Flexible Proceedings and Procedural Contracts

Alan Uzelac

1 Introduction: Flexibility and Civil Procedure in Continental Europe

Flexibility and civil procedure do not always go hand in hand. Procedural law has always been proud of its formality. In Europe, the procedural codes of the 19th and 20th centuries extensively elaborate formal rules of procedure in many technical rules. Until today, a typical code of civil procedure is a big and heavy book which comprises thousands of lengthy articles.[1]

At least in Continental Europe, the proceduralists used to be proud of the fixed nature of legal rules from their codes. They were supposed to provide the best – and, in principle, invariable – rules for dispute resolution. Even though civil procedure deals largely with disputes regarding rights and duties that parties may freely dispose of, even now, the rules of civil procedure are, per se, not regarded as dispositive. On the contrary, most rules of civil procedure are mandatory for both the parties and the court, with only rare exceptions.

In history, the traditional justification for the mandatory nature of procedural formalities used to be the avoidance of arbitrariness. As Rudolf Jhering stated in his famous quote about procedural law as formal law, '[t]he form is the sworn enemy of arbitrariness, the twin sister of freedom.'[2] Invariable formal rules not only protect the parties against the abusive discretion of judges but also safeguard public interests, preventing the parties from abusive behaviour that hurts public interests. By its nature, civil procedural law is considered to be a part of public law, and, therefore, unless otherwise provided, both for the parties and for the court, the rules of civil procedure are strict law.[3]

Such a perspective on procedural rules naturally impairs flexibility. The process which would be determined by an agreement of the parties for each litigation (so-called

1 See, e.g. the French *Code de procedure civile* (CPC) with its current 1,582 articles and German *Zivilprozessordnung* (ZPO) with 1,120 articles; even the 'short' codes such as the Swiss Code or Croatian CCP have 400 to 500 articles.

2 'Die Form ist die geschworene Feindin der Willkür, die Zwillingsschwester der Freiheit.' Rudolf Jhering, *Geist des römischen Rechts* (Breitkopf und Härtel 1858) 497.

3 See Hans W. Fasching, *Zivilprozeßrecht* (Manz 1990) 71-73.

Konventionalprozeß, 'conventional proceedings') has generally been rejected within the boundaries of state civil justice already in the second half of the 19th century, and this has been presented as an achievement of modern civil procedural doctrine ever since.[4] Many Central and Eastern European procedural textbooks have been following that approach for decades, emphasising that procedural law is *ius cogens* and arguing that, unless expressly provided by procedural law, any procedural action that differs from legal rules is, in principle, not admissible.[5] Therefore, from a classic civil law European perspective – at least within the countries which adhere to Germanic models – within the ambit of judicial civil proceedings, a system of procedural rules agreed by the parties, and to be applied before the state courts, is a *contradictio in adiecto.*

Indeed, not every provision regulating civil litigation is mandatory. Even in more restrictive jurisdictions of Continental Europe, there is limited number of exceptions, which need to be expressly provided. Within a relatively narrow ambit, forum selection clauses (e.g. prorogation clauses) allow for the contractual selection of a local jurisdiction different from the default one. By their agreement, parties to a dispute may be allowed to suspend the proceedings for a certain period while pursuing an out-of-court settlement option. Ultimately, the parties can discontinue the court proceedings by withdrawing their claims or concluding a court settlement approved by a judge. However, a number of issues that deal with the constitutive elements of litigation and its progress have been more or less beyond the limits of party autonomy. Among such issues are the composition of the tribunal, selection of adjudicators, application of different procedural rules or specific procedural tracks for the conduct of the proceedings, selection of the language of proceedings, order of submissions and development of procedural stages, procedural preclusions, form of decisions made in the proceedings, means of recourse against judgments, and many other matters. Unless procedural law expressly provides that a certain agreement related to the procedure is valid and binding, a traditional civil law view has been that any 'contract' concluded by the parties concerning the progress of litigation would be, at best, a nonbinding recommendation for the court which could disregard it and decide otherwise; in the worst-case scenario such a 'contract' would be regarded as harmful and illegal.

4 For the reasons for rejecting a 'dispositive civil procedural law', see Oskar Bülow, 'Dispositives Civilprozeßrecht und die verbindliche Kraft der Recthsordnung' (1881) 64 Archiv für die civilistische Praxis 1, 1.

5 For textbooks of former Yugoslavia and its successor states, see Siniša Triva and Mihajlo Dika, *Građansko parnično procesno pravo* (7th edn, Zagreb 2004) sec 7/3; Jože Juhart, *Civilno procesno pravo FLR Jugoslavije* (Ljubljana 1961) 35; Lojze Ude, *Civilno procesno pravo* (Ljubljana 2002) 91; Borivoje Poznić and Vesna Rakić Vodinelić, *Građansko procesno pravo* (17th edn, Beograd 2015) 73-74; Branko Čalija and Sanjin Omanović, *Građansko procesno pravo* (2nd edn, Sarajevo 2000) 17-19.

2 Abandoning the Inflexibility – or ~~Not~~

2.1 Should Litigation Import Freedom of Choice Inherent to Arbitration?

The same parties that cannot escape mandatory rules of civil procedure still have a way to evade the inflexible framework of court proceedings entirely. While conventionally agreed rules in the court proceedings are traditionally rejected, by agreeing on arbitration, the parties, in theory, allow themselves almost total flexibility because their dispute resolution agreement may depart from almost any procedural provisions fixed by law or other authority, as far as the procedure agreed upon by the parties is still fundamentally fair.

A feature of arbitration often accentuated for its promotion has been that, in arbitration, 'the parties have ultimate control of *their* dispute resolution system,' i.e. that '[p]arty autonomy is the ultimate power determining the form, structure, system and other details of arbitration.'[6] A principal factor differentiating litigation and arbitration has been identified as the 'rigidity of national court procedures'.[7]

Indeed, arbitration courts as private or DIY ('do-it-yourself') courts offer a much greater span of options. On a contractual basis, the parties are free to construct all building blocks of the dispute resolution process by their arbitration agreement and create from scratch an adjudication mechanism as a special-purpose vehicle for fulfilling their interests. While the source of arbitrators' authority to decide (*iurisdictio*) is exclusively a private empowerment of private adjudicators and not the state power to regulate conflicts (*imperium*),[8] the fundamental principle is that any meaningful consensus about the dispute resolution process is acceptable and contractually binding, unless specifically excluded by law.

Contractual design of dispute settlement in the realm of arbitration is thereby old (but nevertheless still useful) news. Contractual determinations may take the form of an arbitral clause contained in the contract that originated years before the dispute has arisen; they can be made in the form of a *compromise* – an agreement concluded to deal with an already existing legal problem. By majority opinion, the right to contractually depart from adopted procedural arrangements does not stop with establishing a dedicated dispute resolution body. It continues to exist during the arbitration proceedings until the end of the arbitral process.

It is hard to imagine a broader spectrum of procedural flexibility than the one awarded to the parties to an arbitration agreement. Parties may consensually fix the

6 Julian D.M. Lew, Loukas A. Mistelis and Stefan M. Kröll, *Comparative International Commercial Arbitration* (Kluwer 2003) 4.
7 Ibid., 5.
8 See Emmanuel Jeuland, *Droit processuel général* (LGDJ 2012) 372-374.

composition of the tribunal; determine the qualities of adjudicators, e.g. their nationality and profession; and even appoint by name 'their' arbitrators. The assisting bodies, from institutions administering arbitration to administrative secretaries, also depend on the parties' agreement. In principle, the procedure is also subject to any agreement made by the parties, from issues such as language or languages of the proceedings to detailed case management matters.

Has the time come to abandon this dualism, the black-and-white picture of two worlds – the flexible world of arbitration and the rigid (inflexible) world of judicial civil procedure?

Several recent developments indicate that the old dogma of anti-conventionalism in civil procedure is being questioned. On the one hand, there is a spike in interest in one domain which was the least inflexible – the domain of *Prozessleitung* (Austro-German notion for the active judicial steering of the litigation process) – this time in the guise of case management (its Anglo-Saxon counterpart). Addressing the problems of slow, overburdened and inefficient civil justice systems, it became essential to improve the overall control of judicial proceedings and their progress, both at the level of management of individual cases and at the level of court administration.[9] The optimisation of resources needs a more proactive approach and flexibilisation of judicial proceedings. Case management movement in civil law jurisdictions questions the view that statutory norms must amply regulate procedure and, instead, argues that it should be made more flexible and adjusted to particular circumstances of the case. On the other hand, in common law jurisdiction, case management questions the adversarial and reactive nature of litigation, in which the judge is turned into a spectator of lawyers' tactical battles before the court.[10]

On the other hand, the reduction of court caseloads and the newly found competitiveness of some national justice systems opened the trend of creating international commercial tribunals as optional, rent-a-court venues adjusted to the special demands of the parties. The specialised commercial courts established in Amsterdam, Brussels, Cologne, Düsseldorf and Paris (in Europe), as well as some others elsewhere (Kazakhstan, Dubai, Qatar, Singapore etc.), started to market their activities

9 See C.H. van Rhee (ed), *Judicial Case Management and Efficiency in Civil Litigation* (Intersentia 2008) 11-25; Peter Chan and C.H. van Rhee (eds), *Civil Case Management in the Twenty-First Century: Court Structures Still Matter* (Springer 2021). For Latin America, see Ramón Garcia Odgers, 'El surgimiento del case management y la superación del juez director del proceso: el proceso como reflejo de las exigencies y problemas de nuestra época', *Revista de derecho* (Concepción 2020) 113-147; Álvaro Pérez Ragone, 'An Approach to Case Management from the Horizontal and Vertical Structure of Court Systems' (2018) 23 Zeitschrift für Zivilprozess 345-375.

10 This negative impact of a purely adversarial model became commonplace in the US, so '[m]any American lawyers recognise that judicial management holds the key to more expeditious and less expensive litigation.' Richard Marcus, 'The Litigation Superpower's Case Management Cure for Adversarial Ills', in Chan and van Rhee (n 9) 121.

to parties irrespective of their domicile, offering inter alia some services which were so far reserved for arbitration, for example, proceedings in foreign (mostly English) language.[11] While the success of these initiatives has been limited, they prove a trend of cultural change in the approach to litigation within national civil justice systems. From the once-dominant repellent tactics and 'get out of my court' attitude, now at least some jurisdictions wish to convert (some) state courts into optional, attractive and efficient dispute resolution centres which desire to be competitive and recapture 'clients' from other jurisdictions and prominent arbitral institutions.

Finally, the contemporary focus on civil courts as a user-friendly service for citizens and businesses inevitably raises the question of whether user satisfaction can be reached without empowering the users to (co)design the procedure.[12] The arguments for that are strong: if the parties have the right to freely enter into legal relationships governed by substantive law and have the right to select a forum, why would their voice not be heard with respect to the organisation of the dispute settlement procedure? If civil justice is not conceived as an unquestionable, God-given institution with authoritarian powers but as a system of service providers (online or offline) which cater for the interests of their users, they have the right to be consulted and at least receive plausible explanations for the selected methods and procedures used to dispense justice.

The main topic of this chapter is, however, devoted to flexibility in the context of another movement in the doctrine of civil procedure, which is currently gaining traction.

The latest voices for flexibilisation of litigation proceedings also start from the dilemma: 'Is it necessary for us to remain in the duality of rigid litigation versus flexible arbitration?'[13] This time, the key submission is that the methods of private justice (arbitration and mediation) need to be transposed in the world of state justice, abolishing the inherent distrust in procedural contracts and promoting a renaissance of *Konventionalprozeß* in the form of contractualisation of civil procedure.

Being convinced that civil procedure as it currently functions in many countries does not provide an appropriate level of speed, quality and adjustability to the demands of the present time, I will, however, in this chapter, further explore whether the desired flexibility can indeed be best achieved by a 'contractualisation'. After discussing some questions on the meaning of procedural contractualisation, I will conclude that more

11 On this topic, see Erlis Themeli, *Civil Justice System Competition in the European Union. The Great Race of Courts* (Eleven 2018); Xandra Kramer and John Sorabji, 'International Business Courts in Europe and Beyond: A Global Competition for Justice?' (2019) 12 Erasmus Law Review 1-9; Xandra Kramer and John Sorabji (eds), *International Business Courts. A European and Global Perspective* (Eleven 2019).

12 On the change in understanding where courts would not be conceived as a place, but as a service, see Richard Susskind, 'The Future of Courts' (July/August 2020) The Practice 6, see https://clp.law.harvard.edu/knowledge-hub/magazine/issues/remote-courts/the-future-of-courts/ (accessed 3 March 2024).

13 Antonio Cabral, 'Designing Procedure by Contract: Litigation Agreements in Contemporary Civil Procedure' (2019) 9 International Journal of Procedural Law 368.

participation of the parties in the design of the proceedings is indeed desirable but that, at the same time, the notion of contractualisation is a less-than-perfect response to new challenges.

2.2 Is Procedural Contractualisation a Guarantee of Flexibility?

There is a certain seductive flair in the notion of procedural contractualisation. Arbitration has been 'stealing' cases from the state courts' jurisdiction for decades. It has been argued that arbitration is superior to litigation as it provides more freedom and more choice in shaping the dispute resolution process. And with a good reason: arbitration has often demonstrated that a process not regulated by thousands of complex technical rules can be much better organised and much more efficient and flexible than judicial proceedings. As the cornerstone of every proper arbitration is a contract – the arbitration agreement, it is logical that the idea of 'contractualisation' deserves attention and further exploration also in civil procedure in general.

However, the prima facie attractiveness of the contractualisation notion should not stop us from a closer examination of its meaning. As I will show, further exploration reveals some important problems, both from the perspective of court proceedings and the perspective of the analogy with arbitration practice.

To clarify, 'procedural contractualisation' is sufficiently broad to cover many different topics. In preparing this contribution, the editors suggested that 'contractualisation' may be used as 'a panoply to cover procedural contracts, procedural agreements, and consensual decision-making in civil litigation'.[14] Much of that is not the topic of this text. I will limit my remarks to the issues that deal with flexibility *within* the litigation process, i.e. issues related to consensual departure from prescribed procedural rules among the parties who have resorted to litigation. Within litigation, I will mainly focus on the core of the flexible judicial process – the management of cases before the first instance court. The right of the parties to opt out of the litigation process and resort to other alternative dispute resolution methods is a well-established right, and I will not discuss it here. Neither will I deal with prorogation or other choice of forum agreements. The main issue of this chapter is not how to replace a less flexible court procedure with a more flexible arbitration (or mediation) procedure, but whether court proceedings should be made more flexible and whether a 'contractualisation' (modelled after arbitration and ADR practices) is the right method to achieve such a goal.

The answer to the first question is generally positive: inflexible models of civil procedure arising out of 19th-century legal doctrine cannot withstand the test of modern times. The societal and technological changes call for a transformation of

14 Editors' Letter to Contributors, June 2022.

civil justice, and this process is already ongoing.[15] Rigid procedural forms are hardly acceptable in a dynamic environment. In the context of digitisation, many traditional rules and routines will have to be re-examined and replaced. Indeed, fewer and more open-ended rules allow for more flexibility than an environment in which hundreds of legislatively prescribed procedural provisions need to be constantly adjusted to the changed (and/or changing) circumstances. The quick reaction of those involved in concrete judicial proceedings and their ability to address concrete issues in real time are much more appropriate for optimising speed and resources. It is much closer to the modern ideal of fair, cooperative and proportionate civil proceedings, which has been globally promoted since Woolf's reforms in England and Wales.[16]

Responding to the second question is more difficult. Apparently, an agreement made by the parties on the conduct of the proceedings may create a flexible procedural design adjusted to the particulars of the concrete case, provided that several conditions are fulfilled: parties must be cooperative, act in good faith, have sufficient expert knowledge and experience in (designing of) dispute resolution mechanisms and be sufficiently close to the dispute, i.e. be able to address and regulate problems as they arise. How realistic is that all these conditions will be fulfilled? In reality, dispute resolution clauses are often drafted under a veil of ignorance years before a dispute arises. Would detailed litigation agreements drafted well in advance provide a desired flexible procedural regulatory network? It is not very likely. This submission will later be further corroborated by the experiences from arbitration practice, showing that arbitration's real source of flexibility is not in the broad use of contractual freedom to design the procedure (see Section 2.4).[17]

Admittedly, litigants designing the procedure may be advantageous for some standard sorts of disputes that occur regularly and have similar features. But rarely are the contractual parties equally prepared and equally motivated to regulate their uncertain future disputes. If yes, the forging of procedural clauses is often motivated by the interest of one of them, usually the one who dictates the content of the main contract. The result is not a flexible procedure but a procedure tilted in favour of one party. The consequences of unlimited contractual freedom to regulate dispute resolution have already been plastically visible after the US Supreme Court decision in the AT&T case:[18] instead of a flexible procedure, the outcome is a binding clause which provides a contractually blessed denial of justice.

15 On its various aspects, see Alan Uzelac (ed), *Transformation of Civil Justice. Unity and Diversity* (Springer 2018).

16 See John Sorabji, *English Civil Justice after the Woolf and Jackson Reforms* (Cambridge University Press 2014).

17 See Section 2.3.

18 *AT&T Mobility LLC v. Concepcion* 563 U.S. 333 (2011).

The very form of contract can, in fact, be problematic. As such, contracts are a feature which formalises relationships. In that sense, the contract is a kind of invitation to rigidity and litigiousness – to blind insistence on the *pacta sunt servanda* principle instead of a continuing cooperative relationship which jointly reframes the rules and makes decisions favourable to all participants. Further examples of potential inflexibility a 'contractualisation' may bring will be provided below.

Before entering into an analysis of arbitration practice, another fundamental question needs to be asked. If a contract is an agreement on the conduct of proceedings concluded between two private parties, should they have an *exclusive* right to design procedure? Can they *alone* forge procedural rules for cases that they submit to state courts and do it in a way which would regulate the process in a binding way, i.e. in a way which is mandatory for the justice system, courts and individual judges entrusted with their case?

2.3 Should Parties Have an Exclusive Right to Design Procedure for Their Case?

In principle, a contract is an agreement between two or more persons who assume, each with respect to the other, certain rights and obligations.[19] In case of a violation of contractual terms, sanctions will apply. How would this definition work in the context of civil litigation?

Who are the parties to a 'procedural contract'? If a parallel to arbitration is used, the parties to a dispute are those who agree on a way how their dispute would be handled; for example, what substantive law should be applicable? What forum would be competent to resolve the merits of the case? What would be the language of proceedings, and, in particular, who would be the adjudicator(s)? What would be the procedure under which the competent body would proceed? Following this model, the procedural contract in a court procedure would be the contract between the parties to a dispute, whereby the parties would determine one or several specific features of the dispute resolution process.

An interesting example of procedural contracts recognised in a rather general form is found in the 2015 Brazilian Code of Civil Procedure. Its Articles 190 and 200 allow procedural agreements and provide for the immediate effectiveness of procedural legal acts and legal transactions signed by the parties.[20] In addition to some forms

19 Compare *Black's Law Dictionary* (6th edn, 1990) 322 ('an agreement between two or more persons which creates an obligation to do or not to do a particular thing').

20 Antonio Cabral and Pedro Henrique Nogueira, 'Contractualisaiton of Civil Litigation in Brazil: Party Autonomy and Procedural Agreements' in Anna Nylund and Antonio Cabral (eds), *Contractualisation of Civil Procedure* (Intersentia 2023) 82.

of agreements (e.g. jurisdictional agreements) already specified by law, it seems that Brazilian law also allows for other, non-specified or atypical procedural agreements.[21] Thus, as such, procedural agreements ('contracts') can be concluded prior to or after initiating litigation and contain in principle any procedural agreement except those expressly excluded by law, and they are very similar to arbitration agreements. This position, rather different to the traditional European approach, is probably the most far-reaching example of 'arbitralisation' of litigation and a clear case of a bilateral private law agreement by which two private parties, with no participation of other persons or authorities, shape litigation rules. However, it is also the most consequent example of 'contractualisation' that results in a 'litigation agreement', which, just like an arbitration agreement, is a binding private transaction between the two parties.

What would be the role of the court in such procedural contracts? In arbitration, arbitrators or arbitration institutions are not the parties to an arbitration agreement. Nevertheless, it is generally considered that the parties' will expressed in the arbitration agreement binds the arbitrators who accept to arbitrate.[22] While not being the parties to such a contract, they are at best authorised to help execute it in a way that is faithful to the parties' intentions.

In litigation, the role of contractual arrangements in connection with procedural issues cannot be uniformly assessed. Again, a difference is generally made between some agreements expressly recognised by law and whose validity, mandatory nature and legal effects are provided by law. Certain effects can be reached by parties' action or inaction, and they are often interpreted as tacit agreements and voluntary acceptance of negative inferences. However, these types of agreements are mostly limited to issues of jurisdiction, as in jurisdictional clauses and prorogation agreements (including some forms of *prorogatio tacita*). Settlement agreements concluded before a court are also viewed as specific mixed-type contracts with both substantive and procedural effects. Again, in such agreements, the principal actors are the parties, but the court also has a strong supervisory role. Apart from formal checking of legal requirements for their validity, in the case of court settlements, the participation and supervision of the court may be more proactive, suggesting formal and substantive modifications and rejecting to approve the agreement if it is unclear, inoperative, incapable of being performed, adverse to third parties or contrary to public policy.

21 Ibid., 83.

22 Yet, arbitrators may refuse the offer to arbitrate under rules selected by the parties if they deem those rules to be unsuitable. In particular, arbitration institutions often limit the right of the parties to depart from the selected institutional rules. See, e.g. Rule 19 (Rules Governing the Proceedings) of the ICC Rules of Arbitration (2021), according to which the parties can only depart from the rules not stipulated by the default regime of the ICC Rules: ('…arbitral tribunal shall be governed by the Rules and, *where the Rules are silent*, by any rules which the parties or, failing them, the arbitral tribunal may settle on…').

But these types of procedural contracts are fundamentally different from the agreements which deal with the conduct of the proceedings in a narrow sense – the procedural agreements regarding various issues of case management. These agreements are the most pertinent for our topic – flexibility of the proceedings. Therefore, let us focus on the court's role regarding eventual agreements on the progress of litigation. Such agreements may, e.g. decide whether a court hearing will be suspended or adjourned, whether proceedings are deemed terminated, when and where the next hearings will take place, in what form and at what time the parties submit their statements, declarations and evidence. Such decisions on the management of proceedings, including the setting of procedural calendars, belong to a set of procedural actions which determine the formal course of proceedings, known in German and Austrian theory as *formelle Prozeßleitung*.[23] To a great extent, efficient and flexible judicial proceedings depend on a well-considered, well-planned and proactive approach to the organisation of litigation. The same is true for the organisation of the fact-finding process and gathering of evidence and other material needed for adjudication (so-called substantive case management or *materielle Prozeßleitung*), albeit parties do have, in this respect, a greater margin of influence which arises from their authority to dispose of their substantive rights, either directly or indirectly.

Naturally, the decision-making on such case management issues may be subject to an agreement of the parties or a decision by the court. It is common in the history of comparative civil procedure that the progress of litigation, which solely depends on parties' dispositions (according to the old theory about the parties as *domini litis*), generates an inefficient, slow and overly formalistic process. Such a process was not regarded as helpful for ascertaining the facts of the case and providing effective remedies for the breaches of parties' substantive rights. From the end of the 19th century, when Franz Klein drafted the reform of civil procedure in Austria, the model of civil proceedings governed by uncontrolled actions of the procedural adversaries that turn litigation into a selfish playground of the litigants is denounced as undesirable. In the words of Klein, litigation should not be 'a war without a Red Cross'.[24] From that time onwards, many reforms in Europe and elsewhere strengthened the role of the judge, seeking to create an efficient yet flexible procedural regime where '[p]rocedural formalities were to be pushed back as much as possible, and the judge was given an active role in the conduct of the action.'[25] The strengthening of the role of the judge in

23 See, e.g. Fasching (n 3) 412.

24 Franz Klein, *Pro futuro. Betrachtungen über Probleme der Civilproceßreform in Österreich* (Deuticke 1891) 39.

25 C.H. van Rhee, 'The Development of Civil Procedural Law in Twentieth-Century Europe: From party Autonomy to Judicial Case Management and Efficiency?' in C.H. van Rhee (ed), *Judicial Case Management and Efficiency in Civil Litigation* (Intersentia 2008) 11-25.

case management has been a strong national and international trend, although present in different manifestations and different intensities.[26]

Indeed, the idea of 'procedural contracts' may be a different and, in theory, a more cooperative way of influencing litigation from the adversarial model of litigation in which a battle of litigants is observed and tolerated by a passive judge. But both modalities have a common element. Express procedural agreements and implied 'agree to disagree' adversarial style of proceedings equally root on the idea of litigation being in the ownership of the litigating parties. However, history has shown that, without active control of the proceedings, the parties can easily hijack them and steer them in a socially and economically undesirable direction.[27] Blind faith in the good intentions of the parties and their alleged common interest in speedy and efficient litigation that almost never materialises in practice does not produce effective and just results. Trust is good, but control is better; thus, an active collaboration of the parties is welcome and desirable, but only if it is accompanied by effective supervision and strong institutional incentives to act in conformity with the main goals of civil procedure.

For this reason, the current state-of-the-art consensus among civil proceduralists in Europe, formulated in the ELI/UNIDROIT Model European Rules of Civil Procedure,[28] roots on the idea of joint and shared responsibility of the court and the parties who need to cooperate in order to achieve a fair, efficient and speedy resolution of the dispute.[29] In case management, the role of the court is even more highlighted: the court is responsible for active and effective case management.[30] The parties, on the other hand, do not assume a passive role – they have an obligation for 'careful conduct of litigation' under which they must

> present their claims, defences, factual allegations and offers of evidence as early and completely as possible and as appropriate to the careful conduct of litigation in order to secure procedural expedition.[31]

---

26 Walter Rechberger and Daphne-Ariane Simotta, *Grundriss des österreichischen Zivilprozessrecht. Erkenntnisverfahren* (Manz 2009) 204-205.

27 Criticism of an exclusively party-driven procedure was not only expressed by Franz Klein; also in Germany, the 'liberal attitude' of 1877 CCP 'gave the parties unlimited freedom in conducting civil proceedings', and it was therefore 'an almost ideal instrument for delaying the proceedings by dilatory tactics'. Peter Gottwald, 'Defeating delay in German civil procedure', in C.H. van Rhee (ed), *The Law's Delay* (Intersentia 2004) 121-122. Once it was reformed, the German model of active judicial management became the role model for American critics of a 'lawyer-dominated system of civil procedure'; see most notoriously John H. Langbein, 'The German Advantage in Civil Procedure' (1985) 52 *University of Chicago Law Review* 823-866.

28 *ELI/UNIDROIT Model European Rules of Civil Procedure* (Oxford University Press 2021).

29 See Rule 2 (Principle of Cooperation).

30 See Rule 4 (Role of the Court – the General Case Management Duty).

31 Rule 47.

From this perspective, a reinvented 'contractualisation' of civil litigation, unless combined with the active participation and supervisory role of the court, essentially does not bring flexibility. On the contrary, it may be a return to the past, ineffective forms of civil litigation, where the proceedings have been abducted by the parties (or, more often, their lawyers) who have been staging their procedural tactics in front of a passive judge who could not do anything but helplessly observe their procedural manoeuvres.

2.4 Is Arbitration Really Conducted According to Tailor-Made Rules Designed by the Parties?

Some may say, but what about arbitration? Is it not proof that parties' agreements on the course of the process can make arbitration more effective and better suited to the specificities of each individual dispute than most civil litigations?

Asking such questions is logical but demonstrates a usual misconception about how the arbitration process works. While urban legends and professional advertisements glorify parties' autonomy, arbitration practice shows relatively few successful instances of parties' procedural inventiveness. On the contrary, worst-case scenarios often materialise when innovation is attempted – in the form of pathological arbitration clauses.[32] Namely, the prevailing form of arbitration agreements is arbitration clauses inserted in the main contract before the dispute has arisen. Due to their superficial drafting and low level of attention devoted to them, arbitration clauses have often been labelled 'champagne clauses' or 'midnight clauses'. Designing procedural rules on dispute resolution only minutes before the bottles are opened to celebrate the conclusion of the (main) contract reached after lengthy negotiations naturally invites trouble. Thus, the general advice of arbitration professionals is to refrain from inventing new rules and stick to short and fool-proof standard model clauses of a few reputable arbitration institutions (e.g. ICC, LCIA, VIAC). Still, arbitration practice is permeated with examples of incredibly clumsy and stupid arbitral clauses, which regularly cost a lot of time and expenses and can rarely be saved even by the most pro-arbitration courts and tribunals.

To note just a few of such examples of failed references to the selection of dispute resolution bodies and methods: 'the American Arbitration Association or any other US court'; 'disputes will be referred to arbitration if the parties so determine'; 'arbitration

32 For the origin of this expression, see Fréderic Eisemann, 'La clause d'arbitrage pathologique' in *Commercial arbitration – essays in memoriam Eugenio Minoli* (Unione tipografico-editrice torinese 1974) 129; for a series of examples, see Fourchard Gaillard Goldman, *On International Commercial Arbitration* (Kluwer 1999) 264-272.

in a county other than that of the each of the parties'.[33] These and many other examples which regularly occur show the level of care and/or knowledge regarding dispute resolution agreements in voluminous international transactions concluded by professionals armed with high-level legal support. The outcome of procedural innovativeness at the lower and local levels may only be worse. Considering that litigation covers a much broader span of (non-commercial and non-international) disputes than does arbitration, and eventually also includes unrepresented lay parties, it is to be assumed that litigation agreements, if used on a bigger scale, would have a much bigger margin of error compared to pathological arbitration agreements.

Yes, arbitration is, in most comparable cases, more flexible, more efficient and faster than civil litigation. But the reasons for that are not in an a priori abstract right of the parties to exert creativeness in procedural agreements, i.e. to impose their own rules on arbitrators and arbitral institutions. On the contrary, effective arbitrations have their roots in the selection of short and open-ended standard arbitration clauses, which allow experienced arbitrators to communicate with the parties and jointly select the best options for the case at hand in the preparatory stage of the proceedings. Constant communication with the parties, open discussions at the first case management hearings, and the joint setting of the procedural calendar, as well as numerous email exchanges of various proposals and draft decisions, in the end, make an effective arbitration proceeding.

While, in theory, arbitration proceedings are governed by the parties' agreement adjusted to the particulars of the case, in reality, many arbitrations (especially international commercial ones) feature a stunning harmonisation of procedural forms and practices. While not codified, best practices of international commercial arbitration find their place in many specialised books, papers and journals.[34] They are disseminated at many conferences and practised at massive moot competitions.[35] Multinational law firms regularly have their arbitration departments follow successful practices from their previous cases. In most cases, this practice boils down to avoiding normative experiments and, instead, focusing on selecting efficient arbitrators. They, in turn, regularly follow tested methods of successful case management (e.g. chess clock arbitration), prefer the flexible use ('as a guidance') of soft-law instruments (e.g. IBA Rules on Taking of Evidence)[36] and generally organise the proceedings in a way which

33 Goldman (n 32).

34 The interest in planning started already in the 1990th – see the papers collected at ICCA 12th Congress in Albert Jan van den Berg (ed), *Planning Efficient Arbitration Proceedings* (Kluwer 1996).

35 Among them, the best example is the Willem C. Vis International Commercial Arbitration Moot, sponsored by UNCITRAL and VIAC. With an annual attendance of almost 400 student teams and 1,000 arbitrators from over 80 jurisdictions, in the last 30 years, it has played a major role in promoting a uniform approach to modern arbitral procedure.

36 For IBA Rules on Taking of Evidence in International Arbitration and other practice rules and guidelines, see https://www.ibanet.org/resources.

is not only cooperative but also flexible. This, in practice, means that good arbitrators always consult the parties on the proposed course and methods of proceedings, seeking to obtain their agreement – but not an agreement which will be drafted as a formal and binding document, a 'contract'. Reaching an express or implied consensus regarding draft procedural orders issued by the arbitral tribunal is regularly sufficient and more practical. Relying on a signed 'contract' may be too tempting for one or both parties (i.e. their lawyers) to try various objections and legal strategies of its (mis)interpretation and challenge. Therefore, to avoid sidecar proceedings and secure a focus on the main proceedings, experienced arbitrators insist on consensual decision-making with respect to the conduct of the proceedings but without a formalisation that would amount to a 'contractualisation'.[37]

With the spreading of arbitration practice, the number of experienced arbitrators may, of course, become insufficient to maintain uniformity, except in a limited number of ad hoc arbitrations. But another trend with the same effect is visible: institutionalisation of arbitration. As noted by commentators, this trend 'is not entirely in keeping with the principle of the primacy of the parties' intentions' as '[i]t is becoming increasingly rare for the parties to choose their arbitrators and organise their procedure directly.'[38] It is argued that 'the vast majority of international commercial arbitrations in the world now' are handled by permanent arbitral institutions under their pre-set rules – just like in the state courts. The full circle is thereby drawn: some describe what is going on as the 'judicialisation' of arbitration, this time in a private setting.[39]

In short, a closer study of arbitration practice reveals that the situation with consensual conduct of procedure is much more complex and that a simplistic analogy that advocates replacing a 'rigid' litigation style with a 'flexible' arbitration approach simply does not work. Certainly, a cross-fertilisation between arbitration and litigation does happen, and it is desirable. The state system of civil justice has much to learn from the practice of alternative dispute resolution methods, which have been developing quicker, and offer more modern, user-friendly and flexible case management methods. However, the actual practice of arbitration also teaches us to avoid excessive 'contractualisation' and formalisation of procedural rules and resort to alternative ways

37 Effective management of arbitration is regularly undertaken jointly by both the parties and the arbitral tribunal, and the central place for the determination of the procedure is case management conferences. See, e.g. ICC Rules of Arbitration, Art. 22(1), which requires the arbitral tribunal and the parties to make every effort to conduct the arbitration in an expeditious and cost-effective manner. Under the ICC Guide on Effective Management of Arbitration, issued for In-House Counsel and Other Party Representatives (ICC 2017), 'in practice, after receiving the case file, the arbitral tribunal may invite the parties to make case management proposals,' and 'after listening to the parties, will adopt procedural measures that it deems to be appropriate for the case at hand', taking into account the 'complexity and value of the dispute', seeking to realise 'a cost-effective and expeditious arbitration … in which the time and cost devoted to resolving the dispute is appropriate in light of what is at stake.' ICC Guide, 13-14.

38 Goldman (n 32) 33.

39 Ibid.

of securing a cooperative but efficient and flexible procedural environment. While agreements are always welcome, 'procedural contracts' – when they get formalised and put on paper – may become a straitjacket which forces all participants to concentrate on their interpretation rather than on the effective course of litigation.

3 Effective Flexibility: From Bipartisan Contractualisation to Multilateral Procedural Cooperation

Be it as it may, contemporary civil litigation is certainly not flexible enough. Nevertheless, 'litigation contracts' that regulate the course of litigation are only a small element in a big puzzle and must be used cautiously. Insofar as the notion of 'contractualisation' of procedure is concerned, it should also be handled with care. In addition to the criticisms of the 'contractualisation' concept that have already been presented, let me add another, which points to this notion's symbolic dimension and connotations. Namely, a 'contract' is a static, finalised agreement in a legal universe. It is the result rather than the process. It is the notion that looks backwards; it is retrospective and not prospective.

Efficient case management, on the other hand, needs to be future-oriented. It must be apt to quick changes in the case management decisions depending on circumstances, so it is dynamic and ongoing. It needs to focus on benefits and goals and not on the assignment of blame and sanctions for the non-observance of the formal terms of the contract – which is how lawyers often perceive and use contracts. Therefore, I would say that the notion of 'contractualisation' is the notion that divides and not the notion which connects.

On the contrary, the best practices in effective dispute resolution teach us that we need notions that unite and focus on the continuing communication process. The eyes need to be focused on the road, not fixed on the milestones along the road. In the same vein, effective dispute resolution cannot be limited to one actor in the judicial arena alone, be it the parties and their agreements ('litigation contracts') or the court and its authoritarian rulings.

An approach that has been developed on the basis of these best practices, an approach that unites the parties and the court in pursuing the common goal that transcends their individual interests, is developed in the already mentioned ELI/UNIDROIT Model Rules. Among the key intentions of these rules was to create 'uniform flexible rules for first instance proceedings' and allow 'flexible application of the uniform rules'.[40]

The principle of loyal cooperation of all key players in litigation – the parties, their lawyers and the court – shares with the idea of 'contractualisation' the aspiration to

40 Preamble, ELI/UNIDROIT Model Rules (n 28) 9.

'foster instruments of cooperation, consensus, negotiation, a less authoritarian legal system that emancipate individuals, giving them room to self-regulate'.[41] However, as the parties do not have exclusive ownership over the litigation process, the genuine consensus needs to be broader and include not only the parties (i.e. their lawyers) but also those called to adjudicate the dispute. The key role of the adjudicator is not only recognised in litigation but also – as already demonstrated – in the most private and contractual form of dispute resolution, in arbitration. It has been the element of national reforms and various progressive model rules, from the Storme Project in the 1980s to the 2006 Principles of Transnational Civil Procedure.[42]

The principle of cooperation differs from the idea of 'contractualisation' not only with respect to broadening the circle of those involved in the attempts to reach a consensus regarding the organisation of the civil proceedings but also with regard to the orientation towards the purpose of such consensus. The parties do have the freedom to influence or even regulate civil procedure: yes, but for what cause? While 'procedural contracts' emphasise the rights of the parties, the cooperation principle accentuates the obligations of the parties (as well as that of all other participants in civil proceedings) to use their rights in a way that contributes to the common goal of the procedure: a fair, efficient, speedy and proportionate resolution of civil disputes.[43]

Having set the goal, it is easier to proceed. 'Flexibility' is defined as 'being characterised by a ready capability to adapt to new, different, or changing requirements'.[44] The best way to steer the ship through the rough sea of uncertainty is to orientate it towards the lights emitted from bright lighthouses of principles. The basis of procedural flexibility is the adjustment to new and ever-changing circumstances based on a *dialogue* and not a *contract*. In this dialogue, there should be a moderator, and that moderator in judicial proceedings – the pilot of the ship – naturally is the judge, who should not be stripped of their management powers. But continuous loyal cooperation among all participants needs a cooperative helmsman. Thus, '[t]he court must use its management powers on a dialogical basis, i.e. it must hear the parties before issuing case management orders.'[45]

Another distinctive element of flexible, multilateral, procedural cooperation that distinguishes it from radical 'contractualisation' is its safeguards against abuse.

41 Cabral (n 13) 371.

42 On this development, see C.H. van Rhee 'Towards Harmonised European Rules of Procedure: Obligations of the Judge, the Parties and their Lawyers' (2020) 1(6) Access to Justice in Eastern Europe 6-33. Regarding the cooperation principle in Principle 11 of the ALI-UNIDROIT Transnational Principles, see C.H. 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.

43 See Alan Uzelac, 'Towards European Rules of Civil Procedure: Rethinking Procedural Obligations' (2017) 58 Hungarian Journal of Legal Studies 1, 3-18.

44 https://www.merriam-webster.com/dictionary/flexible.

45 Preamble, ELI/UNIDROIT Model Rules (n 28) 11.

> The flexibility built into first instance case management, and proceedings generally, must not, however, be abused by lawyers or the court adopting a piecemeal approach designed to prevent concentrated proceedings taking place.[46]

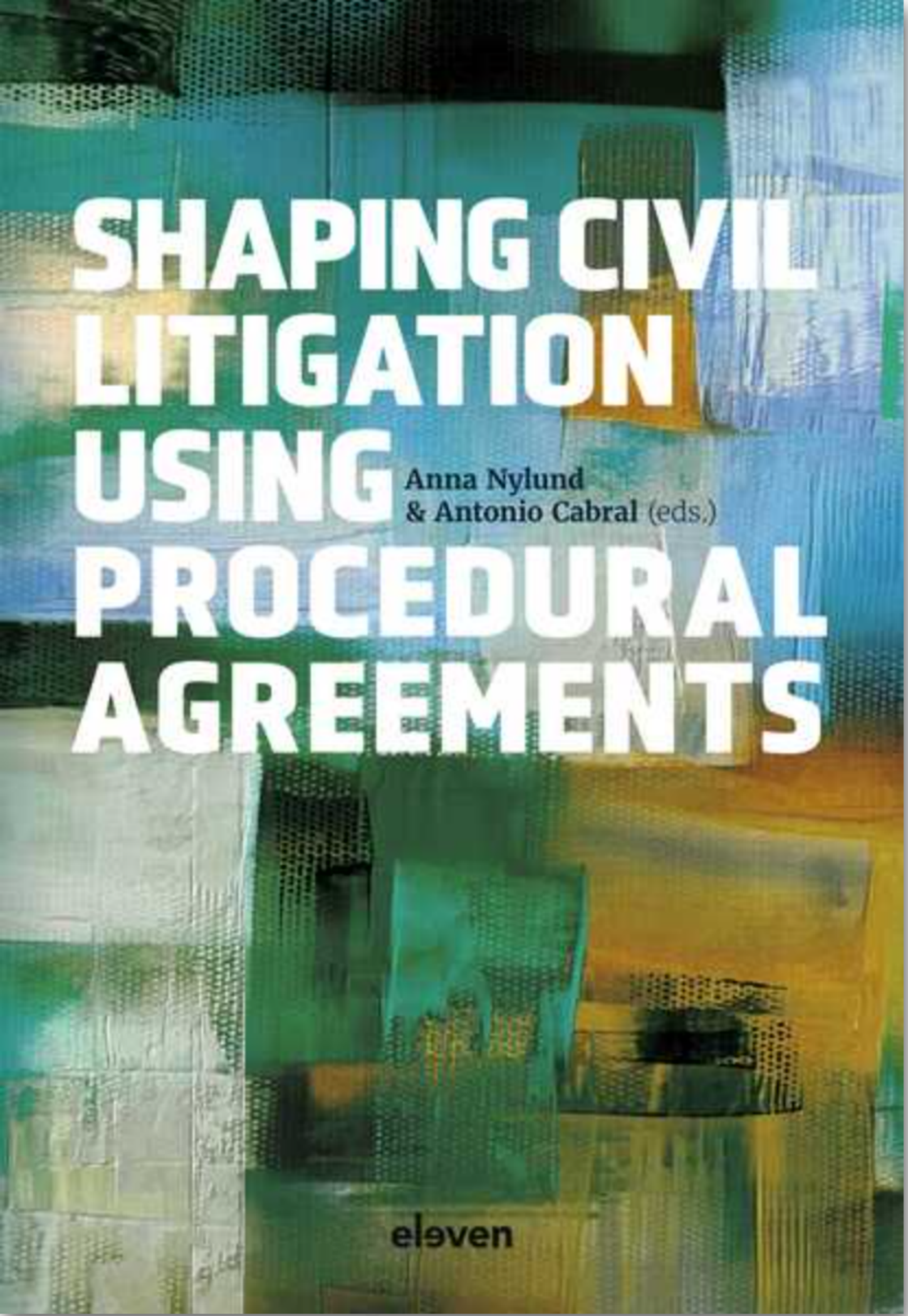
A key precondition for useful flexibility is effective sanctions and incentives preventing the actors, be it the parties, the lawyers or the court, from being non-cooperative and from resorting to or adopting abusive procedural tactics to delay the arbitration proceedings. The notion of 'sanctions' in this context is not identical to legal enforcement of individual rights, as it covers various types and forms, from negative inferences and procedural preclusions to cost orders, disciplinary proceedings, contempt-of-court rulings and fines for procedural abuse.[47]

For all these reasons, I am convinced that a meaningful concept of procedural flexibility is better served by a broad teleological framework of procedural cooperation than by binding procedural contracts. Indeed, in modern civil procedure, the parties must be involved in managing their case. They have a right to be consulted, and their voice must be heard. Their will regarding the choice of forum and venue for the resolution of their civil disputes as well as their agreements regarding the use of alternative dispute resolution methods must be recognised and obeyed. But, if the litigants have opted for the package of services of state litigation providers, the best option for them is to loyally participate in a flexible process managed by skilful adjudicators who are ready and willing to hear the parties' suggestions and engage in a dialogue regarding all important issues of case management. Relying excessively on pre-existent 'litigation contracts' may be as helpful for the flexibility of judicial proceedings as the heavy armour was helpful for the mobility of the Teutonic Knights.

In conclusion, let me add that this contribution deliberately reduced the discussion on procedural agreements to issues of case management, which are most pertinent to the flexibility of the first instance of litigation. Zooming out to further issues, we will see that comparative civil procedure knows hundreds of shades of grey with respect to various agreements between the parties regarding some elements of judicial procedure. Whether and when the parties may waive their right to resort to appeals and other means of recourse; whether and to what extent may the parties exclude provisional measures or conclude various agreements relating to evidence – these and similar issues are subject to a wide variety of national specificities. Some of them (e.g. agreements on the admissibility of evidence and burden of proof) are more closely connected to substantive law issues, while the others deal with incidental and appellate proceedings. While the reasoning presented in this chapter may also apply to some of these issues, their more detailed discussion is left for some other occasion.

46 Ibid.

47 See more in Uzelac (n 43) 6-15.


SHAPING CIVIL LITIGATION USING PROCEDURAL AGREEMENTS
Anna Nylund
& Antonio Cabral (eds.)
eleven