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ELI-UNIDROIT Project 'From Transnational Principles to European Rules of Civil Procedure'

Draft Rules of WG Obligations of Parties, Lawyers & Judges

Please note that the current draft will not be discussed in plenary at the meeting on 16-17 November in Vienna. The current version of the draft rules was submitted by the Working Group on 11 October 2017, and have not been compiled by the Working Group 'Structure'.

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PREAMBLE

The present rules deal with the obligations of parties, lawyers and judges. The rules use the word “obligations” in a broad sense. 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). The focus of the 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 undertaking steps that unduly delay the proceedings or otherwise qualify as procedural abuse.

The 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 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 the present 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 that 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 proposed rules are grouped under five headings. Part 1 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 which have a similar structure: each 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 the 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.

Part 2 deals with obligations in regard to management and planning of the proceedings. It specifies 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 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 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.

Part 3 is devoted to the determination of facts. 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 is only allowed if justified.

Apart from the parties, the court has certain responsibilities regarding facts and evidence: the 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 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-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.

Finally, 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.

The present rules are based on a variety of sources. The starting point is the ALI/UNIDROIT Principles of Transnational Civil Procedure, especially (but not only) Principles 11 and 14. 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 1994 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.

PART I – GENERAL PART

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, stages after the proceedings. In particular, the parties are obliged to:

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

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

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

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

(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 apply to other interested persons who participate in proceedings as they apply to parties.

Sources

ALI/UNIDROIT Principle 11.1, Principle 11.2., Principle 7.2; Council of Europe Recommendation (84)5 on Principles of civil procedure designed to improve the functioning of justice, Principles 2.1 and 2.2

Comments

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.

Examples of 'other interested persons' mentioned at the end of the rule are intervenors and amici curiae. Who these 'other interested persons' can be, depends on the national legal system.

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 to observe their procedural obligations (see Rule 1).

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

Sources

ALI/UNIDROIT Principle 11.1 and 11.5; CoE Recommendation Rec (2000)21 on the freedom of exercise of the profession of lawyer; Code of Conduct for European Lawyers of the CCBE; Council of Europe Recommendation (84)5, Principle 2.3.

Comments

Rule 2 deals specifically with lawyers as 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 CoE 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 the 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 its 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 the present 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 of codes of professional ethics apply to them or if such rules or codes of conduct differ in certain respects. For court-appointed experts, see Rule 3 – their obligations are analogous with the obligations of judges.

Separate mention of obligations of the parties and obligations of their lawyers is also indicated in the title of the ALI/UNIDROIT Principle 11 that emphasised both the duty of the parties and the duties of their lawyers to conduct themselves in good faith in dealing with the court and other parties (11.1). In Principle 11.5, the procedural obligation of lawyers is defined as a professional obligation – the obligation to assist the parties in observing their procedural obligations.

In elaborating this Rule, the Code of Conduct for European Lawyers of the CCBE was also considered, in particular its definition of the functions of lawyers. The CCBE emphasises the point that a lawyer's duties do not begin and end with the faithful performance of what the lawyer is instructed to do so far as the law permits. It also includes serving the interests of justice, i.e. a variety of legal and moral obligations towards the courts (in particular: the courts before whom the lawyer pleads their client's cause), towards other parties and the society as a whole (see CCBE Code of Conduct, at 1.1). See also Council of Europe Recommendation (84)5, Principle 2.3.

While this rule 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 or other persons whom they trust, or by consumer protection organisations or 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. [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 that assist the court.

Sources

ALI/UNIDROIT Principle 11.

Comments

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.

The court's obligations are further specified in the sections of the special part (see in particular the section on case management).

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 that 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).

Although ALI/UNIDROIT Principle 11 only mentions, in its title, the obligations of the parties and lawyers, it also substantively speaks of a "shared responsibility" of parties and the court to promote a fair and efficient resolution of the proceedings. The court, parties and lawyers in these Rules form a tripartite and core collaboration. As such they are all represented equally.

Rule 4. [Sanctions]

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

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

(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 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.

Sources

ALI/UNIDROIT Principles 17, 7.2, 15.6, 18.2, 18.3, 21.3 and 24.3; Council of Europe Recommendation (84)5, Principles 1.2 and 2.

Comments

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 that result 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, the present Rule 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.

The power to impose sanctions on parties or their lawyers for non-compliance with the procedural obligations is provided in ALI/UNIDROIT Principle 17. It is also contained in Principles 7.2, 15.6, 18.2, 18.3, 21.3 and 24.3. See also Council of Europe Recommendation (84)5, Principles 1.2 and 2.

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 other features of specific national justice systems and their approach to costs. They may include fines, cost shifting and augmented court fees.

PART II - MANAGEMENT OF THE PROCEDURE

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.

Sources

ALI/UNIDROIT Principle 14.

Comments

The court's duty of active case management is an important means to achieve the overall goal of a fair and speedy proceeding (see Rule 1). 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 many European jurisdictions. Recently, this traditional concept has been replaced in a number of European jurisdictions by procedural changes that 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. A similar line of development has been found in, for instance, Croatia, France, Spain, the Netherlands, and the Scandinavian countries. Furthermore, such active case management duties, under the concept of materielle Prozessleitung, *has long formed 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.

The rule does not presuppose a specific procedural structure. It is applicable both in jurisdictions that recognise a clear distinction between a preparatory stage and a main hearing, as well as in jurisdictions that do not recognise such a distinction. In jurisdictions where there is a clear distinction between a preparatory stage and a main hearing stage, most case management decisions should be made during the preparatory stage. In any event, such decisions should be taken as early as reasonably possible cf. ALI/UNIDROIT Principle 14.1.

Rule 5 requires the court, while carrying out its general case management duty, to apply its powers with regard to the nature of the case. The court's duty of active case management applies in all cases, but the content of proper case management may vary significantly from one case to another. The court's duty to take the nature of the case into account is important in respect of which decisions are to be taken and how the decisions are taken, for instance concerning whether decisions may be made by the court on its own initiative without having first heard the parties.

Rule 5 also emphasises the parties' and their representatives' obligation to cooperate with each other and the court concerning case management. This is a specific instance of the parties' general duty to cooperate (Rule 1). As case management is an aspect of the court's ex officio or inherent powers, the parties' and their representatives' role is primarily a cooperative one. Parties may have a right to be heard before the court exercises its case management powers (Rule 10). One effect of Rule 5 is that parties must carry out their obligations in good faith. Parties should, for instance, present all their arguments in respect of case management orders at the earliest opportunity and should avoid putting forward arguments that are clearly unsound.

Rule 6. [Case Management Conference]

(1) 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.

Sources

Various national rules and best practices.

Comments

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 (see Rule 10). 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 distance 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 second subsection requires the first conference to be held as soon as practically possible. The Working Group proposes that the shortest possible interval should generally not exceed 28 days (or one month) from the date when the parties' initial statements of case were received by the court. The court may at any case management conference direct orders necessary to manage the case; pursuant to Rule 5 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.

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.

Sources

ALI/UNIDROIT Principle 5.8.

Comments

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.

The powers of the court to issue ex parte orders in cases of urgent necessity, based on considerations of fairness, and in a form that is proportionate to the protected interests, is also present in ALI/UNIDROIT Principle 5.8.

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 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.

Sources

ALI/UNIDROIT Principle 14.3.

Comments

While the court's duty of active case management is based on Rule 5, the powers available for the court to fulfil its duty are found in Rule 8. The list of specific case management powers is non-exhaustive and the court may use any appropriate means, which is any action that is necessary to secure a fair, speedy and proportionate proceeding.

Most of the list from (i) to (xii) is self-explanatory. Particular comment can however be made in respect of:

(iv): If permitted by applicable rules of procedure, the court shall determine whether the form of procedure will be oral, written or a combination of the two. This may include particular types of proceedings (e.g. small claims litigation, or collective actions). In such proceedings, the power of the court is to direct that the proceedings be carried out entirely in writing. Any choice of form of procedure (including the use of e-justice) may also be influenced by any decision to determine the claim via an abbreviated or summary procedure, and any timetable relevant to such a form of process. If specific procedural tracks are available and judges have a right to select the most appropriate one, the choice of form of procedure includes allocating the case to any relevant procedure. The relevant procedure can be e.g. a small claims procedure, a group or multi-party procedure, a test or pilot case procedure, some form of collective action, or any other relevant special procedure.

(vii): The court should determine the order in which issues are to be resolved (see also ALI/UNIDROIT Principles 14.3), and fix a timetable for all stages of the proceeding, including dates and deadlines. This sub-paragraph deals with the very important choice of the appropriate organisation of the decision-making process and the determination of the form of decision-making. The form of decision-making also includes determining whether a particular issue will be decided as a preliminary issue; whether a partial or interim judgment should be issued; whether the proceedings should be stayed until an issue is decided by another court or body; whether the

proceedings will bifurcate; or whether all issues have to be presented simultaneously and determined in a single decision.

(viii): These decisions include determining whether to permit third party intervention, to appoint a 'litigation friend' to act for a party, or appoint an amicus curiae (in jurisdictions where such forms of third party participation exist); whether to permit the substitution of a new party for an existing party to the proceedings; whether to permit the joinder of a new party to the proceedings; of whether to permit the withdrawal of one or more parties to the proceedings.

(ix): Representation by a lawyer may be prescribed or optional. Some jurisdictions allow representation by other persons or bodies for particular cases. The court may have an obligation to monitor whether party representatives discharge their functions properly and to inform the parties about the desirability of engaging or changing its representative. In some jurisdictions, the court is given the power to decide whether a party may proceed without a representative.

(xi): Proper use of technology includes all forms of technology that are available to the court, including email communication, video-conferences, telephone hearings, electronic filing etc.

The second subsection specifies aspects of the so-called materielle Prozessleitung*, that is the court's duty to organise the proceedings in a way that guides all participants in the process to a result that is appropriate, fair and just. In so far as necessary, the court must discuss the factual and legal aspects of the case with the parties and question them so that they: explain all relevant facts timeously and completely and, particularly supplement insufficient information regarding the claimed facts; identify evidence; and, make relevant applications. Identification of the real issues in controversy can also assist with the consensual resolution of disputes and facilitate settlement. Concerning the paragraph's last sentence, decisions pertaining to evidence include whether an on-site inspection, access to evidence or production of evidence is being requested, whether evidence shall be secured and whether an expert should be appointed.*

Decisions on case management are not binding on the court, see the last subsection which makes it clear that any such decision may be modified or revoked. This is in accordance with ALI/UNIDROIT Principle 14.3. 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).

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).

Sources

ALI/UNIDROIT Principles 7.2; 15.6, 17 and 18.2-3.

Comments

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.

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 proposed case management directions. Where the parties agree 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 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.

Sources

ALI/UNIDROIT Principle 14.2.

Comments

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 (see Rule 6) 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. Rule 10 first subsection is in accordance with ALI/UNIDROIT Principle 14.2.

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; cf. the wording "in principle". The court may decide contrary to the parties' agreement if that is necessary to secure the a fair, efficient, speedy and proportionate proceeding (Rules 1 and 5). 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 (see also provisions on appeals in Rules 8 and 9).

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 where 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.

Sources

ALI/UNIDROIT Principles 7.2 and 14.

Comments

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.

The third and fourth subsections deal with some of the consequences of a court's failure 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).

PART III - DETERMINATION OF FACTS

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 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.

Sources

ALI/UNIDROIT Principles 11.3 and 21.

Comments

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 (see part IV). 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. Rule 12 is the normative representation of this approach. Therefore, it introduces procedural duties that have been shaped accordingly.

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 (see Rule 14). The participation of lawyers in preparing statements of claim is therefore vital.

Finally, Rule 12 allows for facts or evidence to be presented at a later stage, but puts the burden on the pleader to justify the late presentation. Clearly, the ultimate decision whether to admit belated facts or evidence is vested with the court (see Rule 14).

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.

Sources

ALI/UNIDROIT Principle 22.

Comments

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.

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.

(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.

Sources

ALI/UNIDROIT Principles 7.2, 11.3, 14.3, 15.6 and 17.

Comments

Rule 14 is intended to operate as a sanction for breaching the duty to provide the court with facts and evidence in a timely, diligent and complete fashion (see Rule 12).

The court should be 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 in order to apply the Rule.

This approach is also in line with the concept of the judge being the manager of the proceedings.

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. [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.

Sources

ALI/UNIDROIT Principles 11.4 and 15.

Comments

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. [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 is requested and authorised by the court.

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

Sources

Various national rules and best practices.

Comments

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 an 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.

PART IV - FINDINGS OF LAW

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.

Sources

ALI/UNIDROIT Principles 11.3 and 19.1.

Comments

In most European systems of civil procedure, the parties have both the right and 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). The rule presented here 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 rule 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 (see also Rule 20), or whether in particular cases the court has increased inquisitorial or investigative powers.

In any case, Rule 17 does 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 that is presented by the parties and to consider points of law on its own motion (Rule 18). 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 this Rule, 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.*

Rule 17 is substantially inspired by Principle 11.3 of the ALI/UNIDROIT Principles, according to which the parties have an obligation to present in reasonable detail (inter alia) their contentions of law. Also see Principle 19.1 which indicates that legal arguments should ordinarily be presented by the parties in their initial written submissions.

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.

Sources

ALI/UNIDROIT Principles 22.1, 22.2.3 and 5.5

Comments

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 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 (Rule 17), 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 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 (para 2 and 3). 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 (see Rule 17(1)), and as such may be subject to sanctions if they were represented by lawyers (see Rule 20). 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.*

Also see the ALI/UNIDROIT Principles, Principles 22.1 (responsibility for determining the legal basis of the case), 22.2.3 (right of the court to rely upon a legal theory that has not been advanced by the parties) and 5.5 (obligation to give a fair opportunity to respond to contentions of law presented by another party, and to orders and suggestions made by the court).

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.

Sources

ALI/UNIDROIT Principle 22.2.1.

Comments

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 (see Rule 16), 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 (para 2).

The right to amend contentions of law is also contained in ALI/UNIDROIT Principles, at. 22.2.1.

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.

Sources

ALI/UNIDROIT Principle 17.3.

Comments

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.

Dismissing claims and defences due to failure or refusal to comply with obligations in the proceedings, is a part of sanctions contained in Principle 17.3 of the ALI/UNIDROIT Principles.

PART V - DUTY TO PROMOTE CONSENSUAL DISPUTE RESOLUTION

Rule 21. [Obligation to Cooperate in Dispute Settlement Attempts]

(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.

Sources

ALI/UNIDROIT Principle 24.3 and 7.2; EU directives on mediation and consumer ADR.

Comments

This Rule expresses the general approach of encouraging consensual dispute resolution. This obligation is applicable at all stages of proceedings (see Rule 1, para 1, and ALI/UNIDROIT Principle 24.2). Emphasis is, however, put on early resolution which could make litigation unnecessary (for specific provisions on pre-action obligations see Rule 22). 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 (see Rule 1). 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 following sections, starting with the period before proceedings are initiated and continuing with obligations in all stages after action is brought.

This Rule is substantially based on ALI/UNIDROIT Principle 24.3 (first sentence - parties' duty to participate in reasonable settlement endeavours). See also Principle 7.2 (parties' duty to cooperate, right of reasonable consultation). The policy of encouraging consensual dispute resolution is also contained in EU directives on mediation and consumer ADR (securing better access to justice through the use of cost-effective and quick methods of dispute resolution, including mediation and consumer dispute resolution).

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.

Sources

EU Mediation Directive at (14)).

Comments

As the early resolution of disputes is to be preferred to litigation (see Rule 21), 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 the 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 (para 1, (i) to (iii)) 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 (see Rule 12). The court may order parties who failed to do it before proceedings were issued to undertake one or more of the steps specified in this Rule (see Rule 26 (i)).

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 this Rule 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 (Rule 25.2). The fulfilment of such an obligation may in certain cases also be a legal requirement for the admissibility of the subsequent civil action (see EU Mediation Directive at (14)).

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.

Sources

CoE Recommendation R(84)5, Principle 2(2-3).

Comments

As a part of their general obligation to assist the parties in observing their procedural obligations (Rule 2), 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. ALI/UNIDROIT Principle 11.5 states that lawyers have a professional obligation to assist parties in observing their procedural obligations, and this rule elaborates their professional obligation in respect to the use of consensual dispute resolution methods.

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 (see Rule 24.2). 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). See on this point the CoE Recommendation R(84)5, Principle 2(2-3).

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.

Sources

ALI/UNIDROIT Principle 24.2; EU Mediation Directive, Art. 5, 6 and 9; CoE Recommendation R(84)5, Principle 3.

Comments

The provisions of this Rule are in part modelled after ALI/UNIDROIT Principle 24.2 (court's duty to facilitate parties' participation in ADR processes at any stage). This Rule 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 (compare the use of the word "court" in Rule 24.1 and 24.2 and the use of the word "judge" in 24.4 and 24.5). 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 this rule and in any other 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 (see Rule 21.1), this obligation particularly targets the preparatory stage of the proceedings and the case management conferences (Rule 24.3). In order to enhance the likelihood of settlement and broaden its scope, the parties may be ordered to appear in person (Rule 24.2), 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 (Rule 24.4). 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 (on binding orders and referrals to ADR see Rule 25).

*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. As the ALI/UNIDROIT Principles note, "the court may conduct informal discussion of settlement with the parties at any appropriate time" (comment to Principle 24). 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.

See also EU Mediation Directive, which notes that the court may invite the parties to use mediation or attend an information session (Art. 5), and requires the Member States to ensure that mediated settlement agreements may be made enforceable (Art. 6). The Directive also encourages broader availability of information on ADR (Art 9). On the right of the court to order the parties to appear in person see CoE Recommendation R(84)5, Principle 3.

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.

Sources

EU Mediation Directive, Art. 5.

Comments

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 (see Rule 22), 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 rejection of a relevant submission (e.g. plaintiff's statement of claim). Other sanctions (e.g. cost sanctions) are not excluded (see Rule 26). 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 EU Mediation Directive (see chapeaux at (14)), provided that obligations and limitations of such mandatory process does 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.

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

If one of 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.

Sources

CoE Recommendation R(84)5, Principle 2.2 and 2.3.

Comments

As in the case of other procedural obligations in this Chapter, a separate Rule is devoted to sanctions. The first paragraph emphasises 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. Breach of this obligation is subject to sanctions. While some specific consequences of 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, or on their lawyers, or on both parties and their lawyers, depending on the reasons and responsibility for the breach. An exception to this are those sanctions which 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.

See CoE Recommendation R(84)5, Principle 2.2 and 2.3 (on disciplinary sanctions by professional organizations for lawyers who fail to observe their duty of fairness in the conduct of the proceedings, or clearly misuse procedure for the manifest purpose of delaying the proceedings).