that they exist and assist the court in any particular jurisdiction).

Rule 4 deals with sanctions. Sanctions are indispensable for promoting the observance of the obligations by those involved in litigation. In the text, the word 'sanction' is used in a broad sense, which includes not only fines or preclusions, but also any means resulting in negative consequences for a participant in the proceedings, if their obligations are not being fulfilled. Normally, such sanctions are not subject to appeal. Appeals shall be allowed, however, if the sanction is especially severe or if the sanction is of special significance to the case in general.

In this sense, Rule 4 mentions a series of pecuniary and non-pecuniary sanctions that may be imposed by the court or a professional organisation on parties, their lawyers and other participants to whom the duties provided in these rules apply. Sanctions for judges who do not observe their judicial case management tasks are more difficult to envisage, not least because providing for a means of recourse against such judges may result in additional delay. If such sanctions are available in a legal system, they should either be proposed or imposed by a competent court body (e.g., the president of the court) or by a body such as a Council for the Judiciary. Professional or disciplinary sanctions that can only be imposed by the respective professional organisation (bar association, body for judicial discipline) may result from the initiative of other participants in the proceeding (e.g., the court, parties or third interested parties reporting relevant conduct to a relevant organisation). They may also be taken by the respective organisation or body on its own initiative. Such sanctions, if imposed on judges, do not affect their independence, since independence should be understood as independence in deciding the substance of the dispute between the parties and not as independence in managing the case procedurally.

As far as the individual sanctions mentioned in Rule 4 are concerned, they are indicated there in a generic way and as a catalogue of possible responses to violations of procedural obligations. For instance, the right to continue and issue decisions without a non-participating party (option under (i)) includes various reactions to passive behaviour of a party (holding hearings in the absence of a duly summoned party; deciding individual issues or the whole case on the merits in spite of the fact that a party, duly informed and invited to supply its arguments, failed to do so). Negative inferences (option under (ii)) can lead to an unfavourable decision on the merits, while summary dismissal of submissions (option under (iii)) that are unsubstantiated or incomplete (e.g., dismissal of the statement of claim or appeal which does not contain essential elements) can save resources and speed up processing cases in which parties do not adhere to minimal procedural requirements. Cost sanctions (option under (iv)), fines (option under (v)) and disciplinary sanctions (option under (vi)) all serve to enforce procedural obligations and protect the integrity of the proceedings.

Cost sanctions can take different forms. Their precise shape depends on features of specific national justice systems and their approach to costs. They may include fines, cost shifting and augmented court fees.

3. MANAGEMENT OF THE PROCEDURE

Part 2 of our Rules contains 7 individual rules:[12]

Rule 5. Obligation to Actively Manage Court Proceedings

(1) The court must actively manage proceedings in order to promote their fair, efficient, speedy and proportionate resolution, whether by consensual settlement or by judgment. In doing so, the court must take account of the nature, value and complexity of the particular proceeding before it and of the need to give effect to its general management duty in all proceedings.

(2) The general management duty is a continuing duty, which must be carried out by the court at all stages of the proceedings. Individual case management decisions must be taken at the earliest opportunity.

(3) Parties must co-operate with each other and with the court in order to facilitate proper case management.

Rule 6. Case Management Conference

(1) In order to manage cases properly, the court may hold a case management conference at which the court may make any order necessary to manage the case properly. If requirements are met, the court must determine the claim on the merits at a case management conference or immediately thereafter.

(2) Such a hearing may be held in person, or by the use of electronic means of communication. The first case management conference shall be held as soon as possible.

12 This part of the rules was originally drafted by John Sorabji and Magne Strandberg.

Rule 7. Power to Issue Case Management Orders

(1) The court may make any case management order on its own initiative or on application of any party. Orders may be made without a hearing or on an *ex parte* basis. Where orders are made by the court on its own initiative, any party may apply to the court to have the order reconsidered at a hearing.

(2) Where orders are made on an *ex parte* basis, the party to whom notice was not given may apply to have the order reconsidered.

Rule 8. Means of Case Management

(1) In order to further its general case management duty, the court may take any necessary step:

(i) schedule case management conferences;

(ii) set a timetable or procedural calendar;

(iii) set deadlines for the parties to take procedural steps;

(iv) determine the type and form of procedure;

(v) limit the number and length of submissions;

(vi) encourage the parties to take active steps to settle all or parts of their dispute including encouraging and where appropriate taking part in, the use of alternative dispute resolution (ADR) processes or practices (Rules 24 and 25);

(vii) determine the order in which issues should be tried, whether certain procedural or substantive issues should be decided jointly or separately, and whether the proceedings should be consolidated or split;

(viii) determine changes related to the parties to the proceedings and on participation of other interested persons in the proceedings;

(ix) consider whether a party is properly represented;

(x) require party's appearance in person or require a party's representative to be present at a court hearing or meeting;

(xi) ensure appropriate use of modern technology; or

(xii) take any other necessary step.

(2) While exercising its general management duty, the court shall manage the proceedings so that all relevant issues in the case are identified and may be decided in a complete and appropriate manner. The court may encourage the parties to identify the real issues in dispute, and discuss with them appropriate methods and steps for dealing with these issues.

(3) The court may vary any case management order, including abridging or extending the time to comply with them. Such orders are ordinarily not subject to appeal.

Rule 9. Sanctions for Lack of Cooperation Regarding Case Management

Unless a specific rule applies, in any case management order the court shall specify the sanction for non-compliance with that order or direction (Rule 4).

Rule 10. Cooperation in Issuing and Amending Case Management Orders

(1) The parties should, ordinarily, be consulted by the court prior to issuing case management orders. The court shall encourage the parties to agree on the content of such directions.

(2) The parties shall attempt to agree to proposed case management directions. Where the parties agree to the directions, they shall inform the court at the earliest opportunity in advance of any scheduled case management conference.

(3) Ordinarily, the court will decide according to the agreement reached by the parties. In case an agreement cannot be reached within any relevant time limit, the court will issue case management directions on its own initiative. Such case management directions are not subject to appeal.

Rule 11. Monitoring and Compliance

(1) The court must monitor compliance with case management directions. In order to do so, the court and the parties will use the fastest and most practicable means of communication and appropriate means of modern technology.

(2) Parties and their legal representatives must inform the court promptly about the steps undertaken and respond promptly to any request from the court to provide information concerning compliance.

(3) A party may request that a competent authority transfer their proceedings to another judge, when there is a failure on the part of a judge to carry out the general case management duty.

(4) The parties may complain to relevant bodies for judicial conduct and discipline for investigation of alleged judicial failure to manage the case in an appropriate manner.

The above rules deal with obligations in regard to the management and planning of the proceedings. They specify that the court is responsible for active and effective case management, but this is always in cooperation with the parties. The obligation is discharged by various case management orders and activities and by continual monitoring by the court to ascertain whether the parties, the lawyers and other participants in the proceedings are carrying out their obligations. Active management of proceedings under the court's direction also includes the duty to consult the parties and, wherever possible, secure their agreement on the form, content and timing of particular steps in the proceedings. The court's duty of active case management authorises judges to encourage the parties to identify the real issues in dispute and to openly discuss with them the appropriate steps and methods for dealing with these issues. A case management conference is meant for consultations with the parties and their lawyers on such matters. In its case management decisions, the court should, according to the proposed rules, always take account of the nature, value and complexity of the particular proceedings, ensuring that procedures are proportionate to the value and importance of the case.

The court's duty of active case management is an important means to achieve the overall goal of a fair and speedy proceeding. Finding a suitable form, length and organisational structure of proceedings increases the prospect of a correct and fair result, either

by judgment or settlement, being achieved and it saves time and money. Arguably, such a duty is in contrast with the traditional concept of the passive judge found in some European jurisdictions. Recently, this traditional concept has been replaced by procedural changes, which have given judges an active role in managing proceedings. Such a development was one of the core features of the Woolf Reforms in England and Wales. Active case management duties, under the concept of *materielle Prozessleitung*, have long formed a part of German and Austrian law. A trend towards the incorporation of active case management duties is also found in international procedural frameworks. While the Storme Report did not contain specific rules on active case management, such rules are explicitly dealt with in ALI-UNIDROIT Principle 14.

Case management duties may be carried out by a single judge, a number of judges jointly, or, in some jurisdictions, by the President of the Court. The duty of active case management is a continuing duty and as such it applies from the start of proceedings until their conclusion.

A case management conference is the arena where the parties may exercise their right to be heard, in particular regarding matters relevant for the organisation of the proceedings. It is also a means to facilitate party cooperation and cooperation between the parties and the judge. A case management conference can be a meeting with all parties present or a distanceed meeting where the parties participate via any sort of tele- or video technology, or through any other appropriate means of instant communication permitted under the applicable court rules. In order to maintain the court's neutrality and to deal with the parties on equal footing, the court shall not allow one party to be present if the opposite party communicates over, for instance, telephone or video. A court may choose not to hold a case management conference, if it is not considered necessary. For instance, to hold a case management conference may be deemed superfluous in the light of the uncomplicated nature of the case, if the case is of low value, if the parties have already agreed on core case management issues, or if such a meeting lacks a clear objective.

The first case management conference should be held as soon as practically possible. The court may at any case management conference direct orders necessary to manage the case; a court may also be obliged to do so. If the case is sufficiently clear, the judge may determine the case on its merits at the case management conference.

The power to actively manage cases is one that must necessarily be exercised by the court either on its own initiative or on application of the parties; the former if the court is to properly exercise its general case management duty on a continuing basis, the latter if the parties are to properly exercise their duty to cooperate with the court in furthering the general duty.

There are instances where the case management hearing will not be possible or desirable. Exceptionally, case management decisions may need to be made in the absence of, and without notice to, one of the parties i.e., where the provision of notice would tend to frustrate the order sought or where it is not possible to give notice on grounds of urgency.

When the court issues a case management order without a hearing or on ex parte basis, in order to protect the parties' or the absent party's right to receive due notice the court

shall schedule a hearing on notice to both parties at the first available date. In order to ensure, however, that court and party resources are not expended contrary to the general case management duty, the parties may inform the court if such a hearing is not considered necessary.

Decisions on case management are not binding on the court: any such decision may be modified or revoked. The parties may have a right to be heard before the court modifies any prior order to a significant extent.

Different national systems have different rules on forms and names of case management decisions. Less important case management decisions are not subject to appeal. For more important case management decisions, it is preferable that no separate (interlocutory) appeals are admissible, and that objections to such decisions can be made only within the appeal against the final decision. However, some national jurisdictions allow interlocutory appeals from the most important case management decisions (e.g., if the court has excluded a party representative having held that the party was not properly represented by the putative representative).

The parties will, ordinarily, comply with orders and directions voluntarily. Awareness of possible sanctions may however increase party compliance, or at the least reduce the prospect of non-compliance. In order to increase the effect of orders or directions, court orders should specify the consequences of non-compliance. The court has to specify the kind of sanction, for instance a fine, but is not obliged to specify the exact amount of such a sanction.

Ideally, case management decisions, even if they only deal with technical matters such as the scheduling and ordering of procedural actions, are taken in a cooperative fashion. The court must consult the parties before an order or direction is made. Consultations outside case management conferences shall normally be written, but should use the most efficient technology. The court shall encourage the parties to agree case management decisions, which means that the court has to take steps to prompt the parties to do so. The parties should make a serious effort to reach agreement. In order to save time and money, the parties must inform the court as soon as possible, if they agree on specific issues of case management. Where parties do not agree case management decisions they should, acting on their own initiative, inform the court of that fact.

As a general rule, the court should issue case management decisions in accordance with any agreement reached by the parties. However, such an agreement is not formally binding upon the court. The court may decide contrary to the parties' agreement if that is necessary to secure a fair, efficient, speedy and proportionate proceeding. In particular, the court may decide contrary to the parties' agreement, if it would tend to result in disproportionate use of the court's time and money. The court has a duty to decide on its own motion, if the parties cannot agree on case management issues and such a decision shall be taken in a fast and efficient manner. Pure case management decisions (directions), in particular, if they are made on the basis of the parties' agreement, should not be subject to appeal.

The court must monitor party compliance with its orders or directions. For communications related to case management, the court and the parties should avoid

time consuming methods of communication like registered post and use faster means, such as central electronic filing systems which can partly automate monitoring and review. If such systems are not available, the court and the parties may communicate by informal means, such as by telephone, e-mail, etc.

A court may fail to carry out its case management duty effectively. This may occur, for instance, where the court has failed to issue any necessary case management order or if, due to its mismanagement of the case, the matter which is put before the court is not resolved within a reasonable time. Indeed, in line with the principle of loyal cooperation, the party or the parties should openly discuss the management issues with the court and stimulate it to take action. Transfer of a case to another judge and, especially, complaints to competent disciplinary bodies, are appropriate only if a court's failure to adequately manage the proceedings is of a more serious nature. It should be noted that in some countries transferring cases may be difficult due to concepts of 'natural jurisdiction' and lack of competence by the court management to transfer cases (which, still, may be inevitable if the judge is unable to continue its work e.g., due to sickness or other grounds).

4. DETERMINATION OF FACTS

Part 3 of the rules is devoted to the determination of facts.[13] Five individual rules are proposed:

Rule 12. Obligation to Present Facts and Evidence

(1) Parties are under a duty to identify the matter in dispute as early as possible, taking into consideration the views of the other party, if these have become known to them.

(2) Parties are under the duty to present relevant facts and identify evidence in a diligent and complete way, ordinarily in their earliest statements of the case. Later presentation of facts and evidence has to be justified.

(3) Lawyers must advise their clients about these duties upon their appointment and assist them in identifying the matter in dispute as early as possible.

Rule 13. Role of the Court

(1) The court shall ordinarily consider only facts and evidence introduced by the parties. However, it may consider facts that appear from the case file or take evidence on its own motion, if it deems that, under the circumstances, it is necessary to the proper adjudication of the case.

(2) The court may amend or alter its orders regarding the taking of evidence.

Rule 14. Right to Disregard Belated Facts and Evidence

(1) The court may at its discretion disregard facts and evidence that are introduced later than the earliest possible opportunity for their introduction.

13 This part of the rules was originally drafted by Bartosz Karolczyk.

(2) Where a party presents belated facts and evidence they must bear their opponent's costs incurred as a result thereof, regardless of the outcome of the case.

(3) New facts and evidence submitted without undue delay in response to matters raised by the other party shall not be considered belated.

Rule 15. Consequences of a Failure to Introduce Facts and Evidence

(1) If a party fails to substantiate its claim in time, the court may, in accordance with the applicable procedural rules, consider the claim as withdrawn or dismiss the case on procedural grounds.

(2) If a party fails to respond to the opposing party's factual allegations or evidence in time, the court may, in accordance with applicable procedural rules:

(i) issue a default judgment;

(ii) consider that the facts have been admitted wholly or partially; or

(iii) continue the proceedings and decide on the merits based on the available facts and evidence.

Rule 16. Closing the Proceedings

(1) As soon as the court is satisfied that both parties have had a reasonable opportunity to present their case, it will close the proceedings, after which no further submissions, arguments or evidence are allowed, unless, in exceptional circumstances such are requested and authorised by the court.

(2) The date of closing shall be fixed as early as possible, subject to later necessary amendments.

The presentation of facts and evidence is primarily a duty of the parties and should be effected as early as possible and preferably before the action is commenced during the pre-action phase. Facts and evidence presented after the early stages of proceedings are only allowed if justified.

Apart from the parties, the court has certain responsibilities regarding facts and evidence: the proposed rules provide that the court may consider facts that appear in the case file, even though they have not been used by the parties to build their argument, or may take evidence on its own motion, if this is necessary for the proper adjudication of the case. This position follows the tradition, common to many European jurisdictions, of allowing the court discretion to actively intervene in factual and evidentiary issues in order to eliminate injustice or an abuse of judicial proceedings. In the understanding of the drafters, these powers will be used only exceptionally. Thereafter, the court can only exceptionally request or permit additional facts and evidence necessary to clarify the respective positions of the parties.

The obligation to identify the matter in dispute as early as possible is an important part of the parties' obligation to contribute to proper case management. What is considered to be a part of that obligation varies in different legal traditions. For some traditions, it may imply the need to specify legal arguments. However, this part of the Rules deals mainly with the need to specify the facts of the dispute and evidence, which supports relevant factual statements made by the parties.

In civil litigation, the court does not search for facts. Instead, facts are submitted by the parties. However, their freedom in that regard cannot be unlimited because the incentives to obstruct the proceedings are too strong. In addition, while accurate fact-finding is an ideal we should strive to achieve, it is not itself the goal of procedure. Indeed, procedure must also realise other values, in particular speed. Thus, parties are expected to present facts and identify evidence in a timely, diligent and complete fashion, so that the factual and evidentiary matters can be crystallised quickly and at an early stage in the proceedings.

To summarise, as fact-finding and evidence evaluation are within the exclusive domain of the court, it is only fitting that the parties must meet a certain standard of care in the presentation of procedural material to the court. In addition, assertions of fact should take into consideration the opposing views, if they were made known to the pleader. The assumption is that this should further the speedy and accurate determination of the dispute. Lawyers are expected to advise their clients about these duties, not least because failing to comply with them (either by the lawyer or the client) may give rise to negative consequences for the client. The participation of lawyers in preparing statements of claim is therefore vital.

Facts or evidence may be presented at a late stage, but the burden is on the pleader to justify the late presentation. The ultimate decision whether to admit belated facts or evidence is vested with the court.

As mentioned above, in civil litigation, the court generally does not search for facts on its own initiative, as that constitutes the exclusive domain of the parties pursuant to classic principles of procedure. Therefore, the court will in principle consider only facts and evidence introduced by the parties. Within these boundaries, however, the court can consider and rely on a material fact, if such fact appears from the material the parties have already submitted, but which is not asserted by either party. This is self-explanatory: within the material provided by the parties the court must be allowed to take note of facts it considers material to decide the case. Still, the court should draw the parties' attention to such facts (cf. Rule 18).

In addition, the court may take evidence on its own motion if it deems that, under the circumstances, it is necessary to the proper adjudication of the case. This rule, based on judicial discretion, is common to many European countries and thus a part of the European legal tradition. It operates as a reasonable check in order to eliminate, in proper cases, judicial injustice or abuse of process by conducting fabricated proceedings. This option is not meant to be used on a broader scale. The court may need to take evidence on its own motion in matters that are important from a broader perspective e.g., where the public interest is at stake. For instance, it would typically occur if the case is about the loss of employment, loss of housing, or if it raises important non-economic interests like environmental issues. Another example could be if the party lacks competence or resources to propose or present the evidence. In cases where only the parties' interests are at stake, the right to take evidence ex officio should only be used exceptionally. As this right is optional on the part of the court, parties and their lawyers may not rely upon its existence to justify or excuse a failure on their part to secure relevant evidence.

Finally, and also in line with many European legal systems, until the judgment has been rendered, the court can amend or alter its orders regarding taking of evidence.

Several types of sanctions are possible when the suggested rules are not observed. A powerful sanction is the court being allowed to disregard belated facts or evidence (preclusion). Thus, falling below a defined standard of care in conducting litigation creates the risk of losing the case. While this is a strong sanction, it is also relatively straightforward and creates a powerful incentive for the parties (provided they know about it) and lawyers to comply with Rule 12. The rule is based on judicial discretion and is indeed very broad. It does not say when the court must disregard belated facts or evidence, neither does it say when the court must admit them due to exceptional or exculpatory circumstances. Obviously, the court's decision should be made known to the parties prior to issuing the judgment and should be justified. Consequently, this will require the court to resort to some sort of balancing test. This approach is also in line with the concept of the judge being the manager of the proceedings.

The court may at its discretion disregard facts and evidence that are introduced later than the earliest possible opportunity for their introduction. The earliest possible opportunity should be determined by two quintessential elements i.e., knowledge of evidence and of the disputed nature of a material fact. If a material fact is, thus, disputed and the party has knowledge of relevant evidence, it should identify that evidence to the court and the other party in order to support its position towards a disputed material fact. This is a reflection of the 'cards on the table' approach introduced in Rule 12.

New facts and evidence submitted without undue delay in response to the other party's statements and submissions are not to be considered belated. This provision reflects the inherent dynamic that exists within civil litigation.

The final section of Rule 14 assumes that belated material has been admitted or considered by the court, despite the lack of exculpatory or exceptional circumstances. Therefore, costs incurred by the other party as a consequence of such belated submission, should be paid by the party introducing the belated material, regardless of the outcome of the case.

Rule 15 authorises the court to sanction a party that has shown a considerable disregard of its procedural duties. The first section allows the court to dismiss, on procedural grounds, claims which are not sufficiently substantiated. This sanction is not automatic, and depends on judicial discretion and on any applicable provisions that define time periods. It is also up to the court to decide, if no special rules are provided, whether it will advise the claimant about its intention to consider the claim as withdrawn and allow to cure the deficiencies within a specific time. If the claim is considered to have been withdrawn, it may be resubmitted later.

The second section of Rule 15 is a summary expression of rules traditionally found in many European countries. As in many other rules, the course of action is left to the applicable procedural rules or, lacking further regulation, to the court's judgment. Thus, for instance, any lack of response to the statement of claim may result in a default judgment (i.e., the presumption that the defendant does not contest the claim arises). Secondly, any lack of response to specific facts may result in the conclusion being drawn that they have been admitted (of which the party will presumably learn from the judgment). Thirdly, the court may decide to continue with the process. In all such cases, the court will issue a decision on the merits which will finally dispose of the case.

Rule 16 regulates closing the proceedings and, as such, it requires the court to close the proceeding after having heard the parties on the merits. This rule incorporates a classic European rule that is currently considered to be a universal element of procedure i.e., that the court should conclude the proceedings once the parties have had a reasonable opportunity to make their respective cases (by alleging facts and presenting evidence). As the Rules implement the idea of judicial case management, the date on which the proceedings will be closed i.e., the trial or trial phase of the proceedings will have finished, will have been identified early in the case management process. Thus, any possible element of surprise in this respect will be eliminated.

5. FINDINGS OF LAW

Part 4 of our Rules contains 4 rules:[14]

Rule 17. Obligation to Submit Relevant Legal Arguments

(1) Parties must present their legal arguments in reasonable detail. Where a party is not represented by a lawyer, the court shall assist the party to identify and clarify its legal arguments.

(2) Legal arguments should ordinarily be presented in the initial phase of the proceedings.

Rule 18. Rights and Duties of the Court Regarding Legal Arguments

(1) The court is responsible for determining the correct legal basis for its decision. It must evaluate parties' legal contentions appropriately. It may consider points of law on its own initiative if this is necessary for correct decision making.

(2) The court shall give each party a reasonable opportunity to submit relevant legal arguments, and to respond to legal arguments presented by the opposing party.

(3) Generally, no legal rule or principle may be invoked in the judgment on the merits unless all parties have had a reasonable opportunity to be heard thereon.

Rule 19. Right to Change or Amend Legal Arguments

(1) Parties may change or amend their legal arguments during the proceedings.

(2) After the proceedings are closed, legal arguments may be changed or amended only when authorised by the court and only if such change or amendment does not raise the need to introduce new facts or evidence.

Rule 20. Consequences of a Failure to Provide Legal Arguments

If a party is represented by a lawyer, the court may impose sanctions for failure to plead law or respond to legal allegations of the other party. These sanctions may include the dismissal of a statement of case that does not contain sufficiently detailed legal arguments.

The subject of Part 4 is findings of law. The rules provide that both the court and the parties should contribute to the determination of the correct legal basis for decision-

14 This part of the rules was originally drafted by Emmanuel Jeuland.

making. Parties have an obligation to present contentions of law, something which must be done in reasonable detail. The court may consider points of law on its own initiative if this is necessary for correct decision-making.

In most European systems of civil procedure, the parties have both the right and the obligation to present their legal arguments. The level to which this is necessary is different in different jurisdictions and may also be different in different types of case (e.g., it may be stronger in commercial than family cases). Our approach is consistent with the trends, which in principle require the parties to present their contentions of law (and not to treat that as an optional element of the parties' statements and submissions). However, this does not exclude differentiated approaches for substantially different civil proceedings. What is 'reasonable detail' may depend on various circumstances e.g., whether the parties are represented by lawyers, or whether in particular cases the court has increased inquisitorial or investigative powers.

In any case, our rules do not dispense with the court's duty to know the law, nor is it inconsistent with the right and obligation of the judge to evaluate the correctness of the legal basis of the claim, as is presented by the parties and to consider points of law on its own motion. However, it is generally not sufficient to limit the parties' submissions merely to the bare presentation of facts on the expectation that the court will simply and passively identify the right legal provisions and apply them to the present case. Consequently, the old approach still influential in some jurisdictions, known under Latin saying 'da mihi factum, dabo tibi ius', is not supported in our rules, at least when parties are represented by qualified lawyers. However, where parties are not represented by lawyers, the court is obliged to act in a more active manner and to assist the parties in identifying and clarifying their legal arguments.

It seems to be universally accepted that the ultimate responsibility for the correct application of law is that of the court. Views differ regarding the court's right and duty to apply the law on its own motion or to apply a different law than the one pleaded by the parties. In Rule 18, the approach present in many European countries, known as 'iura novit curia' (the court needs to know the law and apply it to the case) is generally recognised. Namely, although (in contrast with the extreme versions of 'iura novit curia') the parties share with the court the responsibility for establishing the correct legal basis of the dispute, it is ultimately for the court to evaluate their legal contentions. In principle, the court must evaluate all of the parties' legal arguments that go to the issues in dispute i.e., those legal arguments that may have an impact on the court's decision. European legal systems differ in the form and scope of evaluation, but most systems require the evaluation of legal arguments in the grounds of the judgment. What is 'appropriate' evaluation must be understood according to the standards and requirements of the individual legal system. In any case, the court's obligation to evaluate legal arguments raised by the parties must not be used as a basis for groundless appeals, the aim of which is to protract the proceedings.

If law is not pleaded sufficiently, or if an incorrect law is pleaded, the court has the right and duty to consider some legal arguments on its own initiative and apply them to the facts of the case, if this is necessary to arrive at a correct decision. The judicial obligation to ascertain adequate legal arguments and apply them ex officio is not absolute. If parties

are passive and have failed to plead the law in sufficient detail, they have failed to comply with their procedural obligations, and as such may be subject to sanctions if they were represented by lawyers. Appropriate sanctions would be the summary rejection of parties' claims and submissions.

Irrespective of the source of legal arguments (whether they were presented by the parties or introduced by the court), parties should be afforded an adequate opportunity to respond to them. The right to be heard should also be preserved in respect to legal arguments. No 'surprise judgments' (*Überraschungsurteile* – judgments on the merits that rest on an entirely new legal basis than the one reasonably expected and pleaded by the parties) may be issued.

As legal arguments presented by the parties generally do not bind the judge, there is more flexibility regarding any amendment of legal arguments in comparison with changes in factual pleading or presentation of new facts and evidence. Parties may freely change or amend their contentions of law throughout the proceedings, provided that such changes do not require the need to introduce new facts or evidence at a stage in which this is no more permitted. However, after the proceedings have closed, the parties' right to introduce new legal arguments is limited, as new contentions of law may delay the proceedings and cause additional costs. Therefore, after the proceedings have closed, the parties may change or amend their contentions of law only in so far as they are authorised to do so by the court, and only if that does not raise the need to introduce new facts or evidence.

It is to be expected that parties represented by lawyers present their legal arguments more extensively and accurately. It is the lawyers' role to assist the parties to become aware of their legal rights, and to present their views about those rights to the court. Therefore, the consequences (sanctions) for the lack of legal arguments may, particularly, be imposed on parties represented by lawyers. This rule mentions only one of the express sanctions: the power of the court to reject a statement of claim or other submission (e. g., an appeal) in case of a failure to plead law. If the law permits parties to appear unrepresented (which mostly happens in socially sensitive cases and cases of low value), summary dismissal for failure to plead the law is generally inappropriate. This rule does not contain the obligation of the court to reject claims and submissions automatically if represented parties fail to plead the law adequately (see the wording 'may impose', 'may include'). It is within judicial discretion to undertake other steps prior to this ultimate sanction. For instance, the court may fix a time limit to supplement submissions, specifying when it does so that if sufficient legal arguments are not submitted in time they will be dismissed.

6. CONSENSUAL DISPUTE RESOLUTION

The final part of our rules i.e., Part 5, contains 6 rules:[15]

Rule 21. Obligation to Cooperate in Dispute Settlement Attempts

15 This part of the rules was originally drafted by Alan Uzelac and Elisabetta Silvestri.

(1) Parties must co-operate in actively seeking to resolve their dispute consensually, both before and after proceedings are initiated.

(2) Parties must take all reasonable opportunities to settle their dispute and, where that is not possible, to reduce the number of contested issues prior to adjudication.

Rule 22. Specific Obligations of the Parties in the Pre-Action Phase

(1) In the pre-action phase, the parties shall:

(i) exchange sufficient and concise details of their potential claim and defence;

(ii) clarify and, wherever possible, narrow the legal and factual issues in dispute;

(iii) sufficiently identify relevant evidence.

(2) The parties should also consider:

(i) exchanging settlement proposals or proposals for the use of appropriate dispute resolution methods; and

(ii) taking any other reasonable and proportionate steps to further the general duty of promoting consensual dispute resolution.

Rule 23. Obligations of the Lawyers Regarding the Use of ADR

(1) Lawyers must inform the parties about the availability of alternative dispute resolution methods, ensure that they use any mandatory method and encourage the use of other appropriate methods, and assist the parties in selecting the most suitable method.

(2) To the extent that lawyers participate in any alternative dispute resolution proceedings, they must act in good faith and not seek to abuse or obstruct those proceedings.

Rule 24. Duty to Facilitate Settlement Attempts and Promote Effective Use of ADR

(1) The court must facilitate settlement at any stage of the proceedings. If necessary for effective dispute resolution, it may order the parties to appear in person.

(2) Consensual dispute resolution must be specifically considered in the preparatory stage of proceedings and at case management conferences.

(3) Judges must inform the parties about the availability of court-annexed and out-of-court alternative dispute resolution methods whenever these are available. They may suggest or recommend the use of specific ADR methods.

(4) A judge may participate in settlement attempts, assist the parties in reaching a consensual solution and contribute to the proper drafting and transformation of a settlement agreement into a court-approved form such that it is enforceable.

Rule 25. Order to Attempt Settlement and Referral to ADR proceedings

(1) Subject to rules provided by special legislation, the court may in particular cases order the parties to:

(i) undertake one or more steps provided in Rule 22;

(ii) attend one or more information sessions about the use of alternative dispute resolution;

(iii) participate in one or more alternative dispute resolution schemes, either alone or assisted by lawyers.

(2) The court may stay proceedings or reject parties' submissions until there has been compliance with any such order.

(3) If the law provides for a set of mandatory steps aimed at consensual dispute resolution that have to be exhausted prior to court proceedings, the court shall refer the parties to undertake such steps and stay or discontinue the proceedings. Proceedings may be resumed or reinitiated after the parties have undertaken sufficient and appropriate steps prescribed by mandatory legislation.

Rule 26. Sanctions for Breach of Obligation to Negotiate and Make Use of ADR

If one or more parties or their lawyers fail to cooperate in consensual dispute resolution, or do not discharge these obligations in good faith, the court may impose, on the parties and/or their lawyers:

(i) cost sanctions;

(ii) damages caused by delay and procedural abuse;

(iii) increased court fees;

(iv) fines;

(v) report the conduct to a professional organization.

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

Rule 21 expresses the general approach of encouraging consensual dispute resolution. This obligation is applicable at all stages of proceedings. Emphasis is, however, put on early resolution which could make litigation unnecessary. It is expected that parties will not bring their claims before courts until they have exhausted other available dispute resolution options from direct negotiations to mediation and various other forms of ADR. The underlying assumption is that solutions which are consensual, voluntary and autonomous offer a simpler, faster and less expensive alternative to solutions imposed in a mandatory court procedure.

Autonomous methods of dispute resolution, in particular those that result in consensually accepted outcomes, enhance access to justice, offering another fair, efficient, speedy and proportionate way to resolve disputes. Even if the parties do not settle their case in its entirety, they may narrow the open issues and focus their efforts in subsequent litigation. The fulfilment of this obligation also contributes to the more economical, proportionate, use of state judiciary and its better functioning.

The obligation to exhaust all available means alternative to civil court litigation is not absolute. Only those means that are reasonable, and that offer a fair chance of success have to be considered. Rule 21 sets the statement of principle, providing the obligation at a general level. The scope of this general obligation is further specified and explained in the rules that follow, starting with the period before proceedings are initiated and continuing with obligations in all stages after action is brought.

As the early resolution of disputes is to be preferred to litigation, it is essential that parties take active steps to explore such a possibility before commencing any litigation. The common purpose of these steps is to facilitate consensual settlement of claims, either directly, or by agreement on the use of some form of ADR. Where a settlement is not achieved, these steps may help in better management of the subsequent litigation proceedings.

Rule 22 lists two groups of steps that parties should in principle take or, at least seriously consider, in the earliest stages of their dispute and before resorting to any formal dispute resolution process. Therefore, the notion of 'pre-action phase' refers to the period after the dispute has arisen, but before the formal initiation of civil proceedings.

The three steps that have to be made are connected with the identification of the potential claims and defences, and with the clarification of legal and factual grounds upon which such claims are founded, as well as with the sufficient identification of the relevant evidence. Only a reasonably detailed presentation of the parties' eventual claims, and the identification of arguments and facts and evidence supporting them, can enable both parties to evaluate the situation, clarify all options and engage in settlement discussions. This pre-action obligation is also carried on, in a more stringent form, after proceedings are issued. The court may order parties who failed to do it before proceedings were issued to undertake one or more of the steps specified in Rule 22.

While the obligation to identify the claims and the main legal and factual arguments and evidence upon which the claims are based applies to all cases, optional steps include exchange of relevant evidence (based on agreement between the parties or applicable rules on disclosure) and exchange of proposals for settlement and/or proposals to use a particular form of dispute resolution. Any other reasonable or proportionate steps can also be considered with a view to reaching a settlement regarding outstanding claims and disputes.

The consequences of a failure to discharge specific obligations arising under our rules are subject to regulation by national legislation. In particular, a plaintiff who initiates civil proceedings without exchanging sufficient information on a prospective claim and its basis, with the defendant, may be subject to cost sanctions. The court may stay such proceedings or dismiss a parties' submissions (statement of claim or defence) until certain mandatory steps are complied with. The fulfilment of such an obligation may in certain cases also be a legal requirement for the admissibility of the subsequent civil action.

As a part of their general obligation to assist the parties in observing their procedural obligations, lawyers need to inform the parties about available ADR options (including

mediation), encourage them to use them where appropriate and help them in the choice of the most appropriate method.

The use of ADR as a cost-effective and quick method of dispute resolution that enhances parties' access to justice is possible only if parties understand the respective ADR procedure and know how to participate in it. Generally, ADR methods do not require mandatory legal representation, and some of them are sufficiently simple so that parties can use them without lawyers. However, more complex matters may make the active participation of lawyers in one or more stages of the ADR proceedings indispensable. Lawyers should not, however, take exclusive control of the ADR proceedings. For the purpose of reaching settlements, it may be necessary that parties appear in person in settlement proceedings. In any case, effective ADR process requires that lawyers act in good faith. They should help parties explore and use all the potential of ADR, avoiding abuse and obstruction of these proceedings. If the latter occurs, lawyers may be subject to sanctions (either by fines, direct cost sanctions, or disciplinary liability).

Rule 24 makes a distinction between the court as an institution and the court as a tribunal i.e., as the judge(s) who deal with the case at hand. The facilitation of settlements, both in judicial and in extrajudicial proceedings (and in any combination of the two) may be a matter of broader projects that include institutional support (e.g., the organisation of settlement weeks and promotional campaigns for the use of particular ADR methods). On the other hand, the tribunal (sole judge or a panel of judges) seized with the case has a specific obligation to promote and stimulate settlement in the case at hand.

In our rules concerning the consensual resolution of disputes, the word 'settlement' is used in its general meaning, in the light of the fact that in a few legal systems a variety of terms are used to designate different forms of agreement by which a dispute can be resolved amicably, in court or out of court.

As settlement is particularly beneficial in the early stages of a dispute, this obligation particularly targets the preparatory stage of the proceedings and the case management conferences. In order to enhance the likelihood of settlement and broaden its scope, the parties may be ordered to appear in person, so that all vital issues can be discussed and agreed during settlement negotiations, without the need to postpone the process in order to obtain authorisation. The obligation, in respect of pending litigation, includes providing information about available in- and out-of-court ADR options. However, the tribunal seized with the case can go a step further – it may, assess all the circumstances, suggest or recommend the use of specific method. This can either be a court-annexed dispute resolution scheme, or some extrajudicial ADR method. However, any suggestion or recommendation is not binding on the parties.

Settlement attempts may be undertaken with the participation and facilitation of judges, either those that conduct the litigation or other judges that participate in court-annexed ADR schemes. The exact scope of judicial participation and the active role of judges in settlement attempts can vary under national rules. But, no matter whether settlement is the product of the process in which the judge participated or not, judges

have a right to contribute to the proper drafting of the reached settlement agreement. The main purpose of the judicial involvement is to ensure that the settlement reached be enforceable. In many European countries, the involvement of judges in formulation of settlements is the requirement for recognition of settlement agreements as enforceable instruments that may be subject to direct enforcement just as final and enforceable judicial decisions, without the need to resort to litigation in case of refusal to observe the terms of such 'judicial' settlement (*Prozessvergleich*). The specific process in which relevant requirements are controlled (typically, compatibility with public policy and the rules on capacity to conclude a settlement) and the certification of the settlement agreement as an immediately enforceable instrument, is known as 'homologation' of settlement agreements.

While participating in settlement attempts, judges must always pay attention to the need to ensure that they are and remain independent and impartial. If, at any point, a judge's independence or impartiality is jeopardized, a replacement judge must be appointed. In general, if a settlement cannot be reached, the judges who have participated in specific ADR schemes as mediators (e.g., in the court-annexed mediation schemes) cannot be appointed to hear the same dispute in litigation.

Rule 25 goes one step further than Rule 24 and authorises the court to issue mandatory orders instructing the parties to undertake certain defined steps, attend one or more ADR information sessions or participate in one or more ADR schemes. Under paragraph 2 of this Rule, if the court order is not complied with, the sanction is either a stay of the proceedings or the rejection of a relevant submission (e.g., plaintiff's statement of claim). Other sanctions (e.g., cost sanctions) are not excluded. However, the court shall never compel or coerce settlement among the parties. The mandatory use of ADR shall not be a definite obstacle to access to court. Court-ordered or mandatory referral to ADR proceedings can prevent the parties from initiating or continuing litigation only for a defined and appropriate period of time (e.g., the case may be stayed for three months pending mandatory settlement negotiations). An exception to this is the situation in which the fulfilment of legal requirements – undertaking of steps, etc. – is exclusively within the control of a party, in which case a party can be prevented from commencing or continuing litigation until it discharges its obligation. While deciding on compulsory steps, one should pay attention to the need to ensure that one or both parties do not lose their substantive rights due to rules on prescription (statute of limitations) or preclusion.

Rule 25 is drafted in a narrower way than the Rule 24. While Rule 24, on the facilitation of settlement attempts, applies directly and to virtually all types of cases, Rule 25, on orders and mandatory referrals to ADR, only applies 'subject to rules provided by special legislation' and 'in particular cases'. Therefore, mandatory settlement attempts and referrals to ADR are appropriate only in special situations, and subject to judicial discretion.

The right of the member states to make the use of mediation compulsory or subject to incentives or sanctions is asserted in the EU Mediation Directive, provided that obligations and limitations of such mandatory process do not prevent parties from exercising their right of access to the judicial system. The provisions of this Rule are

consistent with this requirement, and in fact they go below the potential maximum: no blanket and automatic use of mandatory mediation or other ADR proceedings is provided herein.

Once the parties undertake the steps required by mandatory rules of law, they are in principle free to resume or reinitiate the proceedings. However, attention has to be paid to prescription periods and statute of limitations.

As in the case of other procedural obligations, a separate rule is devoted to sanctions. The rules emphasise that cooperation in attempts to settle cases voluntarily, just as cooperation in the use of ADR methods, is a procedural obligation and not just an option or an unenforceable right. The breach of this obligation is subject to sanctions. While some specific consequences of the breach of preceding rules on the use of ADR have already been defined, Rule 26 contains a catalogue of sanctions that may be imposed at the court's discretion. These sanctions may be imposed either on the parties, on their lawyers or on both parties and their lawyers, depending on the reasons and responsibility for the breach. Exceptions to this are those sanctions that the court is not authorised to issue on its own, such as disciplinary sanctions that can only be imposed by respective professional organisations. For such sanctions to be imposed, the court has the right and obligation to inform the bar association or a similar organisation. The same sanctions apply if cooperation in consensual dispute resolution and ADR procedures is discharged in bad faith.

7. CONCLUSION

As I have indicated in the introduction, the draft rules on the obligations of the judge and the parties and their lawyers in civil litigation, discussed in the present contribution, were developed within the context of a project initiated by the European Law Institute and UNIDROIT. It should, however, be remembered that these draft rules have not been sanctioned by either one of the two institutions yet. The draft rules will, however, be used in drafting a complete set of Rules of European Civil Procedure which will cover many additional aspects of civil litigation and which hopefully will be published in 2020. In the process of drafting these consolidated rules, the draft rules on obligations may be amended where needed. Nevertheless, since the draft rules on obligations are the result of a joint project of a group of leading experts in civil procedure from several member states of the European Union and also reflect best European practices in civil procedure, they may be worth the attention of an international audience. The working group feels that the rules presented here reflect a modern approach to civil litigation, which combines efficiency with quality, and which, if adopted in practice, would have the *potential* of greatly improving existing practices in a great many member states of the European Union. It should be noted that I have stressed the word *potential* in the previous sentence since it should always be remembered that rules alone, even rules of the highest quality, cannot change practice if unaccompanied by motivated judges and legal practitioners who will apply the rules according to the overriding objective stated in the first part of our rules. Without committed judges and legal practitioners who make sure that the parties cooperate in the manner as indicated in our rules, the best rules will be a failure. Obviously, committed judges and practitioners do not exist in

abundant numbers in court systems that are overburdened and lacking resources, and the commitment of all can only be expected if sufficient training and time for reflection are offered while the new rules are being implemented. Unfortunately, in many jurisdictions problems exist concerning for example caseloads and the financing of the court system. Obviously, these problems need to be addressed first when introducing reforms aimed at best European practices in civil litigation. It is the conviction of the author of the present contribution that when indeed these problems are addressed, the suggested rules can serve as a major improvement of existing civil procedural practices in Europe and beyond.

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PRIVATIZATION OF CIVIL JUSTICE: IS IT UNDERMINING OR PROMOTING THE RULE OF LAW?

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Summary: 1. Introduction. – 2. Privatization of civil justice. – 3. The Rule of Law concept. – 4. Does Privatized Justice Undermine or Promote the Rule of Law? – 5. Concluding Remarks.

The crisis of civil justice system is present in many countries in the EU and worldwide and it takes different forms. In response, many different pathways are explored in order to overcome not only the growing sense of crisis, but also its manifestations. One of the suggested routes in the ongoing efforts to improve access to civil justice at the EU and national levels is the privatization of justice through the ADR mechanisms. In many areas, with the encouragement and support of governments and other policy-making bodies, the administration of justice is being encouraged to leave the courts for alternative forums. Thereby, the ADR are presented as mechanisms which are facilitating informal, fast, cost-effective and affordable access to justice, at the same time preserving public resources. Yet,

in spite of these undeniable benefits, ADR mechanisms are subject of some doubts and expressed concerns.

One of the major concerns, which has already sparked a wider debate, is whether the informal and private nature of ADR is hostile to the Rule of Law and ultimately to justice itself. Namely, if the privatization of civil justice is considered in the context of the fundamental public commitment to provide substantive justice on an equal basis to all citizens, the question arises whether the ADR mechanisms are capable to secure and foster the virtues of the Rule of Law (publicity, transparency, fairness, equality, etc.).

The purpose of this paper is to contribute to this debate, renewing the interest in analyzing the relationship between the privatization of civil justice and the concept of the Rule of Law. In the light of evolving social, economic and political circumstances, the paper attempts to answer the question whether the growing privatized dispute resolution landscape is undermining or promoting the rule of law.

Key words: crisis of civil justice system, privatization of civil justice, rule of law

1. INTRODUCTION

Back in 1999 professor Zuckerman started his widely known collection of essays by assertion that:

> 'There is a widespread perception that the administration of civil justice is failing to meet the needs of the community. This perception seems to persist across national and cultural frontiers. It is present in many different countries, both within the common law and civil law legal systems. Access to justice is so adversely affected by high litigation costs and long delays that in quite a few countries the courts no longer provide an adequate venue for seeking the protection of rights or for resolving disputes. It is no exaggeration to say that many systems of civil justice experience a crisis of some kind'. [1]

Two decades later, it seems that nothing has changed. Zuckerman's words still sound fresh and more or less they describe the state of affairs of civil justice in many national justice systems in the first two decades of 21st century. As professor Marcus concluded in his research paper on the same subject matter 'happy days are not here yet'.[2] A number of factors over the last decade have created a situation in which the value of civil justice is being undermined and the civil courts are in the state of dilapidation. [3]

Although citizens and businesses need to be assured that, as a final resort, they can seek legal protection from the courts in a reasonable time, according to consistent standards and without any outside interference in the process of adjudication, many national justice systems are still struggling delays, inefficiencies, increased caseloads, excessive

1 See preface of AAS Zuckerman (ed), *Civil Justice in Crisis* (Oxford UP 1999).

2 Richard Marcus, 'A Genuine Civil Justice Crisis?' (March 21, 2017) XV International Association of Procedural Law World Congress 27 (2015); UC Hastings Research Paper No. 238, 32 <https://ssrn.com/abstract=2938793> accessed 10 December 2019.

3 See Hazel Genn, *Judging Civil Justice* (Cambridge UP 2009).

costs and interference of different kinds.[4] Therefore, instead of creating a climate of certainty and reliability (particularly by guaranteeing the security of property rights and the enforcement of contracts) and thus generating a certain degree of trust and public confidence, the judiciary in many countries is facing long-term dissatisfaction. The expectations of the citizens to live and the business to be done under a system that operates within the Rule of Law have not been fulfilled yet.

In response to this crisis, many different pathways are explored in order to overcome not only the growing sense of crisis, but also its manifestations. One of the suggested routes, rapidly and increasingly occurring at all levels of the public justice system, is the privatization of civil justice through the alternative dispute resolution mechanisms (shorthand phrase 'ADR').[5] This route is driven by a wide spread ethos of efficiency-based civil justice reform,[6] as the efficiency has become the underlying principle in many justice reform initiatives.

As the title of this paper suggests, it is about the privatization of civil justice and its potential implications for the Rule of Law. At the beginning of the paper we will briefly present the essence of two concepts at stake: the privatization of civil justice and the Rule of Law and then we will link them and try to find out to which extent the first influences the second.

2. THE PRIVATIZATION OF CIVIL JUSTICE CONCEPT

The phenomenon of privatization of civil justice[7] is well known, but still for the purposes of this paper a definitional framework of it is needed. Let us very concisely sketch its essence.

Broadly defined, the civil justice system is nothing - but substantive law, machinery and procedure for vindication and defending civil claims - in effect the entire system of civil justice in civil matters.[8] Traditionally, civil justice is considered as a function of the public realm, which enables private parties to invoke the power of state dispensed in the judiciary to resolve private disputes according to law and then to enforce the public

4 An extensive body of legal and empirical studies confirms this reality. See for example 'European Judicial Systems, Efficiency and quality of justice', CEPEJ Studies No. 26, 2018 Edition (2016 data).

5 Some studies suggest an increasing trend towards defining ADR as 'appropriate' rather than 'alternative' dispute resolution. See Access to Justice Literature Review: Alternative Dispute Resolution in Scotland and other jurisdiction (2014), Scottish Civil Justice Council https://www.scottishciviljusticecouncil.gov.uk/docs/librariesprovider4/scjc-pubilcations/literature-review-on-adr-methods.pdf?sfvrsn=2 accessed 10 December 2019.

6 See Trevor CW Farrow, *Civil Justice, Privatization and Democracy* (University of Toronto Press 2014).

7 Besides the terms privatization, privatizing, privatized, the terms outsourcing, outsourced are used for describing the same phenomenon. Sometimes the slight difference between them is emphasized. For example, Tracy W. McCormack starts her article with the question: 'What does it mean when we say our justice system has been privatized or outsourced?' And further she says: 'If one distinguishes between the two phrases, then in the extreme view, it is justice outsourced; in a milder form, it is the privatization of the justice system.' See Tracy W McCormack, 'Privatizing the Justice System' (2006) 25 Review of Litigation 735.

8 Sir Jack Jacob, *The Fabric of English Civil Justice* (Sweet & Maxwell 1987) 1-2. Moreover, he says that the ambit of civil justice is wide and far-reaching and its bounds have not yet been fully chartered; it encompasses the whole area of what is comprised in civil procedural law.

decision by public force.[9] This marks the state courts or the judiciary as the primary public venues in which citizens resolve their disputes. Contrariwise, privatization of civil justice means that large elements of the states' civil justice regime are shifting away from the public realm towards a wide range of private dispute resolution services and processes. In short, the phenomenon refers to a shift to private ownership and control of civil justice services. The most frequently invoked label that highlights this private system of dispute resolution is ADR. ADR refers to private mechanisms of resolving disputes outside of the court processes, allowing parties to tailor-make their process in order to incorporate the needs of both parties. It has become the leading trend in resolving disputes during the course of the last few decades.

In the light of such a development, a new thesis has been set that the 'public route' to judgment or the court litigation must be regarded as a matter of 'last resort'.[10] On the other side, it is also true that the processes (*meaning public one*) of civil justice have never been regarded as an option of 'first resort' in terms of dispute resolution.[11] Frances Kellor has duly noted that historically speaking:

> 'Of all mankind's adventure in search of peace and justice, arbitration is among the earliest. Long ago the law was established, or courts were organized, or judges had formulated the principles of law, men had resorted to arbitration for the resolving of discord, the adjustment of differences, and the settlement of disputes.'[12]

But, even after the law was established and the courts were organized, parties have always been encouraged to resolve their disputes informally before resorting to litigation. Traditionally, issues that reach the stage of public formal civil litigation are, by definition, issues that parties have not been able to resolve informally among themselves.[13] Thus, the novelty in a modern era of dispute resolution is that ADR has gained a default position: ADR takes on the attributes of adjudication; it becomes the means for enabling 'access to justice' when adjudication fails.[14]

Although the ADR roster is complex and rich in terms of methods, which enables a lengthy discussion of distinctions among processes called arbitration, court-annexed arbitration, conciliation, mediation, med-arb, mini-trial, early neutral evaluation, judicial settlement conferences etc.,[15] we will not detail its entire array here. As professor Resnik writes: 'My interest here is in the relationship of ADR in its generic form, as an idea of an alternative regime to state-based adjudication'[16] and its prevalence over public justice system.

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9 Peter L. Murray, 'Privatization of civil justice' (2007) 15(2) *Willamette Journal of International Law and Dispute Resolution*, 134.

10 Neil Andrews, *The Modern Civil Process: Judicial and Alternative Forms of Dispute Resolution in England* (Mohr Siebeck 2008) 7-8.

11 Murray (n 9) 134.

12 Frances A Kellor, *American Arbitration: Its History, Functions and Achievements* (reprinted Beard Books 2000) 3.

13 Murray (n 9) 135.

14 Judith Resnik, 'Many Doors? Closing Doors? Alternative Dispute Resolution and Adjudication (1995) 10 (2) The Ohio State Journal on Dispute Resolution 245.

15 For comprehensive descriptions of ADR methods, see Susan Blake, Julie Browne & Stuart Sime, *A Practical Approach to Alternative Dispute Resolution* (5th edn Oxford UP 2018).

16 Resnik (n 14) 222.

Indisputably, the success of the private dispute resolution services and processes is a reflection of the shortcomings of the contemporary civil justice system, briefly explained above. From that perspective, there are many sound rationales for this privatization trend or movement, including reduced costs, increased speed and efficiency, privacy, enhanced participation and autonomy through increased party choice within and control over dispute resolution processes and improved access to the tools of justice.[17] Therefore, in many areas (such as commercial, consumer, family matters etc.), with the encouragement and support of governments and other policy-making bodies, the administration of justice is being encouraged to leave the courts for alternative forums. [18] Thereby, the ADR are presented as mechanisms which are facilitating informal, fast, cost-effective and affordable access to justice, while at the same time preserving public resources. Generally, it is said that ADR enjoys an advantage over court-based dispute resolution processes in speed and effectiveness, without compromising parties' expectations of fairness and without compromising the parties' ultimate rights to access the state justice system. Additionally, as ADR mechanisms generally lead to an agreed solution, they contribute quietly to social and economic well-being and promote social harmony.[19] In a nutshell and to be more poetic, in favor of ADR it is said that many parties may regret a case they contest, but few will regret a case they settle.

For these reasons, ADR mechanisms are developing progressively, but at different speeds and directions in different parts of Europe[20] [21] and worldwide. It should not be neglected that in many countries, there is a great cultural and economic resistance to the promotion and use of ADR. Indeed, many countries so far are facing the failure to make ADR familiar to the public and culturally normal. But even in these circumstances, ADR is present and has become a 'quiet constant' with perspective, something that persists and waits for the time to flourish. It seems that meeting this challenge will ultimately be more important than any tuning of the rules of civil procedure on the way of building an effective civil justice system.

17 See Farrow (n 6) 7-8.

18 The encouragement and support of governments and other policy-making bodies is necessary since the private alternative dispute resolution relies on the coercive power of the state.

19 The significance of ADR not only as a legal but also as a social value is emphasized in Green paper on alternative dispute resolution in civil and commercial law, Commission of the European Communities, (2002) Item 10, Chapter 1.2.

20 See for example, Alternative Dispute Resolution and Judicial Domain, ENCJ Report 2016/2017; Christopher Hodges, Iris Benöhr, Naomi Creutzfeldt, *Consumer ADR in Europe* (Hart Pub 2012). In the recent study on the development in consumer ADR in Europe, among its principal findings, the following can be read: 'There is a clear division between EU Member States that have sophisticated CDR schemes - and, despite the differences between States, are improving their mechanisms - and those States that have very undeveloped Consumer Dispute Resolution (CDR provision). The national landscapes of ADR bodies continue to present problems, notably lack of full coverage and low consumer confidence in the current system.' See Christopher Hodges, *Developments and Issues in Consumer ADR and Consumer Ombudsman in Europe* (FLJS 2019) 1.

21 Besides national developments, the developments at the European level should also be mentioned. There are currently three main ADR instruments in force in the European Union: Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters, OJ L 136, 24.5.2008, Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on alternative dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC, OJ L 165, 18.6.2013 and Regulation (EU) No 524/2013 of the European Parliament and of the Council of 21 May 2013 on online dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC OJ L 165, 18.6.2013.

3. THE RULE OF LAW CONCEPT

Let's now turn to the second key concept at stake: the Rule of Law. Namely, as the dispute resolution system is increasingly privatized, the possible implications this might hold for the Rule of Law and for justice itself, should not be ignored. Of course, the question is: why?

Many assume (very reasonably) that this might be a very odd question, since ADR is often included as a part of Rule of Law projects whereas ADR and litigation approaches usually go hand in hand.[22] In these projects, the availability of ADR mechanisms to complement court structures aims to promote access to justice for individuals and businesses. And nobody objects that ADR is promoting the access to justice, which is an essential element of the Rule of Law. But, it's only one element: the Rule of Law is multi-faceted and dynamic concept, which is comprised of many other things. Considering this, several questions arise: What about the other elements of the concept? Are they eroded by these ADR mechanisms? Or is ADR promoting the Rule of Law? In order to answer these questions, allow us to put forward few words about the definition of the Rule of Law concept and its key elements. In this respect, our intention here is not to write extensively on a concept that has been discussed for decades if not centuries, but just to put some underpinnings for the following discussion.

As usual, there is a multiplicity of definitions and understandings of the Rule of Law concept in legal theory and philosophy. The multiplicity derives from the dilemma which elements to include in the concept. Most definitions however 'give central place to a requirement that people in positions of authority should exercise their power within a constraining framework of public norms, rather than on the basis of their own preferences, their own ideology, or their own individual sense of right and wrong'.[23] Or to put it differently, the Rule of Law centrally comprises 'the values of regularity and restraint, embodied in the slogan of "a government of laws, not men"'.[24] This slogan indeed means that the law is absolutely supreme and it excludes the arbitrariness in any form, a point that might be very important in the context of discussion on privatization of civil justice. At the same time, the slogan puts emphasis on the legal certainty, predictability, and the determination of the norms that are upheld in society and the reliable character of their administration by the state.[25]

Even this brief elaboration of what the definition of the Rule of Law entails, brings us to the key elements of the concept. More or less, there is an overlapping consensus about certain elements of the concept that virtually everyone would agree upon. Most scholars however provide for a non-exhaustive list of elements of the concept, which includes, but is not limited to: legality, legal certainty, non-arbitrary exercise of power, equality

22 See Jean R Sternlight, 'Is Alternative Dispute Resolution Consistent with the Rule of Law?: Lessons from Abroad (2007) 56 DePaul L Rev 581.

23 Jeremy Waldron, 'The Concept and the Rule Law (2008) 43(1) Georgia Law Review 6.

24 Allan C Hutchinson and Patrick J Monahan, *The Rule of Law: Ideal or Ideology* (Toronto: Carswell, 1987) ix.

25 Waldron (n 23) 6.

before the law, access to justice, effective judicial review, independent and impartial courts, etc.[26]

Each element has its own significance for maintaining the concept, but for the question we raised in this paper, doubtlessly, the judiciary is indispensable to the Rule of Law. The judiciary or public justice system plays a crucial role in upholding the Rule of Law and the adjudicative process is the main lever of the Rule of Law. The adjudicative process, at least in general terms, provides an authoritative statement of what the law is, who has what rights, and how these rights have to be vindicated.[27] It provides the idea of formal predictability and legality and promotes individual autonomy in the way of allowing people to live in certainty.

The adjudicative process itself is governed by some principles, which are treated as specific procedural aspects of the Rule of Law concept. Namely, more inclusive Rule of Law definitions incorporate some procedural issues or safeguards besides the formal side of the ideal. As Waldron explains:

> 'A procedural understanding of the Rule of Law requires not only that officials apply the rules as they are set out; it requires the application of the rules with all the care and attention to fairness that is signaled by ideals such as 'natural justice and 'procedural due process. Thus, if someone is accused of violating one of the general norms laid down, they should have an opportunity to request a hearing, make an argument, and confront the evidence before them prior to the application of any sanction associated with the norm.'[28]

The mentioned 'procedural due process stipulates certain principles of process by which the laws that are publicly made and promulgated shall be administered by the courts (for example fairness, equality, publicity, transparency etc.). Instead of the certainty guaranteed by proper application of general norms which makes private freedom possible, the procedural aspects of the Rule of Law seem to value opportunities for active engagement in the administration of justice. Basically, these two currents of thought of the Rule of Law concept – the first puts the emphasis on formal legality and the second pays attention to procedural due process – sit comfortably together and complement each other. The two considerations taken together make the notion of the Rule of Law a most powerful and profound political ideal in contemporary global discourse.

4. DOES PRIVATIZED JUSTICE UNDERMINE OR PROMOTE THE RULE OF LAW?

We have previously concluded that judiciary and adjudicative processes, though crucial for upholding the Rule of Law, are not sufficient to capture the needs of a modern

26 See, for example, Geranne Lautenbach, *The Concept of the Rule of Law and the European Court of Human Rights* (Oxford UP 2014) and Rafael Leal-Arcas, 'Essential Elements of the Rule of Law Concept in the EU (2014) Queen Mary University of London, School of Law Legal Studies Research Paper No. 180/2014 https://ssrn.com/abstract=2483749 assessed 10 December 2019.

27 Genn (n 3) 320. In the same direction, Alexandra D Lahav writes that: 'Adjudication is usually understood as having two functions: dispute resolution and law declaration', The Roles of Litigation in American Democracy (2016) Emory Law Journal 1657.

28 Waldron (n 23) 7-8.

system of disputes resolution and they are complemented by alternative forums. In this constellation, as was mentioned previously, the following question arises: do these alternative forums (or ADR mechanisms) have the same capacity to uphold the mentioned virtues of the Rule of Law or do they erode the vitality of the Rule of Law that the public justice system tries to maintain?

The question raised is neither new nor definitely answered. For a while now, along with the proliferation of ADR mechanisms a debate on whether the informal and private nature of ADR is hostile to the Rule of Law and ultimately to justice itself is going on.[29] We can also very often read the articles posing the question: Do ADR deliver justice?[30] Having spent time over the past few months reading the considerable body of literature on this topic, our general impression is that most scholars and sometimes even practitioners argue that ADR and the Rule of Law seem fundamentally incompatible.[31] Many aspects are emphasized in favour of that incompatibility. We tried to pull together viewpoints and concerns from various sources to provide some context of the debate.

To begin with, it is said that the Rule of Law seeks to resolve disputes according to legal rules established by the state, while ADR (with the possible exception of arbitration) looks to resolve disputes largely by reference to non-law standards, such as underlying interests and preferences of the parties.[32] Namely, although the major goal of ADR processes is the same as litigation, i.e. dispute resolution, the important distinction is that ADR focuses on the interests of the parties rather than their legal rights, in that way its goal is to resolve the dispute so that the full interests of each party are satisfied. Therefore, more and more disputes are settled regarding the disputant's individual preferences and interests, rather than resolved according to the law. But, some scholars think that this might be unfair. They notably criticized the use of ADR (more precisely mediation) on the grounds that it might not appear fair to some disputants, because it

29 See for example Sternlight (n 22), Trevor CW Farrow, 'Privatizing our Public Civil Justice System (2006) Articles & Book Chapters Paper 1930, http://digitalcommons.osgoode.yorku.ca/scholarly_works/1930 accessed 10 December 2019, Hazel Genn, 'Why the Privatisation of Civil Justice is a Rule of Law Issue (2012) 36th F A Mann Lecture, Lincoln's Inn, 19 November 2012 https://www.ucl.ac.uk/laws/sites/laws/files/36th-f-a-mann-lecture-19.11.12-professor-hazel-genn.pdf accessed 10 December 2019, Mediation and the Rule of Law, Keynote of Address by the Honourable the Chief Justice Sundaresh Menon, Supreme Court of Singapore, The Law Society Mediation Forum Singapore, 10 March 2017 <https://www.supremecourt.gov.sg/Data/Editor/Documents/Keynote%20Address%20-%20Mediation%20and%20the%20Rule%20of%20Law%20(Final%20edition%20after%20delivery%20-%20090317).pdf accessed 10 December 2019.

30 Sherif Elnegahy, 'Can Mediation Deliver Justice? (2017) 18 Cardozo Journal of Conflict Resolution, Anna Nylund, 'Access to Justice: Is ADR a Help or Hindrance? in Laura Ervo, Anna Nylund (eds), *The Future of Civil Litigation - Access to Courts and Court-annexed Mediation in the Nordic Countries* (Springer, Cham 2014).

31 Of course, there are many different viewpoints, sometimes based on scope of definition of the Rule of Law concept. For example Jean R Sternlight (n 22), 590, argues that 'the question of whether ADR and the rule of law are consistent is semantic. If the rule of law is narrowly defined only to include litigation-oriented approaches, then most ADR processes are inconsistent with the rule of law. If, on the other hand, the rule of law is more broadly defined, as it sometimes has been in the international context, then rule of law projects may include ADR elements. To the extent the discussion remains on this purely semantic level, it is not particularly interesting.'

32 In the same way Harry T Edwards, 'Commentary, Alternative Dispute Resolution: Panacea or Anathema?(1986) 99 (3) Harvard Law Review 668, cautions that 'a virtue of adjudication is its ability to ensure the proper resolution and application of public values, and that public officials, not private individuals, must interpret the values of the Constitution and statutes.'

did not promote a resolution based on public norms.[33]

Then comes the very often mentioned paradox of privatizing the justice at a time when law is apparently proliferating - reaching into every aspect of business, private and public life[34] in order to provide legal certainty and ensure that the law rules, not the people. In the same context, it is argued that 'in the privatized world of justice resolution you may have the law, but it does not rule. You may not even have the law and certainly you do not have the values of the public justice system.'[35]

In addition to this, publicity is pointed out as crucial for justice and the Rule of Law in terms of keeping the judiciary under scrutiny. The protagonists of the mentioned incompatibility very often refer to the citation of famous Jeremy Bentham's saying: 'Where there is no publicity there is no justice. Publicity is the very soul of justice.' Therefore, it is obvious that when privatizing significant sections of the adjudicative function, making them private and confidential, we are 'systematically and knowingly treading on the key rules of legal protections.'[36] It is said:

> 'There is the point that ADR processes are essentially private, involving only the parties, their lawyers and any third parties they choose to bring in. This privacy may be a major attraction for the parties, but justice is traditionally done in open court, and there are questions as to whether justice will always be done in private proceedings.'[37]

Moreover, it is suggested that court proceedings are governed by well-developed due process values. Public judgment is reached at the end of hearings which provide formal, tightly structured opportunities for an impartial decision-maker to determine the rights and responsibilities of particular persons fairly and effectively, after hearing evidence and arguments from both sides.[38] Contrariwise, 'privatized dispute resolution processes (with the possible exception of arbitration) do not have this commitment to process. Without scrutiny it is impossible to know whether the processes or the outcomes for parties are fair in the context of the legal rights and responsibilities that gave rise to the dispute.'[39]

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33 Deborah Hensler, 'Suppose It's Not True: Challenging Mediation Ideology' (2002) Journal of Dispute Resolution 95. She points out that 'the question of whether (and when) people prefer dispute resolution based on public legal norms to dispute resolution based on ad hoc privately negotiated norms unfortunately has not been subjected to much investigation to date.' However, she thinks that 'the legitimacy that people accord the courts - which is essential to a rule of law - is dependent on the courts offering the opportunity to resolve disputes on the basis of facts and law, using fair, thorough, and dignified procedures, to all who seek it.'

34 Genn (n 29) 2.

35 Genn (n 29) 20.

36 Farrow (n 5) 37.

37 Susan Blake, 'The Contractual Basis for ADR - a Platform for Party Autonomy or the Privatization of Justice?' (2016) https://www.city.ac.uk/__data/assets/word_doc/0010/336439/ADR-Party-Autonomy-or-the-Privatization-of-Justice.docx accessed 10 December 2019.

38 Jeremy Waldron, 'The Rule of Law and the Importance of Procedure', in James E Fleming (ed), *Getting to the Rule of Law* (New York UP 2011).

39 The Chief Justice Sundaresh Menon (n 29) 16. In the same context, Trevor C. W. Farrow arguing for increased transparency and accountability in current dispute resolution mechanisms writes: 'Where a democracy deficit comes into play, however, is not in open court with "activist" judges, but rather when the important societal ordering tool of adjudication goes underground to private arenas, without the guarantee of the rule of law badges of procedural fairness, transparency and independence of the decision maker. When decisions are made in these private circumstances, we often do not know what

By the same token, another critical argument is the lack of formal procedure in ADR and its replacement by flexibility and party-determined processes. It is well known that in ADR mechanisms there is often significant flexibility, so the parties can have notable control over what to agree on in regard to which procedure to follow, in order to resolve the dispute. Many legal scholars have raised questions about the use of such processes referring to a number of valid concerns about the lack of procedural safeguards in informal justice procedures. From the legal scholar's perspective such procedures may not be 'just'. For example, speaking about mediation as ADR method, Genn puts emphasis on the aspect of increased power of strong over weak. She writes:

> 'Precisely because it is an informal and consensual process, it can be used as an inexpensive and expedient adjunct to formal legal processes, seeming to increase access to justice, whereas in fact it can magnify power imbalances and open the door to coercion and manipulation by the stronger party.'[40]

Finally, one additional concern has to be mentioned. It derives directly from private and entrepreneurial nature of ADR itself and defines the providers of the private justice. [41] They have already been labelled as the 'private industry of dispute resolution'.[42] It is claimed that apparently their activities are subject to economic influences and thus inconsistent with the standards of impartiality and independence associated with the public justice and the Rule of Law.

Last, but not least, it's important to stress that the fair treatment of disputants in ADR processes seems to be the least criticized. It is suggested that ADR has enormous potential for accomplishing the needs of fairness and procedural justice of individual disputants.[43] Parties' preferences for particular types of ADR are actually driven by procedural justice assessments, due to the fairness of these processes compared to litigation. In the same light, it is concluded that 'to the extent that this is true, and that parties want to engage in ADR because it appears more procedurally fair to them than traditional judicial decision making, the procedural justice parties experience in these processes may be a key facet of making these processes legitimate.' [44]

5. CONCLUDING REMARKS

The previous elaboration has been pretty much a quick review of the debates on one very intriguing topic in the modern system of dispute resolution. Of course, it is not enough to reflect the variety of thoughts that exist in an extensive and rich literature on

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they are. And in any event, to the extent that we do know (which knowledge brings the broader behavior modification element of adjudication into play) we typically have no record or guarantee of the fairness of the procedural or substantive legal regimes that were employed to reach a given result.' Farrow (n 28) 16.

40 Genn (n 3) 90. Similarly, Trevor C. W. Farrow writes: 'There is a real danger that parties, particularly those with power, will increasingly use this privatizing system in order to circumvent public policies, accountability and notions of basic procedural fairness', Farrow (n 28) 16.

41 Murray (n 8) 144, who in this regard speaks about the dark side of privatized civil justice.

42 Ibid, 145.

43 See extensively Sternlight (n 22).

44 Rebecca Hollander-Blumoff & Tom R Tyler, 'Procedural Justice and the Rule of Law: Fostering Legitimacy in Alternative Dispute Resolution' (2011) Journal of Dispute Resolution 13.

the issue, but somehow to highlight the thoughts that we find the most salient. Having in mind the points of the literature reviewed, but also the author's personal professional background[45] we would like to share very briefly our own observations and to give an answer to the titled question.

Our first point is that ADR and the Rule of Law may actually be mutually supportive rather than mutually exclusive. Although aware that this point of view may have disagreements, the underpinnings of our opinion are as follows. When the judiciary or the public justice system does not meet societal needs, it is to be expected that citizens and businesses will resort to and rely on alternative mechanisms offered to them. Or to put it differently: if the Rule of Law is important for social and economic development while public justice institutions are performing badly and more and more citizens and businesses rely on informal alternatives, it seems necessary to consider these alternatives along with the formal public justice institutions in development strategies relating to the Rule of Law.[46] This implies that the Rule of Law is not in tension with ADR mechanisms because at the end of the day they both aim to achieve the same goals - to resolve the disputes and the pursuit of justice. In this context, justice itself should be considered as a wider concept than the adjudication of legal rights and wrongs.

The second point we want to stress and which seems to us undisputable is the fact that the virtues of the Rule of Law mentioned previously are neither perfectly compatible with ADR, nor entirely incompatible with it. This might be a topic for long and never-ending discussions with a plenty of pros and cons. However, it seems worthless to debate about it, although the rise of private justice system will further raise questions of transparency, legitimacy, accountability etc. In our opinion what is more important is the fact that as soon as ADR mechanisms can help maintain societal values that are consistent with the Rule of Law (such as equality and fairness), we can claim nothing else but that the ADR is promoting the Rule of Law. And we think it should be accepted even when ADR mechanisms do not produce outcomes that arise directly from the Rule of Law by definition, but are rather based on interests and preferences of the parties.

Thus, our further, and from our perspective the most important point is to ensure that the complementary ADR mechanisms meet the minimum procedural standards of the Rule of Law concept. To be more precise: when the disputants' individual perception is that the outcome of the ADR derives from the equal and fair treatment they get, they will highly prize ADR and certainly will choose it in the future. No matter how private and confidential it is. The very essence of the matter will be whether individuals and

45 The author has spent nearly 25 years researching and teaching civil procedure. Recently the author has been involved in ADR mechanisms, predominantly in arbitration, both academically and practically. So, having devoted most of her working life to public justice system, the author also experienced the privatized one. Therefore, the author`s observations are not merely theoretical, but somehow empirical as well.

46 Similarly, Bryant G. Garth speaking about the relation between the public and private justice system says: 'From one perspective, the two systems are no longer discrete conversants but have begun to be "integrated", "melded" or "collapsed" into each other. From another vantage point, the state's system is increasingly in disarray, and the "private" system is becoming the one of choice, when litigants have the resources and ability to "opt out"'. Bryant G Garth, 'Privatization and the New Market for Disputes: A Framework for Analysis and a Preliminary Assessment' (1992) 12 Studies in Law, Politics, and Society 374.

businesses have confidence in ADR mechanisms, because that confidence is fostering the legitimacy of ADR.

This leads us to the last point we want to make. It covers the professional standards to which all private justice providers should adhere to. Only the highest professional standards will promote and sustain the quality of private justice services, strengthening public trust and confidence in them. Just like the independence and impartiality standards do the same for the judiciary.

Finally, having in mind all that was previously presented and keeping the very spirit of this event, celebrating the European day of justice, we will conclude: privatization of civil justice is not only an issue of promoting the access to justice, but also an issue of promoting a positive perception of the justice system overall. Namely, the practice and various studies show that individuals and businesses using ADR mechanisms generally report high levels of satisfaction and therefore attribute that satisfaction to the judicial system taken as a whole. This suggested that ADR does not jeopardize the fundamental values of the civil justice system, but contributes in creating the positive image of it.

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RECENT DEVELOPMENTS IN POLISH CIVIL PROCEDURE IN THE FIELD OF PUBLIC HEARING

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Summary: 1. Introduction. – 2. The Right to a Public Hearing in the Light of the ECHR's and the Polish Constitutional Tribunal's Case Law. – 3. The Grounds for Passing a Judgment in Camera According to the Polish Code of Civil Procedure. – 4. Passing Procedural Decisions outside of a Public Hearing. – 5. Conclusion.

The present paper deals with the possibility of passing judgments on merit and procedural decisions at a court session held in camera. In order to assess the admissibility of this practice and its congruence with constitutional standards, the article presents the relevant case law of the European Court of Human Rights and the Polish Constitutional Tribunal. The paper discusses the issue of the 'right to a public hearing' in connection with the recent amendment of the Polish Code of Civil Procedure, which widened the court's possibility to pass judgments and decisions in chambers.

Keywords: right to a public hearing, case law, passing judgment in camera, passing decisions outside of a public hearing.

1. INTRODUCTION

The Polish Code of Civil Procedure has recently been subject to one of the vastest amendments since its enactment in 1964.[1] The legislative action was aimed at simplifying and accelerating court proceedings.[2] In order to fulfill this goal, the lawmaker resolved to reform selected aspects of civil procedure, which in his view hindered the effective course of the proceedings and a relatively quick adjudication of the case. Some of these changes affect the right to a public hearing, which is significant considering the prominent role of this fundamental procedural right. The right to a public hearing, proclaimed by Article 6 (1) ECHR as well as by constitutional acts such as Article 45 (1) of the Constitution of the Republic of Poland, is widely regarded as one of the pillars of contemporary civil procedure.[3] The right to a public hearing as a general concept exerts an impact on many specific procedural solutions. While characterizing this concept it is possible to differentiate its external (Germ. *Volksöffentlichkeit*) and internal (Germ. *Parteiöffentlichkeit*) aspect.[4] The former facilitates participation of the public at a hearing, which prevents the court from adjudicating a civil case in secret, without the public control of the media and the audience.[5] This issue is regulated in Article 9 § 1 sentence 1 *in principio* of the Polish Code of Civil Procedure (hereinafter: PCCP)[6] and Article 148 § 1 *in fine* PCCP. More specifically it deals with third parties' access to a court hearing, providing them with a possibility of following the course of a civil action and learning about the outcome of the case. It strengthens the transparency of the court's activities and increases the public's trust in the judicial process.[7] According to Article 45 (2) sentence 2 of the Constitution of the Republic of Poland, the external aspect of the

1 The Act of 4 July 2019 on the amendment of the Polish Code of Civil Procedure and other laws [2019] Polish Journal of Laws, item 1469 (Ustawa z dnia 4.07.2019 r. o zmianie ustawy – Kodeks postępowania cywilnego oraz niektórych innych ustaw [2019] Dz.U. poz. 1469).

2 Cf. the written explanation accompanying the Government's bill on the amendment of the Polish Code of Civil Procedure and other laws, Sejm's legislative materials no 3137.

3 Cf. W Miszewski, 'Jawność w procesie cywilnym w związku z przepisami kodeksu postępowania cywilnego' (1933) 1 Polski Proces Cywilny 11-12; K Stefko, 'Główne zasady polskiej procedury cywilnej' (1929) 1 PPiA 23; E Waśkowski, *System procesu cywilnego. Wstęp teoretyczny* (Vilnius 1932); J Skąpski, *Postępowanie. Część ogólna, in: Polska procedura cywilna. Projekty referentów z uzasadnieniem* (Cracow 1921); S Kruszelnicki, 'Zasady procesu cywilnego według polskiej procedury cywilnej' (1931) 9 Głos Sądownictwa 476; W Miszewski, *Proces cywilny w zarysie* (Łódź 1946); A Kościółek, *Zasada jawności w sądowym postępowaniu cywilnym* (WK 2018); W Broniewicz, 'Jawność jako konstytucyjna zasada procesu cywilnego Polski Ludowej' (1954) 5-6 NP 83; K Gajda-Roszczynialska, 'Zasada jawności w postępowaniu cywilnym' (2013) 1 Iustitia 11; T Stawecki, 'Jawność jako wartość prawa' (2004) 43 Studia Iuridica 217; P Rylski, T Zembrzuski, 'Rozpoznawanie spraw cywilnych na posiedzeniu niejawnym' (2006) 6 Przegląd Sądowy 84-85; Z Miczek, 'Jawność posiedzeń sądowych w postępowaniu cywilnym i jej wyłączenia' (2005) 6 Ius et Administratio 85; J Gudowski, 'Laserunkowość postępowania cywilnego' in A Laskowska-Hulisz, J May, M Mrówczyński (eds), *Honeste procedere. Księga jubileuszowa dedykowana Profesorowi Kazimierzowi Lubińskiemu* (WK 2017).

4 Cf. K Weitz, 'Commentary to article 9 PCCP' in T Ereciński (ed), *Komentarz KPC* (Warsaw 2016) vol 1, point 1.

5 The German and Swiss doctrine uses the concept 'keine Geheimjustiz'. Cf. WH Rechberger, DA Simotta, *Grundriss des österreichischen Zivilprozessrechts. Erkenntnisverfahren* (MANZ 2010); FC Mayer, in U Karpenstein, FC Mayer (eds), Konvention zum Schutz der Menschenrechte und Grundfreiheiten. Kommentar (CH Beck 2015), art 6, p 178; T Sutter-Somm, B Seiler, in T Sutter-Somm, F Hasenböhler, C Leuenberger (eds), Kommentar zur Schweizerischen Zivilprozessordnung (ZPO) (Schulthess 2016) art 54, p 455.

6 Polish Code of Civil Procedure of 17 November 1964 with amendments [1964] Polish Journal of Laws, no 43, item 296 with amendments.

7 Rechberger, Simotta (n 5) 234; Mayer (n 5) 178; Sutter-Somm, Seiler (n 5) 455; Gudowski (n 3) 120.

right to a public hearing can be excluded only under exceptional circumstances which include: the regard for morality, the safety of the State, public order, the protection of privacy of the parties or other important private interest.[8]

By contrast the internal aspect of the right to a public hearing is directed towards the procedural relationship of the parties and the court. It constitutes the inherent component of the right to be heard[9] and is consequently an indispensable part of the procedural justice.[10] It manifests itself in the parties' right to be notified of the court sessions, the possibility of presenting their own standpoint, acquainting themselves with the stance of their opponent and participating in the court's activities. The internal aspect of the right to a public hearing can be neither limited nor excluded because it would lead to the invalidity of civil proceedings (cf. article 379 PCCP).[11]

2. THE RIGHT TO A PUBLIC HEARING IN THE LIGHT OF THE ECHR'S AND THE POLISH CONSTITUTIONAL TRIBUNAL`S CASE LAW

The assessment of legislative solutions, which limit the right to a public hearing, should be preceded by an analysis of the standards and requirements elaborated by the European Court of Human Rights (cf. art. 6 (1) sentence 1 ECHR – 'everyone is entitled to a fair and public hearing') and the relevant case law of the Polish Constitutional Tribunal on article 45 (1) of the Constitution of the Republic of Poland. According to the European Court of Human Rights, the right to a public hearing is endangered, if the lawsuit is examined in written proceedings and the party does not have any legal instruments to have her case heard in the public and oral court session.[12] This scenario is likely to occur, when the lack of a public hearing cannot be redressed at the later

8 P Grzegorczyk, K Weitz, 'Commentary to art. 45 of the Constitution of the Republic of Poland', in M Safjan, L Bosek (eds) *Konstytucja RP* (2016) vol 1, nb 108. Cf. also Gudowski (n 3) 119-120. Cf. Art. 45 (2) sentence 1 of the Constitution of the Republic of Poland.

9 On the links between the internal aspect of the right to a public hearing and the right to a fair trial – cf. P Hofmański, 'Prawo do sądu w ujęciu Konstytucji i ustaw oraz standardów prawa międzynarodowego' in L Wiśniewski (ed), *Wolności i prawa jednostki oraz ich gwarancje w praktyce* (Wydawnictwo Sejmowe 2006).

10 As the Polish Constitutional Tribunal indicated in its judgement of 31 March 2005, SK 26/02, OTK-A, 2005, no 3, item 29, the term of procedural fairness does not have a strictly specified meaning. However, different concepts procedural fairness have a common core containing: 1) the right to be heard; 2) a clear manifestation of the motives of the verdict, thus avoiding any arbitrariness in the court's decisions in a way allowing for the verification of the court's reasoning; 3) guaranteeing foreseeability to the parties of the proceedings, by assuring cohesion and internal logic of the procedural mechanisms. Cf. Judgement of the Polish Constitutional Tribunal of 16.1.2006, SK 30/05, OTK-A 2006, no 1, item 2; of 2.10.2006, SK 34/06, OTK-A 2006, no 9, item 118; of 20.11.2007, SK 57/05, OTK-A 2007, no 10, item 125; of 26.02.2008, SK 89/06, OTK-A 2008, no 1, item 7; of 12.01.2010, SK 2/09, OTK-A 2010, no 1, item 1; of 18.10.2011, SK 39/09, OTK-A 2011, no 8, item 84; of 8.04.2014, SK 22/11, OTK-A 2014, no 4, item 37.

11 Rechberger, Simotta (n 5) 234-235. Cf also Miszewski, 'Jawność w procesie cywilnym w związku z przepisami kodeksu postępowania cywilnego' (n 3) 17-18; Gajda-Roszczynialska, 'Commentary to art. 9 PCCP' in A Góra-Błaszczykowska (ed), *Komentarz KPC* (CH Beck 2013) point 45; Weitz'Commentary to art. 9 PCCP' (n 4) point 4. Under exceptional circumstances the internal aspect of the right to a public hearing must be correlated with the regard for the safety of the State, which may have a negative influence on the way and scope of informing parties about the course of the proceedings and the collected means of evidence – cf. Grzegorczyk, Weitz (n 8), and the ECHR case law cited in this publication.

12 *Weber v Switzerland* [1990] ECHR judgement of 22.5.1990, no 11034/84, , point 39; 46 ff. In literature Mayer (n 5) 178.

stage of the proceedings.[13] When the case is to be examined only in the course of one instance proceedings, the Strasbourg court accepts the lack of a public hearing only under exceptional circumstances.[14] The public hearing can be foregone, if at a certain point of the civil process the court deals exclusively with strictly formal, legal or technical issues, which have nothing or little to do with the sphere of examining facts and conducting evidence proceedings.[15] The European Court of Human Rights has held that the principle of procedural justice is not infringed, if the judgment was passed in written proceedings, as long as the goal of legal protection in the framework of a given civil process does not require holding a public hearing (for a second time),[16] the party to the proceedings already had an opportunity to present her stance in a different manner than at the oral hearing.[17] Although the ECHR presents a rather restrictive approach in its case law, it nonetheless accepts the fact that conducting a public hearing should not be regarded as a goal in itself.[18] While examining this issue, it is important to assess to what extent the lack of a public hearing could have impacted on the outcome of the case. While analyzing this issue, it should be borne in mind that examining the case by the first instance court at the public hearing diminishes the intensity of this requirement at the subsequent stages and instances of civil proceedings.[19] Having said that, a party's right to a public hearing should be safeguarded in at least one stage or instance of the proceedings.[20] In the light of the Strasbourg court's case law with regard to Article 6 (1) ECHR it is acceptable to conduct a public hearing as late as in the appellate proceedings, similarly as forgoing the right to a public hearing at the appellate stage, if the aforementioned right had already been safeguarded at an earlier part of the civil process.[21] It needs emphasizing that these remarks hold true, unless the examination of the case at a given stage of the proceedings requires conducting and assessing evidence with the participation of the parties.

While analyzing the procedural guarantees of the publicly conducted judicial process, one should also take into account some equally important values, such as the effectiveness

13 *Moser v Austria* [2006] ECHR judgement of 21.9.2006, no 12643/02, , point 96. Cf. Mayer (n 5) 179.

14 Cf ECHR judgement of 23.2.1994, no 18928/91, Fredin v Sweden, point. 21; ECHR judgement of 19.2.1998, no 16970/90, *Allan Jacobsson v Sweden*, point 46.

15 Cf. *Axen v Germany* [1983] ECHR judgement of 8.12.1983, no 8273/78, point 28; *Monnell and Morris v the United Kingdom* [1987] ECHR judgement of 2.3.1987, no 9562/81 and 9818/82, point 58; *Hoppe v Germany* [2002] ECHR judgement of 5.12.2002, no 28422/95, point 64.

16 Cf. *Hoppe v Germany* (n 15); *Fejde v Sweden* [1991] ECHR judgement of 29.10.1991, no 12631/87, point 33; *Ekbatani v Sweden* [1988] ECHR judgement of 26.5.1988 – 10563/83, point 31-32; *Helmers v Sweden* [1991] ECHR judgement of 29.10.1991 – 11826/85, point 37 ff.; *Kremzow v Austria* [1993] ECHR judgement of 21.9.1993, no 12350/86, point 67 ff.; *Elsholz v Germany* [2000] ECHR judgement of 13.7.2000, no 25735/94, point 66; *Constantinescu v Romania* [2000] ECHR judgement of 27.6.2000, no 28871/95, point 55.

17 Cf. *Schuler-Zgraggen v Switzerland* [1993] ECHR judgement of 24.6.1993, no 14518/89, point 58; *Döry v Sweden* [2002] ECHR judgement of 12.11.2002, no 28394/95, point 37 ff.; *Jussila v Finland* [2006] ECHR judgement of 23.11.2006 (GK), no 73053/01, point 41 ff.

18 Mayer (n 5) 179, point 64.

19 Cf. *Miller v Sweden* [2005] ECHR judgement of 8.2.2005, no 55853/00, point 30.

20 Cf. *Fischer v Austria* [1995] ECHR judgement of 26.4.1995, no 16922/90.

21 Cf. *Faugel v Austria* [2003] ECHR judgement of 20.11.2003, no 58647/00 and 58649/00; *Abrahamian v Austria* [2008] ECHR judgement of 10.4.2008, no 35354/04; Weber (n 12); *Riepan v Austria* [2000] ECHR judgement of 14.11.2000, no 35115/97, point 40 ff. Cf. Mayer (n 5) 180-181, point 65, 67.

and speed of civil proceedings.[22] The possibility of taking those values into account is nonetheless conditional upon multiple factors, such as the scope of examination of the court at the given stage of the case and the type and subject matter of the proceedings at hand.[23] It is also worth adding that the European Court of Human Rights accepts the situation when a party renounces its right to a public hearing.[24] As the court indicates in its case law, neither the letter, nor the spirit of article 6 (1) ECHR prevents a party from not taking advantage or relinquishing the right attributed to her.[25] Such a renouncement may take place in a direct or implied manner, but it must be unambiguous, and it cannot give room to speculation.

Before discussing amendments introduced to the PCCP by the Act of 4 July 2019 it is also indispensable to refer to the case law of the Polish Constitutional Tribunal on the grounds of article 45 of the Constitution of the Republic of Poland, which regulates the right to a fair and public hearing. As far as the internal aspect of the right to a public hearing is concerned, the scope and shape of respective legislative solutions designed to fulfill it, are conditional upon the procedural positions of the parties, the subject matter of the case, its character and the type of the proceedings.[26] These solutions must enable a party to learn about the proceedings and its development. Although this aspect of the right to a public hearing is most frequently characterized by a party's right to participate at the court session, it may as well be realized by means of service of judicial documents, court announcements and access to the court files.[27] The right to be heard – understood as the party's right to present her procedural stance and the possibility of learning about the procedural stance of the opposite party – will be deemed respected, even if it takes place in a written form.[28]

In regard to the external aspect of the right to a public hearing, the strictly literal content of article 45 (1) of the Constitution of the Republic of Poland, similar to article 6 (1) ECHR, does not give basis to qualitatively different stages of the proceedings, when it comes to the guarantee of the right to a public hearing. However, as was shown with regard to article 6 (1) ECHR, a reasonable approach to this issue should be adopted. For instance, fulfilling the requirement of a public hearing in the proceedings before the court of first instance allows for adopting a more lenient approach to this issue in

22 *Petersen v Germany* [2001] ECHR judgement of 6.12.2001, no 31178/96; *Helmers* (n 16) point 36 ff.

23 C Grabenwarter, *Europäische Menschenrechtskonvention* (Beck 2008); Mayer (n 5) 180.

24 Cf. Art. 233 of the Swiss ZPO.

25 Cf. *Albert and Le Compte v Belgii* [1983] ECHR judgement of 10.2.1983, no 7299/75,7496/76, point 35; *Schuler-Zgraggen v Szwajcarii* [1993] ECHR judgement of 24.6.1993, no 14518/89, point 58; *Hakansson and Sturesson v Szwecji* [1990] ECHR judgement of 21.2.1990, no 12585/86, point 66; *Le Compte ua* [1981] ECHR judgement of 23.6.1981, no 6878/75, point 59; *Zumtobel v Austria* [1993] ECHR judgement of 21.9.1993,no12235/86; *Pauger v Austria* [1997] ECHR judgement of 28.5.1997, no 16717/90, point 58 i 62; *Sejdovic v Italy* [2006] ECHR judgement of 1.3.2006, no 56581/00, point 86 – <www.echr.coe.int> accessed 18 February 2020. In literature cf. Mayer (n 5) 181, point 69-70.

26 Cf. Judgement of the Polish Constitutional Tribunal of 3.07.2007, SK 1/06, OTK-A, 2007, no 7, item 73.

27 Grzegorczyk, Weitz (n 8) point 97.

28 See judgement of the Polish Constitutional Tribunal of z 11.06.1002, SK 5/02, OTK-A 2002, no 4, item 41; judgement of the Polish Constitutional Tribunal of 6.12.2004, SK 29/04, OTK-A 2004, no 11, item 114; judgement of the Polish Constitutional Tribunal of 2.10.2006, SK 34/06, OTK-A 2006, no 9, point 118; judgement of the Polish Constitutional Tribunal of 19.9.2007, SK 4/06, OTK-A 2007, no 8, item 98; judgement of the Polish Constitutional Tribunal of 20.11.2007, SK 57/05, OTK-A 2007, no 10, item 125; judgement of the Polish Constitutional Tribunal of 20.10.2010, P 37/09, OTK-A 2010, no 8, item 79.

the course of the appellate proceedings due to its secondary, control-oriented or strictly juridical character. The legislator's decisions whether the case should be examined at a public hearing or not, should also take into account such factors as the subject matter of a case, the type, character and stage of the proceedings as well as the scope of court's control powers under specific circumstances.[29]

The assessment of the solutions adopted by the Act of 4 July 2019 should also be preceded with an analysis, whether the exclusion of the right to a public hearing is congruent with the premises enumerated in article 45 (2) sentence 1 of the Constitution of the Republic of Poland. It is worth adding that a similar issue was regulated in article 6 (1) sentence 2 ECHR.[30] In the written clarifications added by the Polish legislator to the Act of 4 July 2019, it was explained that the motive behind introducing amendments to the PCCP consisted in increasing the speed and effectiveness of the proceedings.[31] The Polish Constitutional Tribunal and the jurisprudence indicate that these values should be examined in the context of the premise of public order.[32] These elements are in connection with the right to obtain a verdict without undue delay (*iustitiae dilatio est quaedam negatio*), which is equally safeguarded by article 45 (1) of the Constitution of the Republic of Poland and consequently, its influence cannot be overlooked when it comes to the interpretation of article 45 (2) sentence 1 of the Constitution of the Republic of Poland.[33] Therefore, it is possible to draw a preliminary conclusion that the Polish Constitution accepts to a certain extent an examination of civil cases in camera.[34] Additionally, it is worth mentioning that the European Court of Human Rights holds that the exclusion of a public hearing is supposed to meet the requirements of proportionality. Thus, it will be deemed acceptable as long as a) an exclusion of a public hearing serves the objectives laid out in article 6 (1) sentence 2 ECHR; b) an exclusion of a public hearing *truly* serves those objectives; c) there is an adequate relation between the grounds of exclusion specified in article 6 (1) sentence 2 ECHR and the reasons against the exclusion; d) it is not possible to fulfill the goals indicated in article 6 (1) sentence 2 ECHR in a different way (i.e. by taking advantage of other means) than by forgoing the public hearing.[35]

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29 Grzegorczyk, Weitz (n 8) point 97.

30 Cf. Article 6 (1) sentence 2 ECHR which states that 'the public may be excluded from all or part of the trial in the interests of (…) public order (…), or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice'.

31 Cf. the written explanation accompanying the Government's bill on the amendment of the Polish Code of Civil Procedure and other laws, Sejm's legislative materials no 3137.

32 Cf. A Kubiak, *Konstytucyjna zasada prawa do sądu w świetle orzecznictwa Trybunału Konstytucyjnego* (Wydawnictwo Uniwersytetu Łódzkiego 2006); judgement of the Polish Constitutional Tribunal of 26.11.2013, SK 33/12, OTK-A 2013, no 8, item 124. Cf, however, M Skibińska, 'Rozpoznanie i rozstrzygnięcie sprawy cywilnej na posiedzeniu niejawnym na podstawie art. 148[1] KPC w świetle zasad postępowania cywilnego i treści art. 5 KPC' in A Barańska, S Cieślak, *Ars in vita. Ars in iure. Księga jubileuszowa dedykowana Profesorowi Januszowi Jankowskiemu* (CH Beck 2018) 160; M Mączyński, 'Ograniczenie prawa podmiotów gospodarczych do sądu' (2000) 5 PiP 60 ff.; judgment of the Polish Constitutional Tribunal of 2.10. 2006, SK 34/06.

33 T Ereciński, K Weitz, 'Efektywność ochrony prawnej udzielanej przez sądy w Polsce' (2005) 10 Przegląd Sądowy 14–15 and 17.

34 Cf. Judgment of the Polish Constitutional Tribunal of 18.2.2009, KP 3/08, OTK-A 2009, no 2, item 9; judgement of the Polish Constitutional Tribunal of 15.4.2009, SK 28/08, OTK-A 2009, no 4, item 48; 7.12.2010, P 11/09, OTK-A 2010, no 10, item 128.

35 P Hofmański, A Wróbel, in L Garlicki (ed), *Konwencja o Ochronie Praw Człowieka i Podstawowych Wolności* (CH Beck 2010) vol. 1, art. 6, p. 363-364.

The regard for speed and effectiveness[36] as an element of the public order does not raise controversy in situations when the court examines in camera strictly formal, procedural, incidental or technical issues.[37] Nonetheless, some other situations can also be accepted from the constitutional standpoint. For instance, in the light of the abovementioned interpretation of Article 45 (1) sentence 2 of the Constitution of the Republic of Poland, it is acceptable to issue a judgment in camera if a party has conceded the claims of the plaintiff (article 148^1 § 1 *in principio* PCCP).[38] It could even be asserted that as long as the defendant's stance (i.e. the fact of acknowledging the claims of the opponent) does not raise doubts (cf. art. 213 § 2 PCCP), setting up a public hearing just in order to pass a judgment on the merits would be an excessive realization of the right to a public hearing.[39] The external aspect of this procedural right should make concessions to another procedural value, which under these circumstances manifests itself in ending the proceedings without undue delay.[40] This interpretation does not infringe upon the internal aspect of the right to a public hearing, nor upon the right to a fair trial.[41]

3. THE GROUNDS FOR PASSING A JUDGMENT IN CAMERA IN THE LIGHT OF A RECENT AMENDMENT OF THE POLISH CODE OF CIVIL PROCEDURE

The Act of 4 July 2019 widened the spectrum of situations in which the Polish Code of Civil Procedure allows the court to pass a judgment on the merits in camera, i.e. without conducting a public hearing. Examining the case without a public hearing means that the court conducts proceedings in their office (Germ. *Kabinettsjustiz*) in written proceedings without the participation of the parties and the public. While examining the case outside of a public hearing the court is not obliged to inform the parties of the date of the session, unless the judge summons them to appear before the court. However, most often the parties learn about the outcome of the case when the court serves them with a judgment.[42] Situations in which the court passes the verdict without holding a public hearing should only happen under exceptional circumstances, because they diverge from the 'right to public hearing' guaranteed under art. 6 (1) ECHR, art. 45

36 Cf. K Flaga-Gieruszyńska, 'Szybkość, sprawność i efektywność postępowania cywilnego – zagadnienia podstawowe' (2017) 3 Zeszyty Naukowe KUL 5 ff; Ereciński, Weitz (n 33) 3 ff.

37 Grzegorczyk, Weitz (n 8) point 113.

38 Cf. Kościółek (n 3) 451-452 and 457-458; A Mendrek, 'Wyrokowanie na posiedzeniu niejawnym – zagadnienia wybrane' in T Ereciński, J Gudowski, M Pazdan, *Ius est a iustitia appellatum. Księga jubileuszowa dedykowana Profesorowi Tadeuszowi Wiśniewskiemu* (WK 2017) 369; Skibińska (n 32) 152; A Jasiecki, 'Wydanie wyroku na posiedzeniu niejawnym na podstawie art. 1481 KPC – uwagi dotyczące nowelizacji Kodeksu postępowania cywilnego' (2016) 17 Monitor Prawniczy 905 ff.; M Sorysz, 'Rozpoznanie sprawy na posiedzeniu niejawnym w postępowaniu cywilnym w świetle zmiany KPC z 10 lipca 2015 r.' (2016) 9 Palestra 82 ff.

39 Kościółek (n 3) 452.

40 See. R Kulski, 'Komentarz do art. 148^1 KPC' in A Marciniak (ed) *Komentarz KPC* (CH Beck 2019) vol. 1, point 7.

41 Cf. A Łazarska, *Rzetelny proces cywilny* (WK 2012) 355-356; M Kłopocka, 'Prawo do sądu w orzecznictwie Trybunału Konstytucyjnego' (2007) LXXVI Acta Universitatis Wratislaviensis 'Prawo' 74. Cf. Judgement of the Polish Constitutional Tribunal of 13.5.2002, SK 32/01, OTK-A 2002, no 3, item 31; judgement of the Polish Constitutional Tribunal of 18.2.2009, KP 3/08, OTK-A 2009, no 2, item 9; judgement of the Polish Constitutional Tribunal of 7.12.2010, P 11/09, OTK-A 2010, no 10, item 128.

42 M Kłos, 'Commentary to article 374 PCCP', in A Marciniak (ed.), *Kodeks postępowania cywilnego. Komentarz* (CH Beck 2019) vol. II, ed. 1, point 6. Cf Grzegorczyk, Weitz (n 8) point 112.

(1) of the Constitution of the Republic of Poland and article 9 § 1 sentence 1 *in principio* PCCP and article 148 § 1 *in fine* PCCP.

Prior to the amendments introduced by the Act of 4 July 2019, the Polish Code of Civil Procedure regulated two cases, in which it was possible to pass a judgment in camera. The first one, article 341 PCCP enables the court to issue a default judgment, if the writ of service on the defendant is delivered to the court within two weeks since the date of the audience at which the defendant was absent. The other one, article 148^1 PCCP, added by the Act of 10 July 2015,[43] concerns a situation in which a) the defendant conceded the claims laid out in the lawsuit or b) when upon filing all the documents by the parties, the court comes to the conclusion that it is not necessary to hold a public hearing.[44]

In regards to further grounds for passing a judgment in camera, the Act of 4 July 2019 introduced changes in article 339 § 1 PCCP and added a new article 191^1 PCCP. According to the new content of article 339 § 1 PCCP such a possibility will present itself, if the defendant does not file a response to the lawsuit in the deadline ordered by the judge.[45] If the judge fails to inform the defendant about this obligation, the statement of grounds specified in article 339 § 1 PCCP will not be possible. As the lawmaker underlined in the written explanation accompanying the Act of 4 July 2019, the introduction of an obligatory response to the lawsuit caused changes in the set of circumstances, which should be perceived as passivity on the part of the defendant.[46] Obliging a judge to conduct a public hearing just in order to pronounce the default of the defendant is not an effective solution. Therefore, a judge is allowed to impose consequences from the defendant's passivity as early as possible, provided that the facts presented in the lawsuit do not raise doubts and the plaintiff's claims do not require to be verified. It is worth adding that the discussed regulation does not necessarily require the court to pass a default judgment but rather provides a judge with such a possibility, if the grounds for ending the process seem justified (cf. article 205^4 § 1 PCCP).

The amendment of Article 339 § 1 PCCP was positively evaluated by the Polish doctrine.[47] It is worth adding that the idea of linking a default judgment with the defendant's failure to file an obligatory response to the lawsuit goes back to the works of the interwar Codification Commission.[48] The postulate to introduce this regulation in the general part of the PCCP regularly occurred in the course of the doctrinal discussion.[49] It was

43 Cf the Act of 10 July 2015, Polish Journal of Laws 2015, item 1311 with amendments.

44 Cf Skibińska (n 32) 151 ff; Jasiecki (n 38) 905 ff.; M Bieszczad, 'Dopuszczalność rozpoznania sprawy przez sąd na posiedzeniu niejawnym po nowelizacji – uwagi do przepisu art. 148^1 § 1 KPC', in *I Gil* (ed.) Postępowanie cywilne w dobie przemian, Warsaw 2017; Sorysz (n 38) 82 ff.; Mendrek (n 38) 364 ff.

45 In comparative perspective cf. Art. 223 Swiss ZPO (*versäumte Klageantwort*); § 331 (3) German ZPO; § 276 (1) German ZPO; § 335 (1) point 4 German ZPO; § 396 (1) Austrian ZPO; § 397 Austrian ZPO.

46 Cf. the written explanation accompanying the Government's bill on the amendment of the Polish Code of Civil Procedure and other laws, Sejm's legislative materials no 3137, p. 26.

47 Kościółek (n 3) 463-465. Cf. B Kaczmarek-Templin, 'Commentary to article 339 PCCP', in J Gołaczyński, D Szostek (eds), *Kodeks postępowania cywilnego. Komentarz do ustawy z 4.07.2019 r. o zmianie ustawy – Kodeks postępowania cywilnego oraz niektórych innych ustaw* (CH Beck 2019) point 2.

48 FK Fierich, 'Postępowanie przed sądami okręgowemi', in *Polska procedura cywilna. Projekty referentów z uzasadnieniem* (Cracow 1921) 216.

49 AG Harla, 'Odpowiedź na pozew w projektach Komisji Kodyfikacyjnej II RP i refleksje de lege ferenda', in J Gudowski, K Weitz (eds), *Aurea praxis, aurea theoria. Księga pamiątkowa ku czci Profesora Tadeusza Erecińskiego* (WK 2011) vol 2, p 2983 ff.; AG Harla, 'Odpowiedź na pozew w przyszłym Kodeksie

often indicated that widening the possibility of issuing a default judgment in camera would have a beneficial effect on the economy and the effectiveness of the proceedings.[50] Nonetheless, there are some controversial issues connected with the new regulation. For instance, it is not entirely clear why the decision on passing a default judgment is left to the *discretionary* power of the judge. Hence, it is difficult to explain why under certain circumstances the court might decide to continue the proceedings, even though the defendant defaulted on the obligation to file a response to the lawsuit. Therefore, *de lege ferenda* it might be suggested that passing a default judgment on the grounds specified in article 339 § 1 PCCP might be conditioned on the request of the plaintiff. Such a solution would eliminate the uncertainty in this regard.

The exclusion of the right to a public hearing is also present in the new article 191[1] PCCP, which allows the court to dismiss the lawsuit *a limine* at a court session held in camera, if the content of the lawsuit is regarded by the court as manifestly ill-founded. The new legal provision stipulates that the court is not required to serve an manifestly ill-founded lawsuit on the defendant and that it is dismissed from examining the motions put forward by the plaintiff. The same simplified mechanism also applies to the appellate procedure. According to article 391[1] § 1 PCCP the appellate court is allowed to examine in camera an appeal from the judgment in which the evidently ill-founded lawsuit had been dismissed. In this situation the court is also exempted from serving the appellate measure to the defendant. The cassation is admissible only, if the court of the second instance quashed the judgment in which the lawsuit was deemed as 'manifestly ill-founded', which, in consequence, led to the examination of the case according to the general rules.

In the written explanation accompanying the Act of 4 July 2019, the lawmaker stated that there are many situations in which plaintiffs file evidently groundless lawsuits just to generate needless judicial activity that requires significant time input. Dealing with such cases absorbs the court's energy which could have been dedicated to dealing with the adequately filed lawsuits.[51] The lawmaker also provided the definition of the 'manifestly ill-founded lawsuit'. In his opinion such a lawsuit has no chances whatsoever to be accepted by the court. Therefore, dealing with it would mean a waste of time for the judicial system.[52]

The abovementioned regulation raises concerns when it comes to its congruency with the constitutional standard of the Republic of Poland.[53] The questions concern not only the exclusion of the public hearing (art. 45 of the Constitution of the Republic of Poland),

postępowania cywilnego', in K Markiewicz, A Torbus (eds), *Postępowanie rozpoznawcze w przyszłym Kodeksie postępowania cywilnego* (CH Beck 2014) p. 621-622; Sorysz(n 38) 91; Mendrek (n 38) 377-378.

50 Kaczmarek-Templin (n 47) point 2; Sorysz (n 38) 91; Kościółek (n 3) 464.

51 Cf. the written explanation accompanying the Government's bill on the amendment of the Polish Code of Civil Procedure and other laws, Sejm's legislative materials no 3137, s. 36.

52 The evident groundlessness of the lawsuit takes place when every lawyer, without a thorough analysis of the matter will state that the plaintiff cannot be successful. – see decision of the Polish Supreme Court of 18.01.1966, I CZ 124/65, Legalis; decision of the Polish Supreme Court of 8.10.1984, II CZ 112/84, Legalis. Cf. D Szostek, 'Commentary to art. 191[1] PCCP', in J Gołaczyński, D Szostek (eds), *Kodeks postępowania cywilnego. Komentarz do ustawy z 4.07.2019 r. o zmianie ustawy – Kodeks postępowania cywilnego oraz niektórych innych ustaw* (Legalis 2019) point 2.

53 Kościółek (n 3) 480-482.

but also other guarantees of the right to a fair trial. First of all, the lawmaker excluded the defendant's right to be heard by curbing procedural guarantees connected with the internal aspect of the right to a public hearing.[54] These guarantees should be put into effect by informing the defendant about the lawsuit and the outcome of the proceedings. By infringing on this procedural right, the defendant is deprived of the possibility of learning about the lawsuit and taking a stance on it. Even though the Committee of Ministers of the Council of Europe[55] accepts to some extent simplification of procedure with regard to manifestly ill-founded lawsuits, such measures should not infringe upon procedural rights of the parties. Unfortunately, a maximally simplified way of dealing with such lawsuits, like the one adopted by the Act of 4 July 2019, violates the rights to a fair trial not only from the perspective of the plaintiff, but also from the perspective of the defendant.

The Act of 4 July 2019 also introduced amendments for examining an appeal in the court session held in camera. Prior to the enactment of the new law, it was admissible for the court to examine an appeal outside of the public hearing, if a) the plaintiff withdrew the lawsuit, b) the appellant withdrew the appellate measure, c) if the proceedings were invalid, or d) if the appellate measure was inadmissible (art. 374 sentence 2 *in fine* PCCP). Under the new law the court will have a new possibility of passing a verdict in camera at its disposal. According to article 374 § 1 sentence 1 *in fine* PCCP it will encompass a situation when conducting a public hearing is *not necessary*. Examining this premise will be left to the discretionary power of the court. However, if a party requests the court to conduct a public hearing, the court will be obliged to respect it, unless the circumstances cited in article 374 sentence 2 *in fine* PCCP (see above) take place.

It ensues from the following that unless a party files a motion for a public hearing, the decision whether to conduct a public session or not, will remain with the appellate court. In the process of taking this decision, the court should take into consideration the type of charges raised in the appellate measure and whether an appellant presented new facts and evidence. If the court of first instance correctly established the facts of the case and the dispute at the appellate level is focused on strictly legal issues connected solely with the interpretation of law, it would be acceptable to examine an appeal in the course of written proceedings. Similarly, if the appellant filed charges with regard to strictly formal or technical issues, such as arithmetic errors, it would also be acceptable to refrain from examining an appeal at the public hearing. It needs emphasizing that the appellate court should also take into account the system of appeal that is regulated in a given procedural system. When it comes to the Polish law, the so-called full appeal and *appelatio cum beneficium novorum* are adopted, which means that the appellate court's

54 Cf. judgement of the Polish Constitutional Tribunal of 11.06.2002, SK 5/02, OTK-A 2002, no 4, item 41; judgement of the Polish Constitutional Tribunal of 6.12.2004, SK 29/04, OTK-A 2004, no 11, item 114; judgement of the Polish Constitutional Tribunal of 2.10.2006, OTK-A 2006, no 9, item 118.

55 The Committee of Ministers of the Council of Europe has adopted on 28.02.1984 a Recommendation No R (84) 5, in an attachment to which it formulated nine *Principles of civil procedure designed to improve the functioning of justice*. It indicated: 'When a party brings manifestly ill-founded proceedings, the court should be empowered to decide the case in a summary way and, where appropriate, to impose a fine on this party or to award damages to the other party'<https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016804e19b1> accessed 20 February 2020.

role consists not only of controlling the judgment of the court of the first instance, but also in examining the merits of the case as thoroughly as possible. Therefore, whenever an appellate court carries out evidence proceedings or examines the facts of the case, holding a public hearing should be a rule rather than an exception.

4. PASSING PROCEDURAL DECISIONS OUTSIDE OF A PUBLIC HEARING

The Act of 4 July 2019 also widened the scope of strictly procedural decisions (Pol. *postanowienia*) that can be passed in camera. According to the new rule specified in article 148 § 3 PCCP, every procedural decision (i.e. not: the judgment on the merits) – *lege non distinguente and* also a decision concerning the evidence proceeding – can be rendered outside of a public hearing. The lawmaker has concluded that this new rule will benefit the economy of the proceedings. It is worth underlining that the standard established by the ECHR, as well as the Constitution of the Republic of Poland with regard to strictly procedural decisions, is more lenient than when it comes to judgments on the merits. Additionally, less emphasis on the external aspect of the right to a public hearing does not adversely affect the internal aspect of this procedural right (i.e. the parties' right to be heard and the right to be informed about the course of the proceedings – cf. Art. 357 § 2 and § 2^1 PCCP).

The regulation of the new article 148 § 3 PCCP has sparked divergent reactions in the doctrine.[56] On a negative note, it was underlined that passing a procedural decision sometimes requires the court to hear the parties. Passing a procedural decision outside of a public hearing is controversial, especially when the court decides about the scope of evidence proceedings.[57] The Supreme Court even held that establishing the facts of a case on the basis of means of evidence, which has not been formally accepted at the public hearing, infringes on the rules of evidence proceedings, when it comes to the procedural rules of directness, public hearing, equality of the parties and adversarial proceedings.[58] Prior to the enactment of the Law of 4 July 2019 it was possible only in two cases: firstly, when the court decided about accepting an opinion of an expert (cf. former art. 279 PCCP) and secondly, when it modified its former decision on the evidence proceedings (Pol. *postanowienie dowodowe*; art. 240 § 1 PCCP).

The specificity of the phase of the proceedings, when the court reaches a decision regarding the scope and means of evidence, makes it highly desirable for the parties to participate directly in this process. A situation, in which the court dismisses a means of evidence in its entirety or in part, has a direct influence on the extent of the evidence proceedings and indirectly exerts an influence on the outcome of the case. Adopting

56 Critically in this regard – cf. A Kościółek, 'Commentary to article 148 PCCP', in T Zembrzuski (ed), *Kodeks postępowania cywilnego. Komentarz do zmian* (Lex 2019) point 17; K Flaga-Gieruszyńska, 'Commentary to article 148 PCCP', in A Zieliński (ed), *Kodeks postępowania cywilnego. Komentarz* (Legalis 2019) point 9. Cf a different approach – R Kulski, 'Commentary to article 148 PCCP', in A Marciniak (ed), *Kodeks postępowania cywilnego* (Legalis 2019) vol 1, point 9; D Markiewicz, 'Commentary to article 148 PCCP', in T Szanciło (ed), *Kodeks postępowania cywilnego. Komentarz* (Legalis 2019) vol 1, p 7.

57 Cf. in detail A Łazarska, K Górski, 'Commentary to article 236 PCCP', in T Szanciło (ed), *Komentarz KPC* (Legalis 2019) vol 1, point 20-23.

58 Cf judgement of the Polish Supreme Court of 20.08.2001, I PKN 571/00, OSNP 2003, no 14, item 330.

adequate procedural rules at this stage of the judicial decision process is highly significant, when it comes to safeguarding the guarantees of the right to a fair trial (art. 6 ECHR, art. 45 (1) of the Constitution of the Republic of Poland). In the course of the proceedings it is essential to enable the parties to present their stance with regard to the evidence motions of the other party, as well as to call into question (appeal) the scope of evidence proceedings which was ordered by the court (art. 236 PCCP).

On a positive note, the new article 148 § 3 PCCP contributed to unifying the rules of passing procedural decisions. Prior to the enactment of the Act of 4 July 2019 these rules were scattered throughout the Polish Code of Civil Procedure and many procedural situations were unnecessarily regulated in multiple provisions. It is worth mentioning that article 148 § 3 PCCP does not prevent the court from issuing procedural decisions at the public hearing, leaving the judge a discretionary possibility in this regard.

5. CONCLUSION

In conclusion the right to a public hearing does not necessarily need to be guaranteed in equal measure at all stages of civil proceedings. In the course of a civil process one can point at many situations and many procedural activities, which not only can but also should be performed in camera. It contributes to a more effective organization of the proceedings and it benefits the economy of judicial action. Therefore, some amendments introduced to the Polish civil procedure by the Act of 4 July 2019 are worth praising, as they help to speed up the civil process in a good way. Others are more controversial as they overlook important aspects of the right to a fair and public hearing. The legislator should always keep in mind that the parties to the proceedings are interested in a transparent judicial process.[59] Therefore, adjudicating the case in camera (*Germ. Kabinettjustiz*) should be regarded as an exception to the rule. The right to a fair trial, as well as public control over it, constitute an indispensable element of the proper functioning of judicial system.

59 As JF du Tremblay stated, 'The justice is the creation of light, not darkness' – citing Waśkowski (n 3) 154.

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OPEN ENFORCEMENT: NEW APPROACH OF UKRAINE IN ACCESS TO JUSTICE

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Summary: 1. – Introduction. – 2. Open Judicial Decisions and Open Enforcement Procedure. – *2.1. Automated System of Enforcement Proceedings: How Does It Work? – 2.2. The Unified Register of Debtors: Who Controls the Information? – 2.3. The Register of Decisions Enforcement of Which is Guaranteed by the State.* – 3. Conclusion.

Open justice is one of the fundamental human rights guaranteed by international agreements, as well as by the national legislation of Ukraine. During the reform of justice, the provisions of procedural and judicial legislation have been substantially updated, in particular with regard to ensuring openness and transparency of court proceedings. At the same time, the legislation on enforcement of court decisions does not disclose the essence of these principles, which are enshrined in the relevant laws. Accordingly, the purpose of the article is to identify specific elements of the implementation of the principle of openness and transparency of the enforcement process based on the analysis of the legislation of Ukraine and other countries of the world, national legal doctrine and case law of the European Court of Human Rights.

Keywords: enforcement, public enforcement, a fair trial, open justice.

1. INTRODUCTION

The rule of law and access to open justice are one of the fundamental human rights guaranteed by the Universal Declaration of Human Rights (hereinafter referred to as the Universal Declaration)[1] and the Convention for the Protection of Human Rights and Fundamental Freedoms and Protocols thereto (hereinafter referred to as the European Convention). [2] The case law of the European Court of Human Rights (hereinafter referred to as the ECtHR or the Court) has developed a number of elements, which are constituent of the right to a fair trial in terms of ensuring the publicity of a court case and the announcement of a judgment.

Ukraine, as a member of the United Nations (hereinafter referred to as the UN) and the Council of Europe (hereinafter referred to as the CE), throughout the years of its independence has endeavoured to approximate national laws and jurisprudence to global and European standards. In particular, the Constitution of Ukraine enshrines the right of a person to defend his/her rights in court (Article 55) in the course of a public court hearing (Article 129),[3] which has been further consolidated in the national procedural and judicial legislation.

During the reform of the justice system in Ukraine, the provisions on the openness and the publicity of court proceedings in the case were substantially updated in the relevant procedural codes of Ukraine – the Civil Procedure Code (hereinafter – the CPC),[4] the Commercial Procedure Code (hereinafter – the Commercial PC)[5] and the Code of Administrative Procedure (hereinafter – CAP).[6] In particular, the new wording clarified the provisions on the publicity of the trial and the openness of information about the case (for example, Articles 7 'Publicity of the trial' and 8 'Openness of information about the case' of the CPC).

The publicity, transparency and openness of the trial are inherent features of the judiciary, providing an opportunity for public involvement and an appropriate level of confidence in the judicial activity, as well as guaranteeing the implementation of other principles of justice, such as the equality of parties and competitiveness in the process. But the protection of rights is not only carried out during the trial of the case – it is an integral part of the execution of a court decision, which makes it possible to realize the main purpose of all this activity. Therefore, guaranteeing access to information during the execution of a judgment is also important.

1 The Universal Declaration of Human Rights [1948] <http://www.un.org.ua/ua/publikatsii-ta-zvity/global-un-publications/3722-zahalna-deklaratsiia-prav-liudyny> 15 February 2020.

2 The Convention for the Protection of Human Rights and Fundamental Freedoms [1997] <https://zakon.rada.gov.ua/laws/show/995_004> accessed 15 February 2020.

3 The Constitution of Ukraine [1996] <https://zakon.rada.gov.ua/laws/show/254к/96-вр> accessed 15 February 2020.

4 The Civil Procedure Code of Ukraine [2004] <https://zakon.rada.gov.ua/laws/show/1618-15/print> accessed 15 February 2020.

5 The Commercial Procedure Code of Ukraine [1992] <https://zakon.rada.gov.ua/laws/show/1798-12/print> accessed 15 February 2020.

6 The Code of Administrative Procedure of Ukraine [2005] <https://zakon.rada.gov.ua/laws/show/2747-15/print> accessed 15 February 2020.

In Ukraine, a new Law 'On Enforcement Proceedings'[7] (hereinafter – the Law on Enforcement) was adopted, Article 2 of which enshrined the principles of conducting enforcement proceedings, including the transparency and openness of enforcement proceedings in Ukraine. At the same time, there are no specific provisions in which the essence of this principle is disclosed in said law.

The lack of clear legal regulation of the provisions on taking specific procedural actions in the course of enforcement of court decisions is an urgent problem, which leads to problems of the realization of a person's right to a fair trial during the execution of enforcement proceedings. At the same time, possible solutions to these problems can be found in the systemic-structural approach to characterizing enforcement as an essential part of justice and the process of protection of rights, which provides specific guarantees for the exercise of the right to a fair trial. In view of the above mentioned, we have chosen the principle of openness and transparency of enforcement proceedings as the subject of our research. In our conclusions we propose to comprehensively improve the enforcement of court decisions and to bring us closer to the modern concept of justice. In this case we may reach it by transforming this basis into the transparency of enforcement actions or, as we propose, into open enforcement of judicial decisions, which helps us to improve the whole system of judiciary in Ukraine. The aim of the article is to identify specific elements for the implementation of the principle of openness and transparency of the enforcement process on the basis of the analysis of the legislation of Ukraine and other countries of the world, national legal doctrine and case law of the European Court of Human Rights.

2. OPEN JUDICIAL DECISIONS AND OPEN ENFORCEMENT PROCEDURE

According to the national legislation of Ukraine, as a general rule, a court hearing is held in public in an open court session, in which any person may be present. Persons may be removed from the courtroom only in case of actions in contempt of court or of the participants in the court process, by reasoned court decision. At the same time, the provisions of Article 11 of the Law 'On the Judiciary and Status of Judges' regulate the relationship between the court and the parties of the proceedings in case of a closed trial, which is an absolute exception to the above general rule.[8]

This approach is broadly in line with the concept of a fair trial, since Article 6 of the European Convention and the ECtHR case law also contains provisions on possible restrictions, when the press and the public may not be admitted to the courtroom during all or parts of the hearing, but only in the interests of morality, public order or national security in a democratic society. Also if the interests of minors or the protection of the privacy of the parties so require, or – to the extent that is strictly necessary by the

7 The Law of Ukraine 'On Enforcement Proceedings'[2016] <https://zakon.rada.gov.ua/laws/show/1404-19/print> accessed 15 February 2020.

8 In the CPC, the grounds for removal of a person from the courtroom are set out in more detail: in particular, pursuant to the provisions of part 3, Article 7, a court may remove from the courtroom persons who impede the conduct of a court hearing, the exercise of rights, or the performance of duties of participants in a trial or judge, violate the order in the courtroom.

court – when under particular circumstances the publicity of the proceedings may harm the interests of justice.[9]

There is currently an unprecedented practice in Ukraine of granting any person the right of free access to all court decisions, which, under the Law 'On Access to Court Decisions',[10] is published freely in the Unified State Register of Court Decisions (hereinafter referred to as the 'USRCD') /reyestr.court.gov.ua. Such an idea was realized in view of the need to ensure public access to the acts of the judiciary, as well as to prevent any abuse, in particular, by amending an already announced court decision.[11]

According to Part 2, Article 2 of the said Law, all court decisions shall be open and shall be made public in electronic form, not later than the day after their preparation and signature. In order to access court decisions of courts of general jurisdiction, the State Judicial Administration of Ukraine provides for the maintenance of the USRCD – an automated system for collecting, storing, protecting, recording, searching and providing electronic copies of court decisions (Articles 3 and 2). Court rulings may also be published in printed publications in compliance with the requirements of this law.

The complex interpretation of the legislation on enforcement proceedings can lead to the conclusion that the enforcement of judgments in Ukraine is carried out according to the conditions of open functioning of the *automated system of enforcement proceedings* (hereinafter referred to as the ASEP).[12]

The ASEP was implemented in Ukraine in accordance with the Regulation on the Automated System of Enforcement Proceedings No. 2432/5,[13] approved by the Decree of the Ministry of Justice of Ukraine on 5 August 2016 (hereinafter – the Regulation on the ASEP). The Ministry of Justice of Ukraine provides free and open access to the information of the ASEP on its official web site https://asvpweb.minjust.gov.ua/#/search-debtors with the ability to view, search, copy and print information through common browsers and editors, without the need for custom technology or software tools, without restrictions and around the clock.

According to the above Regulation, the ASEP is a computer program that provides for the collection, storage, accounting, search, synthesis, submission of information on enforcement proceedings, the formation of the Unified Register of Debtors and protection against unauthorized access. The administrator of the ASEP is the state enterprise 'National Information Systems' authorized by law to conduct actions on software creation, technology maintenance, data storage and security information contained therein and the performance of other functions prescribed by the Regulation.

9 The Convention (n 2).

10 The Law of Ukraine 'On Access to Court Decisions' [2016] <https://zakon.rada.gov.ua/go/3262-15> accessed 15 February 2020.

11 T Lesiuk, 'The activity of the judiciary will become more transparent' (2005) 1 (61) Legal Newspaper 5.

12 See also OS Snidevych, 'Openness as a background for building enforcement procedure' (2019) 3 Law and Society 124-128.

13 The Regulation on the Automated System of Enforcement Proceedings No. 2432/5 approved by the Decree of the Ministry of Justice of Ukraine on 5 August 2016 [2016] <https://zakon.rada.gov.ua/laws/show/z1126-16/ed20180828> accessed 14 February 2020.

It is worth noting that in Ukraine there was a *Unified State Register of Enforcement Proceedings* (hereinafter referred to as the USREP), which today is an archival component of the ASEP and contains information on enforcement proceedings registered prior to its introduction. This register was introduced by the Regulation on the Unified State Register of Enforcement Proceedings, approved by the Decree of the Ministry of Justice of Ukraine of 20 May 2003 No. 43/5.[14] and by the Temporary Procedure for Automatic Distribution of Enforcement Documents between State Enforcement Agents and Control of Time Limits for Execution of Decisions of Courts and Other Bodies (Authorities), approved by the Decree of the Ministry of Justice of Ukraine of 28 April 2015 № 614/5.[15]

Other components of the ASEP include the *Unified Register of Debtors* (hereinafter referred to as the URD), which is a systematic database of debtors maintained in order to publish real time information on debtors' outstanding obligations and to prevent the alienation of property by debtors and the *Register of Decisions Enforcement of Which is Guaranteed by the State* (hereinafter referred to as the RDEGS), which records the decisions enforced by the State, inventories the debt set in these decisions and submits them to the Treasury body.

2.1. Automated System of Enforcement Proceedings: How Does It Work?

Accordingly, the said ASEP allows registering and distributing enforcement documents among state executors, provides the parties to enforcement proceedings with information on enforcement proceedings, records enforcement actions, etc. In particular, decisions of executors and officials of state enforcement bodies are made with the help of ASEP (for more details, see section 8 of Article 8 of the Law on Enforcement), which generally meet the requirements set out in the Recommendations on Enforcement,[16] the Guidelines[17] and the Practical Guide[18] for Informing the Parties to the Enforcement Proceedings.

It is structurally possible to distinguish the following elements of the implementation of the principle of openness of enforcement proceedings by means of ASEP: it is *information as an object*, in particular, the types and content of information available

14 The Regulation on the Unified State Register of Enforcement Proceedings, approved by the Decree of the Ministry of Justice of Ukraine of 20 May 2003 No. 43/5 [2003] <https://zakon.rada.gov.ua/laws/show/z0388-03> accessed 15 February 2020.

15 The Temporary Procedure for Automatic Distribution of Enforcement Documents between State Enforcement Agents and Control of Time Limits for Execution of Decisions of Courts and Other Bodies (Authorities), approved by the Decree of the Ministry of Justice of Ukraine of 28 April 2015 № 614/5 [2015] <http://zakon.rada.gov.ua/laws/show/z0478-15> accessed 15 February 2020.

16 Recommendation Rec(2003)17 of the Committee of Ministers to member states on enforcement (adopted by the Committee of Ministers on 9 September 2003 at the 851st meeting of the Ministers' Deputies [2003] <https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=09000016805df0c1> accessed 15 February 2020.

17 *The Guidelines for a better implementation of the existing Council of Europe recommendation on enforcement* (CEPEJ(2009), 11REV2, 17 December 2009, adopted by the CEPEJ at its 14th plenary meeting, in Strasbourg, on 9 and 10 December 2009 [2009] <https://rm.coe.int/16807473cd> accessed 15 February 2020.

18 Good practice guide on enforcement of judicial decisions as adopted at the 26th CEPEJ Plenary Session 10-11 December 2015 [2015] <https://rm.coe.int/european-commission-for-the-efficiency-of-justice-cepej-good-practice-/16807477bf> accessed 20 February 2020.

for review, as well as *the subjects of access to information* – those who have access to information about enforcement proceedings.

With regard to the subjects of access to information, they can be divided into three categories: authorized persons, parties to the proceedings and the civil society which is granted a free access. Thus, in particular, clause 4 of the Regulation on the ASEP provides for such categories of users as the Ministry of Justice of Ukraine, structural subdivisions of its territorial bodies in the Autonomous Republic of Crimea, districts, cities of Kyiv and Sevastopol, which provide the exercise of authority in the field of enforcement of decisions; officials of the Secretariat of the Government Ombudsman of the European Court of Human Rights, designated by the Ministry of Justice of Ukraine, whose powers include the execution of decisions of the European Court of Human Rights and the representation of the State in cases of non-enforcement of decisions of national courts; and the parties to the enforcement proceedings.

With regard to the subject matter of access, paragraph VI of the Regulation on the ASEP states that the Ministry of Justice of Ukraine provides open and free access to information of the ASEP with the ability to view, search, copy and print information (through common web browsers and editors) without restrictions and around the clock in the form of open data, namely surname, name, patronymic (if any), the day, month, year of birth of the debtor – natural person and the surname, name, patronymic (if any) of the collector – natural person; the name, identification code in the Unified State Register of Legal Entities, Physical Persons – Entrepreneurs and Public Formations for the legal entity – debtor and collector; number, date of opening and status of enforcement proceedings; the name of the body of the public enforcement service (private executor) in which the enforcement proceedings are pending.

Accordingly, based on the general provisions on the publicity of judicial proceedings and the enforcement of a court decision, which is realized in the concept of a person's right to a fair trial, there should be openly available information on the reason of the enforcement proceedings initiation. Within the framework of this scientific research, it is the court decision in a case, on the basis of which enforcement is being carried out. Such information is available in the ASEP, which grants any person the right of free access to all court decisions in accordance with the Law of Ukraine 'On Access to Judgments',[19] as we have noted earlier in this article.

Placing such information in the public domain will enhance confidence in the judiciary in Ukraine, confirm the integrity and completeness of the judicial process and enforce the final judgments of national courts, ensuring the implementation of the provisions of the European Convention on the Right to a Fair Court and the ECtHR practices.

It should also be borne in mind that the decisions of the courts may affect the rights and / or interests of persons who did not participate in the case and who, in accordance with the procedural law of Ukraine, have the right to appeal such a decision in the manner prescribed by law.[20] Accordingly, for the categories of persons mentioned above, the information on

19 The Law (n 11).

20 See Part 2, Article 8 of the CPC, according to which persons who did not participate in the case, if the court resolved the issue of their rights, freedoms, interests and (or) duties, which filed an appeal or

the court decision, if it becomes the basis for opening enforcement proceedings, is a freely available object placed in the ASEP representing the interests of justice.

Thus, access to the ASEP, which is provided only to authorized bodies, as well as to the parties to enforcement proceedings in the case, does not correspond to the general principles of openness of information on the protection of the rights of persons and the administration of justice. Based on the principle of providing open access to information on court decisions, as well as limited access to the case files of persons, who did not participate in the case, provided that the decision affects their rights, as well as taking into account the general principles of the need for public trial and enforcement of the judgment provided for in the provisions of the European Convention, it is necessary to ensure equal and open access to information on enforcement proceedings in a case to persons who did not participate in the case, as well as to persons involved in the case and the court which ruled the decision subject to enforcement.

In order to determine the content and amount of information available at different levels to different groups of subjects of access to enforcement proceedings, the latter should be divided into two groups, depending on their interest in the enforcement proceedings. The *first group* should include persons directly interested in obtaining information on enforcement proceedings, as they are the applicant (s), debtor (s) or the issue regarding their rights and responsibilities is decided by court ruling. The *second* group should include persons whose interest lies in the general access to information on enforcement proceeding, the procedure for its implementation, the peculiarities of the proceedings in specific categories of cases for possible appeal, or others, not related directly to the object of the specific enforcement proceeding.

Thus, the openness of enforcement proceedings is ensured, in particular, through the provision of information on the execution of court decisions and other acts, the procedure for appealing to enforcement agents etc. At the same time, the current national legislation does not contain a procedure for verifying and controlling information on enforcement proceedings that is made public, which may violate a person's rights to the protection of personal data.

Pursuant to paragraph IV of the Procedure for the ASEP, a public or private bailiff, upon receipt of the enforcement document, decides to open enforcement proceedings or to return the enforcement document to the collector without taking them into execution. The bailiff is obliged to submit the information to the ASEP on all enforcement actions and procedural decisions, in particular, information on all documents received at the request of the State Bailiff, statements of the parties to the enforcement proceedings, their replies and their scanned copies, simultaneously with the production of the document on the basis of which the enforcement action is performed, or at the same

cassation appeal against the relevant decision, have the right to see the case files, make extracts from them, take copies of documents attached to the case, receive copies of court decisions; as well as part 1, Article 17 of the CPC, according to which persons who did not participate in the case, if the court resolved the issue of their rights, freedoms, interests and (or) duties, have the right to appeal the case and in cases specified by law – to appeal against a court decision; and Article 352, first part, concerning the right of persons who did not participate in the case, if the court resolved their rights, freedoms, interests and (or) obligations, to appeal in full or in part the decision of the court of first instance.

time as the production of a document that registers execution action. These actions shall be carried out immediately or no later than the following day.

In order to prevent errors during filing in information to be disclosed, as well as to prevent possible misuse of filing information for open access, it is necessary to introduce a mechanism for verification and control of information that is freely available in the ASEP and to provide for the right of persons, about whom such information is posted, to verify such information within a certain period of time since the issue of its placement has been resolved.

2.2. The Unified Register of Debtors: Who Controls the Information?

Another element of the openness of enforcement proceedings[21] is the URD which was introduced in 2018. The URD is a systematic database of debtors, which is part of an automated enforcement system and is maintained in order to publish real-time information on debtors' outstanding obligations and to prevent the alienation of property by debtors according to Art. 9 of the Law on Enforcement.[22] The procedure for maintaining the URD is governed by paragraph X of the Regulation on the ASEP.[23]

This register is formed in order to publish real-time information on debtors' outstanding obligations and to prevent the alienation of property by debtors. Accordingly, its creation resulted from the reform and marked the transition to a new stage of openness of enforcement proceedings in Ukraine. Since its introduction, all information about debtors included in the URD is open and published on the official website of the Ministry of Justice of Ukraine https://erb.minjust.gov.ua/#/search-debtors.

This register receives information from all state and local self-government bodies, notaries and other entities in the exercise of their managerial functions, in accordance with the legislation.

The UDR holds in open access the information on debtors in respect of which enforcement proceedings are registered in the ASEP after the implementation of the UDR and debtors within enforcement proceedings on collection of periodic payments (alimony) in case of arrears of the respective payments for more than three months. Accordingly, the following information was published in respect of these persons: surname, name, patronymic (if any), date of birth of the debtor – natural person or name, identification code in the Unified State Register of legal entities, natural persons – entrepreneurs and public entities of the debtor – legal entity; name of the body or name, first name, patronymic and position of the official who issued the executive document; the name of the public enforcement authority or the surname, first name, patronymic of the private bailiff, communication tool number and email address of the bailiff; the enforcement number; category of recovery.[24]

21 See also Snidevych (n 13) 72-75.

22 The Law 'On Enforcement Proceedings' (n 7).

23 The Regulation on the Automated System of Enforcement Proceedings (n 14).

24 About potential of the URD see also Snidevych –(n 13). 72-75.

Therefore, the UDR should be recognized as an element of openness in enforcement proceedings, based on the concept of the right to a fair trial and in accordance with the requirements of the Recommendations on Enforcement,[25] the Guidelines,[26] and the Practical Guide[27] to Informing Parties of the Enforcement Proceeding about the Debtors, the Terms and Procedures for Enforcing Decisions in Their Cases.

At the same time, the legislation does not provide for effective mechanisms for verification and control of information to be disclosed in relation to debtors. Thus, in particular, the Regulation on the ASEP provides for the possibility of excluding information about the debtor (points 6 and 7 of paragraph X), but the procedure for introducing changes to the disclosed information is not provided. In point 8 it is noted that in case of change of the debtor to the assignee or change of his name, the relevant information shall be entered in the UDR at the same time as the information on the replacement of the debtor or the change of his/her name is entered in the ASEP. However, there is no procedure for modifying other disclosed information on the ASEP, in particular, related to the grounds for opening proceedings, the executing authority, etc., which in practice leads to certain problems (see, for example, the decision of the Commercial Court of Odessa region on a complaint of inaction of the state bailiff).[28]

2.3. *The Register of Decisions Enforcement of Which is Guaranteed by the State*

Another element of the openness of enforcement proceedings is the RDEGS, which contains decisions, execution of which is guaranteed by the State of Ukraine. This register is available at https://stack.informjust.ua.

In 2012, the Law of Ukraine 'On State Guarantees for the Enforcement of Judgments' (hereinafter – the Law On State Guarantees)[29] was adopted, which established the state guarantees for the enforcement of court decisions and executive documents defined by the Law on Enforcement, and specifics of their implementation, namely court decisions on the recovery of funds and the obligation to take certain actions in respect of property, the debtor of which is a public authority; state enterprise, institution, organization; or a legal person whose forced sale of property is prohibited by law.

The procedure for the operation of the RDEGS, namely the mechanism of accounting for the relevant executive documents and court decisions provided for in paragraph 3 of Section II 'Final and Transitional Provisions' of the Law On State Guarantees, Inventory and Debt Repayment is provided for by the Debt Repayment Procedure for the Decisions of the Court, Enforcement of which is Guaranteed by the State, approved

25 Recommendation (n 17).

26 *The Guidelines* (n 18).

27 Good practice guide on enforcement of judicial decisions (n 19).

28 The decision of the Commercial court of Odessa region on a complaint (№2-924/19 of 28 February 2019) of inaction of the state bailiff of Kirovohrad Region Division of State Enforcement Service of the Main Territorial Administration of Justice in Kirovohrad region in the enforcement proceeding №53804695 on the enforcement of the decision of the Commercial court of Odesa region of 1 February 2016 in the case №916/4546/15.

29 The Law of Ukraine 'On State Guarantees for the Enforcement of Judgments' [2013] <https://zakon.rada.gov.ua/laws/show/4901-17#n9> accessed 20 February 2020.

by the resolution of the Cabinet of Ministers of Ukraine of 3 September 2014 No. 440[30] (hereinafter – the Debt Repayment Procedure).

Pursuant to paragraph 2 of the said Debt Repayment Procedure for the Decisions of the Court, Enforcement of which is Guaranteed by the State, these are the enforcement documents under the court decisions on recovery of funds or court decisions that have become enforceable, the debtors for which are subjects defined in Article 2, paragraph 1 of the Law on State Guarantees issued or approved before 1 January 2013.

It should be noted that the information on the implementation of such decisions in the said register is extremely small, especially given their resonant importance and the need to ensure transparent activity of the state and public control over fulfilment of its obligations. In particular, in accordance with the provisions of point 7 of the Debt Repayment Procedure the responsible person shall, within ten working days from the date of receipt of the decision, be obliged to check the enforcement of such a decision according to the ASEP, taking into account the data of enforcement proceedings opened for the enforcement of decisions of the ECtHR for non-enforcement of the decision of a national court to which the complainant applies. In the absence of information on the implementation of the decision, the responsible person shall submit full details of that decision to the RDEGS. In the case when the application on decision enforcement the applicant adds the debtor's certificate of the existing outstanding debt, the responsible person certificate shall submit the data on such decision to the RDEGS.

It is worth noting how important it is for Ukraine to ensure the enforcement of court decisions, since the aforementioned Law on State Guarantees was approved as a result of the adoption of a pilot ECtHR decision against Ukraine in the case of *Yurii Mykolaiovych Ivanov v. Ukraine.*[31] In this the ECtHR clearly stated that the state cannot justify non-enforcement of judgments against the state, against institutions or enterprises that are state-owned or controlled by the state with the lack of funds. They shall bear responsibility for the enforcement of final decisions, if the factors that delay or hinder their full and timely implementation, are within the control of the authorities. The lengthy delay in the enforcement of a judgment which may constitute a breach of the ECtHR was also considered unjustified and should be assessed in the light of the complexity of the enforcement proceedings, the conduct of the applicant and the competent authorities, as well as the amount and nature of the repayment assigned by the court. The ECtHR also stressed that it is the responsibility of the state to ensure that the final decisions taken against its state-owned or controlled bodies, institutions or enterprises are enforced in accordance with the aforementioned requirements of the ECHR.

The information on the order of execution of the decision shall be sent to the applicant and the debtor at their location or e-mail no later than ten working days from the date of the decision being sent to the RDEGS. In order to provide access to this information,

30 The Debt Repayment Procedure for the Decisions of the Court, Enforcement of which is Guaranteed by the State, approved by the resolution of the Cabinet of Ministers of Ukraine of 3 September 2014 No. 440 [2014] <https://zakon.rada.gov.ua/laws/show/440-2014-п> accessed 20 February 2020.

31 *Yurii Mykolaiovych Ivanov v. Ukraine* [2009], The decision of the ECtHR <http://zakon.rada.gov.ua/laws/show/974_479> accessed 20 February 2020.

the address of the relevant website on the Internet and the identifier for access to information on the RDEGS is attached to the message.

3. CONCLUSION

In conclusion we should note the following. The openness and transparency of enforcement proceedings must be consistent with the openness and transparency of the administration of justice, which is enshrined in fundamental acts guaranteeing the rule of law and access to justice, as well as in national law on the judiciary and on justice. Based on the above, the provisions regarding the transparency of specific procedural actions and openness of access to information should be both extended to the process of judicial protection of a person's rights and be reflected in the execution of a court decision. Given that public participation appropriately affects public confidence in the courts and promotes the preventive purpose of justice, open access to information will significantly simplify the work of the executor and provide him/her with a greater level of credibility that will enhance confidence in the justice system.

The lack of free access to at least limited information on state enforcement of relevant decisions excludes the possibility of exercising any public control and significantly reduces the confidence in the judiciary in the state. Free access to such information is indispensable and reflects the right of a person to a fair trial, as well as this embodies his/her belief in a state guaranteed effective protection of rights.

The free access to information on enforcement, authorities and persons empowered to enforce court decisions, other information necessary to effectively protect the rights of the individual at this stage, namely through the implementation and functioning of the ASEP and the UDR, should, in our opinion, be designated to a special provision that discloses the essence of the principles of transparency and openness enshrined in the laws on enforcement and executors.

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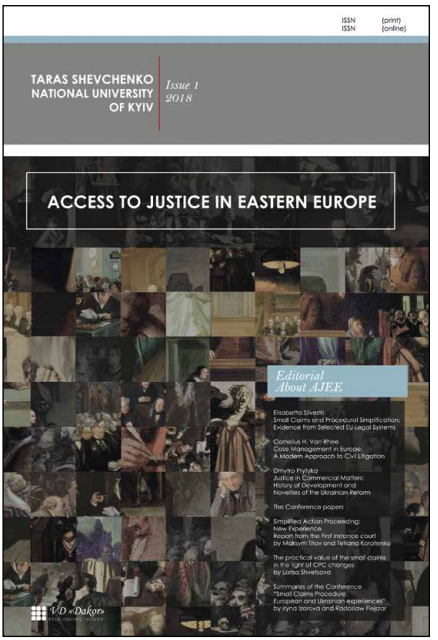

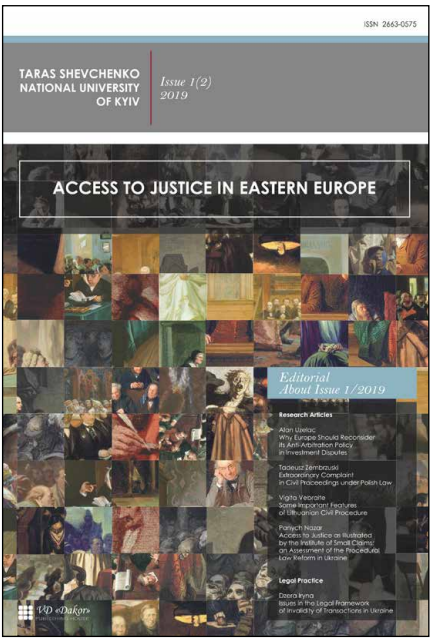

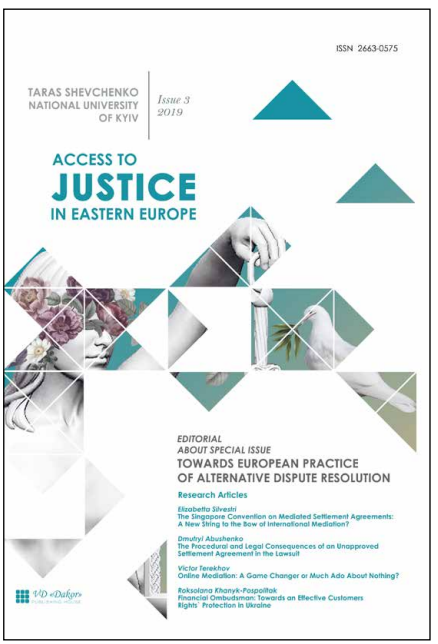

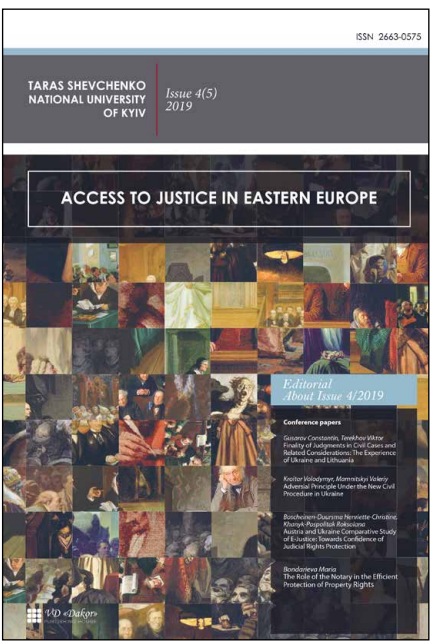

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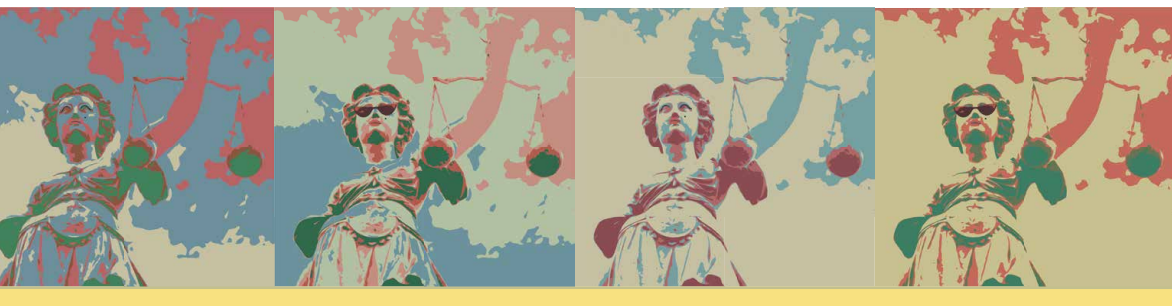

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