Chapter 4

Obligations of parties, lawyers, and judges

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DE BENITO. — Most of the working groups dealt with a specific topic, which then became a specific chapter of the Rules. However, there is no chapter in the Rules devoted to the duties of parties and lawyers. This information must be found elsewhere: scattered or in provisions dealing with other issues. This is probably because the issue of the obligations of parties and lawyers concerns the very model of litigation proposed by the Rules.

UZELAC. — Usually, it is Remco who talks about history, but this time it is I who will talk about the history of this fundamental part of the project. The Rules could probably have been clearer and more precise, as our working group produced what we felt was a more coherent whole than the couple of provisions that made it into the final text.

Initially, the scope assigned to us was 'obligations of the parties and lawyers'. Only later did we add 'judges' alongside parties and lawyers; from the point of view we adopted, it was essential that courts have specific obligations in the proceedings.

As we know, the working groups were formed in waves. The creation of the individual working groups was something of a piecemeal

[1] We thank Alessandro Spinillo and Jorge González Carvajal for their insightful comments.

process; there was a first wave of three initial groups and, six months later, two new intermediate groups were formed. Six months later, these groups were followed by another wave of three new groups, which were supposed to be the final ones. Eventually, another group on appeals and a supergroup on structure were formed.

As co-reporters of the 'obligations' group that was formed in the second wave, Remco and I were tasked with assembling a well-dimensioned and balanced working group: one that brought together experts from various parts of Europe; one that included not only the academic but also the practical perspective; and whose members were fluent in both English and French, as the Rules would be written in these two languages. In the end, the group consisted of Emmanuel Jeuland, Bartosz Karolcyzk, Walter Rechberger, Elisabetta Silvestri, John Sorabji — who was our native English speaker and a member of the steering committee —, and Magne Strandberg.

The group was created in late 2014 and its mission[2] was to further develop Principle 11 of the ALI-UNIDROIT Principles[3], which reads:

> Principle 11. *Obligations of the parties and lawyers*
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> 11.1 The parties and their lawyers must conduct themselves in good faith in dealing with the court and other parties.
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> 11.2 The parties share with the court the responsibility to promote a fair, efficient, and reasonably speedy resolution of the proceeding. The parties must refrain from procedural abuse, such as interference with witnesses or destruction of evidence.
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> 11.3 In the pleading phase, the parties must present in reasonable detail the relevant facts, their contentions of law, and the relief requested, and describe with sufficient specification the available evidence to be offered in support of their allegations. When a party

[2] For a more extensive presentation of the mandate and the approach of the working group on obligations of parties, lawyers and judges, see UZELAC, A. "Towards European Rules of Civil Procedure: Rethinking Procedural Obligations", *Acta Iuridica Hungarica / Hungarian Journal of Legal Studies*, 58-1, 2017, pp. 3-18, at 3-7.

[3] THE AMERICAN LAW INSTITUTE, UNIDROIT, *ALI/UNIDROIT Principles of Transnational Civil Procedure*, New York: Cambridge University Press, 2006.

> shows good cause for inability to provide reasonable details of relevant facts or sufficient specification of evidence, the court should give due regard to the possibility that necessary facts and evidence will develop later in the course of the proceeding.
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> 11.4 A party's unjustified failure to make a timely response to an opposing party's contention may be taken by the court, after warning the party, as a sufficient basis for considering that contention to be admitted or accepted.
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> 11.5 Lawyers for parties have a professional obligation to assist the parties in observing their procedural obligations.

We were faithful to the spirit of the ALI-UNIDROIT Principles, but we also wanted to deepen these principles in various areas of importance.

We started by dividing the work into different areas and topics, each of which was initially covered by two members of our team. The general part was the task of Remco and Walter; case management was assigned to John and Magne; factual and legal determination were assigned to Bartosz and Emmanuel. Together with Elisabetta, I initially prepared the part of the text that dealt with consensual dispute resolution.[4] Over time, we discussed our draft together, so that our text is, in all its parts, truly the result of collective work.

We had nine meetings. In three years, we met in Maastricht, Dubrovnik, Leuven, Pavia, Paris, Bergen, Vienna, and Rome: quite a pan-European project! This shows that the members of our group were all proactive hosts and collaborators.

I do not recall any major disagreements on any aspect of our work or the draft rules themselves. The final product was fully supported by every single member of our group. However, unlike the text produced by most of the other working groups, which was incorporated into the

[4] See, for further information about the draft rules produced by the working group, UZELAC, A., "Towards European Rules of Civil Procedure: Rethinking Procedural Obligations", *Acta Iuridica Hungarica / Hungarian Journal of Legal Studies*, 58-1, 2017, pp. 3-18, at 8-12.

final text of the Rules with virtually no changes, ours was partly modified.

We tried to achieve a new understanding of civil procedure that could overcome the old adversarial-inquisitorial dichotomy. Never in history have these two opposing models existed in pure form. However, to illustrate the extreme positions, the Romano-Canonical procedure was certainly adversarial in many respects, whereas the socialist civil procedure could rightly be called inquisitorial. We wanted to find a virtuous middle way in which both the parties and the court contributed equally to a common task. We found this in the principle of loyal cooperation, which eventually found its deserved place in Rule 2:

> Rule 2. *General*
>
> Parties, their lawyers and the court must co-operate to promote the fair, efficient and speedy resolution of the dispute.

The common procedural interest of the parties should transcend their mutual differences as to the merits. That common interest lies at the core of our approach to procedural obligations. The final purpose — the 'overriding objective' in English legal terminology[5] — is to contribute to fair and efficient proceedings. The cooperation principle requires from everyone that partakes in the adjudication process behaviour that is just, effective, and adequate in costs. It also requires all participants to refrain from any actions that would abuse the process and be contrary to the overriding objective.

We were convinced that civil procedure should be based on cooperation. Of course, civil procedure should incorporate other goals and aims,[6] which are sometimes also called 'principles'; but most of them revolve around the central idea of cooperation. This is

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[5] SORABJI, J., *English Civil Justice after the Woolf and Jackson Reforms. A Critical Analysis*, Cambridge: Cambridge University Press, 2014, pp. 135-254.

[6] UZELAC, A., "Goals of Civil Justice and Civil Procedure in the Contemporary World", in UZELAC, A. (ed.), *Goals of Civil Justice and Civil Procedure in Contemporary Judicial Systems*, Cham: Springer, 2014, pp. 3-31.

the case with proportionality, the need to attempt an amicable settlement of disputes, etc. Even the fundamental right to be heard can be considered an expression of cooperative behaviour.

VAN RHEE. — All participants in civil litigation share one responsibility: to bring an end to the dispute in a fair, efficient, and speedy manner. This cooperative approach[7] goes back some time in history. In Austria, we already find the *Kooperationsprinzip* formulated by Franz Klein,[8] although its contents differ slightly from the way we use it in our draft. The *principe de coopération* is currently present in French procedural law. We thought of it as a best practice and thus as a starting point for our work.

When does cooperation start? In our framework, it starts before the case is brought before the court, in what we may call the pre-commencement or pre-action stage. In that stage, the parties should cooperate to avoid unnecessary disputes and costs and to facilitate the early consensual resolution of the dispute. Where such early resolution or settlement is not possible, the parties should cooperate to encourage proportionate management of the proceedings. In this endeavour for proportionality, the court is at the centre, but it should also have the cooperation of the parties. With their help, the court should consider the nature, importance, and complexity of the individual case to deal with it fairly.

DE BENITO. — With all these *should*, a question comes to mind. Is this really what happens in the courts or is it just wishful thinking?

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[7] VAN RHEE, C. H., "Principe de coopération / Cooperation Principle", in JEULAND, E., LALANI, S. (eds.), *Recherche lexicographique en procédure civile / Lexicographical research in civil procedure*, Paris: IRJS, 2017, pp. 207-214; VAN RHEE, C. H., "Judicial Case-Management and Loyal Cooperation. Towards Harmonized European Rules of Civil Procedure", in AARLI, R., SANDERS, A. (eds.), *Courts in Evolving Societies. A Sino-European Dialogue between Judges and Academics*, Leiden: Brill, 2020, pp. 168-202.

[8] KLEIN, F., *Pro futuro. Betrachtungen über Probleme der Zivilprozessreform in Österreich*, Leipzig: Deuticke, 1891, pp. 10-50.

VAN RHEE. — In our framework, we want the parties and the lawyers to get together and, in a certain way, already be prepared before the action is brought in court. This is aligned with the idea of the pre-action protocols, which were introduced in England and Wales by Lord Woolf.

DE BENITO. — But going to the extreme of making settlement talks mandatory?

VAN RHEE. — Reaching an amicable settlement is a central task for the parties and their lawyers.[9] According to the Rules (in their current wording), the court must facilitate settlement at any stage of the proceedings. Both the court and the lawyers should inform the parties of the different settlement methods that can be used, and even suggest some of them to the parties. Often the parties are not aware of the different alternatives, so it is necessary to inform them. We thought it would be a good idea for the judge to do this in addition to the lawyers. This is more efficient and could reduce the workload of state courts, often overloaded. From this point of view, settlement discussions result in fewer cases coming to court or in better prepared cases where lawyers and parties have established contact and exchanged information.

DE BENITO. — What happens to cooperation after settlement attempts have failed and the parties enter the courtroom? How does the case develop according to the Rules?

VAN RHEE. — In court, parties and lawyers are expected to show a cooperative attitude.[10] As we said before, they must contribute to the proper management of the proceedings; this is a shared responsibility. They must of course present their claims and defences,

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[9] VAN RHEE, C. H., "Mandatory Mediation before Litigation in Civil and Commercial Matters: A European Perspective", *Access to Justice in Eastern Europe*, 4-2021, 12, pp. 7-24.

[10] VAN RHEE, C. H., "Obligations of the Parties and their Lawyers in Civil Litigation: The ALI/UNIDROIT Principles of Transnational Civil Procedure", in ADOLPHSEN, J., GOEBEL, J., HAAS, U., HESS, B., KOLMANN, S. (eds.), *Festschrift für Peter Gottwald zum 70. Geburtstag*, Munich: Beck, 2014, pp. 669-679.

including facts and offers of proof. They must also assist the court in determining the relevant facts and applicable law. All this must be done as promptly and completely as possible and as appropriate to the careful conduct of the case to ensure expediency.

Effective case management is primarily the responsibility of the court, albeit with the assistance of the parties.[11] The court must ensure that the way the case is dealt with is in accordance with the nature of the dispute. To this end, case management conferences are crucial.

DE BENITO. — Etymologically, to confer, *con-ferre*, means to 'bring together'. However, we must acknowledge that most of the time parties will just *agree to disagree*…

VAN RHEE. — The essence of cooperation is to bring the parties together! But let us now turn to Rule 11:

> Rule 11. *Fair opportunity to present claim and defence*
>
> The court must manage proceedings to ensure that parties have a fair opportunity to present their case and evidence, to respond to their respective claims and defences and to any court orders or matters raised by the court.

An honest and orderly exchange of claims and defences is necessary for the proceedings to proceed fairly and efficiently.

The same approach is needed with the determination of the applicable facts and legal rules. Bartosz Karolcyzk and Emmanuel Jeuland led this part of our project. It is the traditional task of the parties to present the relevant facts: *dabo mihi factum, dabo tibi jus*. We added that the court may invite the parties to clarify or supplement these facts. The court does not merely passively receive the facts. The court will enter into a conversation with the parties to

[11] VAN RHEE, C. H., "Case Management in Europe: A Modern Approach to Civil Litigation", *International Journal of Procedural Law*, 8-2018, 1, pp. 65-84; VAN RHEE, C. H., "Gerenciamento de casos e cooperação na europa: uma abordagem moderna sobre a litigância cível", in *Civil Procedure Review*, 13-2022, 2, pp. 157-170; VAN RHEE, C. H., "Case Management and Co-Operation in the Model European Rules of Civil Procedure", *Journal of International and Comparative Law*, 9-2022, 2, pp. 1-16.

indicate that, for example, further clarification or the provision of additional facts is required.

The court may only consider facts that have not been presented by the parties if there is good reason to do so. Thus, to a certain extent the parties are still the masters of the facts of the case, but the court may take facts that have not been pleaded by the parties into consideration if they are relevant and implied by the facts pleaded or appear from the case file:

> Rule 24. *Facts*
>
> (1) The parties must put forward such facts as support their claim or defence. The court may invite the parties to clarify or supplement these facts.
>
> (2) The court must not consider facts not introduced by the parties.
>
> (3) The court may consider such facts not specifically addressed by a party but that are necessarily implied by matters of fact put forward by the parties or which are contained within the case file. It may only do so if they are relevant to a party's claim or defence and the parties have been given a reasonable opportunity to respond.

Obviously, this is a rather different approach from what we are used to in some more traditional jurisdictions.

Proof of the relevant facts is, again, the task of the parties. In effect, this means that the parties should, as a rule, offer evidence in support of the facts they introduce:

> Rule 25. *Evidence*
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> (1) Each party is required to prove all the relevant facts supporting its case. Parties must offer evidence supporting their factual contentions. …
>
> (2) Each party has, in principle, a right to access all forms of relevant, non-privileged and reasonably identified evidence. In so far as appropriate, parties and non-parties must contribute to disclosure and production of evidence. It is not a basis of objection to such disclosure by a party that disclosure may favour the opponent or other parties.

The traditional rule is that no one is obliged to disclose facts, especially when these are damaging to one's case: *nemo contra se edere tenetur*. We felt that another approach, reminiscent of the common law approach to disclosure, is preferable. Also, the court may ask the parties to supplement their offers of evidence, or even suggest the introduction of additional evidence. This requires a certain degree of cooperation between the parties and the court.

DE BENITO. — When it comes to legal grounds, however, a more traditional *jura novit curia* approach seems to appear in the Rules. The parties 'must' put forward the facts (Rule 24) and are 'required' to prove them (Rule 25); but they merely 'may' present legal arguments:

> Rule 26. *Applicable law*
>
> (1) While taking account of any applicable special provisions, the parties may present legal arguments supporting their claim or defence.

As a classical jurist would say: *da mihi factum, dabo tibi jus*.

VAN RHEE. — This is the final version of the Rules, and it differs from our draft. We set forth an obligation to also provide legal arguments. Fortunately, however, in practice it is difficult to find proceedings in which the parties merely present facts and not legal arguments, if only because the selection of these facts is guided by the *Tatbestand*, the general and abstract factual assumption from which certain consequences are derived: the ones sought. Therefore, even if there is no specific obligation in the Rules in their final version, this duty or rule — or burden — of providing a legal context will, in the end, be respected.

DE BENITO. — Even if the parties provided only the facts, substantive case management, as opposed to purely procedural case management, would probably require the court to ask the parties to identify the relevant legal grounds at an early stage. And not only those necessary to simply identify the cause of action and thus the scope of the claim, but also the broader and more elaborate ones necessary to clarify the *thema decidendum* and with it the terms of the

debate and the judgment. The second paragraph of Article 26 indirectly indicates this possibility:

> Rule 26. *Applicable law*
>
> (2) The court must determine the correct legal basis for its decision. … It may only do so having provided the parties a reasonable opportunity to present their arguments on the applicable law.

The consequence is certainly a relativisation of that initially surprising contrast between the 'shall' we read about facts and the 'may' we find about the law.

UZELAC. — According to older procedural theory, the parties are *domini litis*: they do everything themselves, without *proper* obligations in the strict sense. Everything the parties do is an expression of their freedom to take or not take a certain action. The only thing that can be said about a party's obligation is that there is a certain self-interest in the party's actions. The dichotomy between *Lasten* and *Pflichten*, that is, the dichotomy between *proper* and *mere* obligations, was fundamental in older procedural theory.[12] For various reasons, it does not seem a productive dichotomy today.[13]

GRADI. — That is a bold statement! I think the distinction between duties and burdens is still useful, at least in the determination of facts. These are conventional distinctions and definitions that have been accepted almost universally. One speaks of a procedural burden when the activity requested by the party is in its own interest, to enable it to gain an advantage. Conversely, we speak of a procedural duty when

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[12] See UZELAC, A., "Towards European Rules of Civil Procedure: Rethinking Procedural Obligations", *Acta Iuridica Hungarica / Hungarian Journal of Legal Studies*, 58-1, 2017, pp. 3-18, at 12-13. The classical work on the concept of burden is GOLDSCHMIDT, J., *Der Prozess als Rechtslage. Eine Kritik des prozessualen Denkens*, Berlin: Springer, 1925 (later in Aalen: Scientia, 1962), although the idea can be found earlier in KISCH, W., *Deutsches Zivilprozessrecht*, Berlin-Leipzig: De Gruyter, 1922, vol. I, pp. 18 ff.

[13] On contemporary trends and the change in the approach to civil litigation, see UZELAC, A., VAN RHEE, C. H., "The Metamorphoses of Civil Justice and Civil Procedure: The Challenges of New Paradigms — Unity and Diversity", in UZELAC, A., VAN RHEE, C. H. (eds.), *Transformation of Civil Justice. Unity and Diversity*, Cham: Springer, 2018, pp. 3-21.

the conduct required is aimed at protecting a different interest, particularly that of the other party.

With respect to the determination of facts, the procedural burdens are the burden of proof and the burden of allegation. Each party bears the burden of alleging and proving facts in support of its case. Proof of a fact, of course, requires its prior allegation, its prior introduction into the procedural debate. In my view, the burden of allegation is implicit in the burden of proof. The burden of proof and allegation allocate the risk of the absence of allegation and the absence of proof in the sense that, if at the end of the proceedings, the fact is not proved, the party with an interest in it loses the case.

It is also generally recognised that, after a limited time, it is no longer possible for the parties to introduce new facts or new evidence. As Remco said, there is a kind of collaboration: the judge can invite the party to modify or complete the facts; however, there comes a time when it is no longer possible to introduce new facts or evidence. In my opinion, this is acceptable because each party is responsible for protecting its interests promptly and adequately.

It is well known that James Goldschmidt taught that civil procedure should only consist of burdens.[14] Therein lies, of course, a major problem: the problem of asymmetric information. With reference to fact-finding, burdens only work if both parties have equal access to information and evidence. If there is asymmetric information, we have what Rolf Stürner called 'Darwinian litigation',[15] which is not acceptable. We must introduce a duty of cooperation in fact-finding: a duty of clarification. The duty of clarification — *Aufklärungspflicht*, in German— is the duty to answer, to give information, to give

[14] GOLDSCHMIDT, J., *Der Prozess als Rechtslage. Eine Kritik des prozessualen Denkens*, Berlin: Springer, 1925, pp. 335-362.

[15] STÜRNER, R., "Zur allgemeinen Aufklärungspflicht der nicht beweisbelasteten Partei im Zivilprozeß", *Zeitschrift für Zivilprozess*, 1991, 104, pp. 208-217.

evidence, to explain and disclose information and evidence[16]. It is usually a duty that works upon request.

Both principles — the burden of allegation and proof and the duty of clarification — have been incorporated into the Rules. For example, Rules 24 and 25 burden the parties with the introduction of facts and evidence. The sanction is given by Rule 27:

> Rule 27. *Sanctions for non-compliance with rules and court orders*
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> (1) The court shall disregard factual allegations, modifications of claims and defences, and offers of evidence that are introduced later than permitted by these rules or by court orders, including those concerning amendment. Preclusion does not apply if the court could have taken notice of the party's failure or mistake and itself failed to raise with the parties whether they wished to seek an amendment or relief from sanction.
>
> (2) As a general rule, the court may continue the proceedings and decide on the merits based on the facts and evidence available to it.
>
> …

This is the idea of a burden in the party's own interest.

On the other hand, we have the duty of cooperation in the determination of facts; in particular, Rule 25(2) on access to information and evidence. It is possible to request information and evidence, but the duty of clarification of the opponent party is a duty upon request, not an automatic duty — which is reasonable and proportionate. And then there's the judge, who controls the proportionality of the request. The Rules also provide sanctions for

[16] VON HIPPEL, F., *Wahrheitspflicht und Aufklärungspflicht der Parteien im Zivilprozess*, Frankfurt: Klostermann, 1939, pp. 282-381; STÜRNER, R., *Die Aufklärungspflicht der Parteien des Zivilprozesses*, *Tübinger rechtswissenschaftliche Abhandlungen*, 44, 1976, pp. 134-151; GRADI, M., *L'obbligo di verità delle parti*, Turin: Giappichelli, 2018, pp. 343-400.

uncooperative behaviour. In this respect, the Rules provide every possible sanction that exists in comparative civil procedure:[17]

> Rule 27. *Sanctions for non-compliance with rules and court orders*
>
> (3) The court may draw negative factual inferences, order a party or their lawyer to bear the costs of non-compliance, or in serious cases of non-compliance render an *astreinte*, an order for payment of a fine, administrative sanction as provided by national law, or hold the non-compliant party in contempt.

The first sanction, adverse inferences, is probably the most important sanction in practice and my preferred solution; it is a simple and inexpensive sanction. Of course, it does not guarantee that truth in fact-finding will be established. But if one party has asymmetric information, and the other party who has evidence refuses to cooperate, the decision against the non-cooperating party is not unfair.

Another duty is the prohibition of lying and withholding essential information. In Germany, this type of duty is called *Wahrheitspflicht* and *Vollständigkeitspflicht*.[18] These issues are not directly addressed in the Rules, but some provisions lead to the conclusion that lies and concealment of information are not permitted. For example, Rule 47:

> Rule 47. *Careful conduct of litigation by the parties*
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> Parties 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.

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[17] GRADI, M., *The Right of Access to Information and Evidence and the Duty of Truthful Disclosure of Parties in Comparative Perspective*, in CADIET, L., HESS, B., REQUEJO, M. (eds.), *Procedural Science at the Crossroads of Different Generations*, Baden-Baden: Nomos, 2015, pp. 93-122.

[18] OLZEN, D., "Die Wahrheitspflicht der Parteien im Zivilprozeß", in *Zeitschrift für Zivilprozess*, 1985, 98, p. 403-426; GOMILLE, C., *Informationsproblem und Wahrheitspflicht. Ein Aufklärungsmodell für den Zivilprozess*, Tübingen: Mohr Siebeck, 2016, pp. 18-23; CARRATTA, A., "Dovere di verità e completezza", *Rivista trimestrale di diritto e procedura* civile, 2014, pp. 47-76.

I do not think, however, that this is the most important rule concerning this matter, given the comment on Rule 24:

> These Rules do not establish as a procedural principle a general obligation upon parties to provide the court from the start of proceedings with a full account of the information about all the facts known by that party and which are possibly relevant to the case.[19]

Therefore, the Rules generally exclude the obligation not to withhold information. However, there are other Rules that seem to indicate otherwise. First, Rule 186:

> Rule 186. *Without-notice* (ex parte) *procedure*
>
> (3) An applicant must fully disclose to the court all facts and legal issues relevant to the court's decision whether to grant relief and, if so, on what terms.

In the case of *inaudita altera parte* proceedings, there is a duty to be as complete as possible in the provision of facts and legal grounds. But this is only a special rule. In general, we can refer to Rule 3(e), which imposes a duty on the parties to act in good faith. A party who makes a false statement is not acting in good faith.

However, a statement is false not only when it is untrue, but also when it is incomplete and lacks information essential to the case. In this situation, the party who does not act in good faith may be sanctioned when deciding on costs:

> Rule 241. *General rule*
>
> (1) When determining upon which party the obligation to reimburse costs shall be placed under Rule 239, the court shall take into account the circumstances of the specific proceedings, in particular whether and to what extent the parties' claims were successful.
>
> (2) The court may also take into account the parties' conduct, in particular, whether and to what extent they acted in good faith and

[19] Rule 24, comments, para. 5.

> contributed to the fair, efficient and speedy resolution of the dispute.

Another example is in cases of extraordinary review. Reopening the procedure is possible if new evidence is discovered that was unavailable to one party because of the other party's behaviour:

> Rule 182. *Grounds for an extraordinary motion for review*
>
> (1) An extraordinary motion for review may only be brought against a judgment on the following grounds
>
> (d) after a judgment is issued, evidence that would have been decisive to it is recovered or obtained, and such evidence was not available prior to judgment being given due either to force majeure or improper conduct by the party in whose favour the judgment was made;

Obviously, these provisions do not directly sanction lying or withholding essential information; but they can be useful in sanctioning such behaviour.

DE BENITO. — This is an interesting debate: does the distinction between duty and burden still make sense? From a theoretical point of view, the answer is clearly yes. However, considering that the principle of cooperation plays such an important role in the Rules, the difference may be blurred. It may be the case that parties are expected to act in their own interest as well as in the best interest of fair adjudication. It is therefore unclear whether the distinction between burden and duty is still relevant in the Rules.

UZELAC. — *Lasten* and *Pflichten*, burdens and duties. I intentionally use German here because the terms are very precise and nuanced. Nowadays, however, people speak less German and more English. Some fine nuances are sacrificed in English. The English semantic field of 'obligations', with its plethora of 'must' and 'shall', encompasses both *Lasten* and *Pflichten*. This linguistic difficulty cannot be overlooked. Of course, in English there is also 'burden' — e.g., the burden of proof —, but trying to assign a very precise meaning to it leads to perplexity and is probably futile.

For certain purposes, distinguishing what is a burden and what is an obligation — in the proper sense of the term — may be useful. But when our approach to civil procedure is a practical one, we must ask ourselves what our objective is. Our aim is to insist on cooperation. And for that purpose, the distinction between burden and obligation is simply not very useful.

In the end, we felt that insisting too much on burdens and obligations would lead to something we wouldn't like to adopt. Therefore, even when sanctions were mentioned in our draft, we did not distinguish sanctions in the proper legal sense of the word — i.e., legally coercing the parties or other participants in the proceeding — from other types of sanctions.

Moreover, in our approach, sanctions cover something that may not be a sanction in the strict legal sense, but only a consequence. For example, negative inferences are not sanctions in the strict sense; but they can be effective. A negative inference is a sanction only in the sense that it motivates the parties and leads them to work towards the common goal of fair adjudication.

VAN RHEE. — The distinction between *Pflichten* and *Lasten*[20] is in my opinion pertinent when discerning whether something is relevant for the parties only, or for society at large. I'd say that establishing true facts is not only relevant for the parties. Society at large has an interest in decisions based on true facts. Society at large has an interest in a judgment based on the correct legal grounds. Society at large has an interest in litigants who use scarce resources in an efficient way, because otherwise not all litigants have access to justice. The corresponding obligations must be considered as genuine duties (*Pflichten*) and not just burdens (*Lasten*). This means that many of the

[20] VAN RHEE, C. H., "Charge et obligation / Burden and Duty", in JEULAND, E., LALANI, S. (eds.), *Recherche lexicographique en procédure civile / Lexicographical research in civil procedure*, Paris: ICRJ, 2017, pp. 77-80.

obligations that we find in the Rules need to be sanctioned; and sometimes not only by drawing adverse inferences.

GRADI. — I believe that *Pflichten* and *Lasten* converge into one indistinct obligation only if we adopt a primarily public perspective on civil procedure. The collective or public interest requires an appropriate sanction even when a party's conduct is contrary to its own interest in establishing the facts. However, from the litigants' point of view, the distinction remains. This brings us to the crux of the matter: the fusion of duties and burdens presupposes a markedly public conception of civil litigation.

As regards the consequences of non-cooperation, I agree that adverse inference may seem, at first sight, an ambiguous sanction. However, I think it is an appropriate sanction against uncooperative behaviour of a party, especially if we focus on the private interest of the other party.

DE BENITO. — Adverse inferences can function as a sanction, but also as a method of establishing facts, as a way of inferring facts from a party's failure to cooperate — a logical inference, according to the adjudicator's *conviction intime*, in the light of the available facts and evidence. This is very different from a sanction for breach of duty. We see all this regularly in international arbitration.[21]

VAN RHEE. — It is difficult to compare arbitration with proceedings before a court established by law. I would say that adverse inferences might not be a good sanction in a state court, although I realise that we have them in the Rules. Adverse inferences may lead to a decision based on facts other than the actual facts.

We have an interest, as a society at large, in the state courts delivering a judgment based on the correct law and the true facts. An adverse inference is, as Marco said, a way of establishing the facts, but not

[21] See, e.g., AMARAL, G. R., "Burden of Proof and Adverse Inferences in International Arbitration: Proposal for an Inference Chart", *Journal of International Arbitration*, 35, 2018, pp. 1-30.

necessarily the true facts. In a state court, fact-finding should not only be seen as a burden, but also as a duty that comes with sanctions. This is different in arbitration. Arbitration does not have the same social significance as court proceedings. In arbitration, adverse inferences may be a good method of establishing the facts of the case because society's interest in a decision based on true facts is either non-existent or at least not as pronounced in arbitration.

DE BENITO. — Should the old idea of burdens therefore remain alive in arbitration?

UZELAC. — It is not important whether the cat is black or white; the important thing is that it catches mice. In the context of sanctions and negative inferences, the distinction between this or that item is less important than its effectiveness in its respective context.

I do not regard arbitration as socially indifferent. Arbitration has long ceased to be an alternative method of dispute resolution and has become the standard in certain contexts. And it is effective precisely because of its lack of formal and mandatory sanctions — sanctions in the sense of fines. However, cost sanctions exist in arbitration — even more so than in litigation — and can be quite effective.

DE BENITO. — I agree with Alan. Arbitration has evolved to become a 'system of justice';[22] as such, it's hardly less socially relevant than court litigation. Indeed, arbitrators and courts regularly collaborate in many ways; the relevant legal framework is designed and is constantly being refined to make this collaboration as smooth as possible.

VAN RHEE. — I meant that litigation before a court of law, precisely because it is public, can convey messages. The proceedings are public, the judgements are public. Arbitration, on the other hand, is mostly a black box. It is therefore unable to convey the messages that court litigation conveys to the public.

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[22] MOURRE, A., "Soft Law as a Condition for the Development of Trust in International Arbitration", *Revista Brasileira de Arbitragem*, 13-2016, 51, pp. 82-98.