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CASE MANAGEMENT AND CO-OPERATION IN THE
MODEL EUROPEAN RULES OF CIVIL PROCEDURE

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Abstract: Rules of civil procedure reflect the state’s attitude to balancing competing interests of the litigants and the wider public interest. While litigants have an interest in protecting their autonomy in the conduct of litigation, there is a greater public interest in ensuring that litigation is conducted in an efficient, cost-effective and time-saving manner. It is for this purpose that the adversarial system came to be modified with some elements of the inquisitorial system, giving rise to case management whereby the judge takes an active part in regulating the litigation process. An important aspect of case management is identifying issues or disputes that can more appropriately be settled by less formal methods of dispute resolution. Where alternative dispute resolution is not favoured, the judge retains case management powers throughout the litigation process. This article presents an overview of the “Model European Rules of Civil Procedure” of the European Law Institute and UNIDROIT that are intended to guide member states of the European Union. The article concludes that the Model European Rules of Civil Procedure represent the best practice in civil litigation, the adoption of which by member states of the European Union will to a great extent harmonise litigation procedure throughout the European Union, although the Model European Rules may not be readily embraced by all the states.

Keywords: alternative dispute resolution; case management; consensual dispute resolution; Model European Rules of Civil Procedure; co-operation between litigants; duties of litigants and lawyers

I. Introduction

The Woolf Reforms, which came into effect in England and Wales in 1999, giving judges the power of “case management”, meaning the power to actively manage a case from the point at which a claim is made, attracted considerable attention in Europe. Generally on case management, see Lord Woolf, Access to Justice: Interim Report to the Lord Chancellor on the civil justice system in England and Wales (Lord Chancellor’s Department, 1995) and Access to Justice: Final Report to the Lord Chancellor on the Civil Justice System in England and Wales (HMSO, 1996). For an up-to-date and excellent account of case management in the United Kingdom, see “Note on Case Management” in Practical Law UK.

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Law jurisdictions had already moved away from an idea that had dominated civil procedure in the non-Socialist states of Europe for a long period of time, that is the idea that the parties are free to shape their civil lawsuits in the way they deem fit, since civil litigation is (as a rule) about the scope of their private rights and duties.²

The idea that the parties have a free hand in shaping their civil lawsuits is forcefully represented by a fundamental principle of civil procedure that was first formulated in the early nineteenth century by the Bavarian legal scholar Nikolaus Thaddäus von Gönner (1764–1827): the Verhandlungsmaxime, which can be roughly translated into English as the adversarial principle (for von Gönner, this principle also included the Dispositionsmaxime as defined by later legal scholars—party control of bringing an action in court, its continuation and early termination).³ In its extreme form, the adversarial principle is harmful to justice, as it only views the civil process from the perspective of the private interests of the parties (or, better, from the private interests of the more powerful party) and goes against the contemporary view that the social welfare state has an obligation to actively intervene to protect the interests of weaker groups in the society.

The concept of Verhandlungsmaxime, while it remained a central principle in handbooks on civil procedure in Europe throughout the nineteenth and twentieth centuries, gradually lost its status as an overarching principle of civil procedure because of the many exceptions that came to be recognised. This is well demonstrated by the change of direction since the end of the nineteenth century in many European jurisdictions towards a new balance between adversarial and less adversarial elements in civil procedure. The result of this development was the adoption of a new principle of civil procedure, first formulated at the end of the twentieth century. The principle can be best described as the “principle of co-operation”, even though there is explicit reference to it only in a few jurisdictions, notably France (principe de coopération).⁴ While there is no explicit reference to it in the 2005 Principles of Transnational Civil Procedure of the American Law Institute and the International Institute for the Unification of Private Law (UNIDROIT), that is soft law formulating best practices in international commercial litigation globally,⁵ the 2020 Model European Rules of Civil Procedure of the European Law Institute (Model European Rules) and UNIDROIT appear to embrace it.⁶

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² For a brief account of the development of civil procedure in Europe, see C H van Rhee, “Introduction” in European Traditions in Civil Procedure (Volume 54 in Ius Commune Europaeum Series, Antwerp, Intersentia, 2005), 3–16.
⁵ See https://www.unidroit.org/instruments/civil-procedure/ali-unidroit-principles/ (consulted in July 2022).
These Model European Rules are meant to provide a set of procedural best practices for the member states of the European Union (soft law) and are the result of the need to enforce harmonised substantive law of the European Union through the national courts of the member states. These best practices are aimed at reducing existing differences between the procedural laws of the member states and, consequently, at safeguarding the uniform application of harmonised substantive law. They are, at least to a certain extent, based on the Transnational Principles of Civil Procedure of the American Law Institute and UNIDROIT, but they are more detailed and specific since they do not aim at the world at large but especially at the European Union member states.

The co-operation principle appears in the following Model European Rules:

Rule 2. General: Parties, their lawyers, and the court\(^9\) must co-operate to promote the fair, efficient and speedy resolution of the dispute.\(^10\)

Rule 6. Role of the parties and their lawyers: Parties and their lawyers must co-operate with the court to promote a proportionate dispute resolution process.\(^11\)

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7 See Ibid., the Preamble. Part III: Project Methodology of the Preamble states as follows: “The aim was not to devise a set of rules articulating common practices, i.e., a ‘restatement’ of European civil procedure, nor was it to devise a set of rules based on the predominance of approaches across European jurisdictions, or based on compromise. The project’s aim was to devise a set of best practice rules for the future development of European civil procedure”.

8 Ibid.

9 The Model European Rules do not seem to make any explicit distinction between “court” and “judge”, although such a distinction was suggested by one of the working groups preparing the Model European Rules, that is the Working Group on Obligations of Parties, Lawyers and Judges (Obligations Working Group). The Preamble to the draft of this working group states that “[i]t 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”.

10 As regards the terminology “fair”, “efficient” and “speedy”, we find the following observations in the report of the Obligations Working Group (Rule 1, Comments):

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 co-operate 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 timeframe which is reasonable given the nature, value and complexity of the case.

11 As regards the terminology “proportionate”, we find the following observations in the Report of the Obligations Working Group (Rule 1, Comments):
This article discusses the procedural model of the Model European Rules, especially where it concerns the effects of the principle of co-operation and case management (Section III). First, some brief remarks may be made on the historical context of the co-operation principle.

II. A Procedural Model Based on the Principle of Co-operation

At the outset it must be said that there is a political ideology behind the civil procedural model based on the co-operation principle, namely that civil procedure should be viewed not only from the perspective of the litigants but also from the perspective of the society as a whole. This political idea is of course not new: it is rooted in the writings of legal scholars such as the nineteenth-century Austrian law professor Anton Menger (1841–1906) and the early twentieth-century Austrian law reformer Franz Klein (1854–1926).12

While, admittedly, civil procedure rules are crafted to resolve private disputes, the process through which such disputes are resolved may have an impact on other members of society. It is not only that the particular solution reached in a lawsuit will influence the behaviour of others, but the way the solution is reached will also have consequences for others, for instance, inefficient use of court time in one particular case will inevitably reduce the time the tribunal has for deciding other disputes.

The three overarching goals of the civil procedure rules are to ensure that the rules of procedure:

(a) facilitate dispute resolution based on finding of facts as accurate and comprehensive as possible;
(b) allow the court to take into consideration the correct legal rules; and
(c) contain guarantees for an effective and efficient use of the scarce resources available for litigation.

Such a model cannot exist when the role played by the participants in a civil lawsuit (judges, parties and their lawyers) is defined uniformly according to an overarching principle such as the adversarial principle. What is needed is a balanced approach

\[ \ldots \text{“proportionate” to a certain extent covers similar grounds as the terminology “efficient” and “speedy” taken together. “Proportionate” is added [to the original draft rule of the Obligations Working Group] in order to emphasise that different types of cases may require different use of resources and time.} \]

in defining the role played by the participants at various stages of litigation, emphasising co-operation between these actors where it is necessary to achieve the three overarching goals.

III. The Procedural Model of the Model European Rules

The starting point of the procedural model of the Model European Rules is that all participants in a civil lawsuit, that is, the court, parties and their lawyers, share the responsibility of resolving the dispute in a fair, efficient and speedy manner. As

13 In this article, I will not discuss sanctions for non-observance of various obligations of parties and lawyers that are mentioned in the Model European Rules. It should, however, be noted that, unlike the (unpublished) draft of the Obligations Working Group, the Model European Rules do not provide for any sanctions for judges in case they disregard their case management duties. Rule 11(3) and 11(4) drafted by the Obligations Working Group were not included in the Model European Rules. The draft rules of the Obligations Working Group read as follows:

11(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;
11(4) The parties may complain to relevant bodies for judicial conduct and discipline for investigation of alleged judicial failure to manage the case in an appropriate manner.

The Comments to these rules read as follows:

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 co-operation [the draft consistently refers to “loyal co-operation” to better emphasise what behaviour is expected from the participants to a legal dispute], 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).

The Obligations Working Group also stated in Rule 4, Comments, that “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”.

14 Rule 2 of the Model European Rules. Draft Rule 2 of the Working Group states that the lawyers must assist the parties to observe their procedural obligations. The comments to this draft rule state as follows:

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 co-operate in any non-compliance with these obligations. If necessary, they should actively
the ELI/UNIDROIT working group entrusted with providing first drafts of the rules on the obligations of parties, lawyers and judges (Obligations Working Group) explained:

The rules [drafted by the Obligations Working Group] provide a modern approach to civil litigation in that they put the emphasis on loyal co-operation 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.

In order to achieve this goal and to promote “a proportionate dispute resolution process”, the court, the parties and their lawyers need to co-operate. It is the court that must ensure that the dispute resolution process is indeed proportionate. To this end, the court must not only consider “the nature, importance and complexity” of the dispute before it but also take into account its caseload (other cases) to ensure that justice is administered in a proper manner in all the cases that come up before it. This idea finds expression in Rule 5(2): “In determining whether a process is proportionate the court must take account . . . of the need to give effect to its general management duty in all proceedings with due regard for the proper administration of justice”. The court should ensure that the least complex and least costly methods are chosen to resolve disputes, preferably where possible by resorting to forms of alternative dispute resolution.

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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.

15 The rules of the Obligations Working Group (see n. 9 above for the composition of this working group and its work) have served as a basis of part of the Model European Rules. It should be noted that not all suggestions of the Obligations Working Group have been adopted.

16 Rules 2 and 6.

17 Rule 5.

18 Cf. Comments Rule 5.
According to the Model European Rules, co-operation must take place before the case is brought to court, that is at the pre-commencement or pre-action stage.\textsuperscript{19} The Comments accompanying draft Rule 1 of the Obligations Working Group (which are unpublished) states as follows:

Parties should observe their obligations not only during litigation but even before the case is brought to court (the pre-action stage). . . . In the pre-action stage, the parties should co-operate 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 pre-action stage, the parties are required to co-operate with each other to avoid “unnecessary disputes and costs, to facilitate the early consensual resolution of their dispute and, where such a resolution is not possible, the proportionate management of future proceedings . . .”.\textsuperscript{20} Co-operation in the pre-action stage may imply that the parties must ensure that they provide their opponent with “concise details” of the claims and defences that they may raise if the case proceeds to trial, that disputed issues of law and fact are clarified and, if possible, narrowed, and relevant evidence is identified.\textsuperscript{21} In the pre-action stage, parties may also discuss a possible timetable for the proceedings that may follow, make an estimate of the potential costs of proceedings and pay attention to prescription (statute of limitations), as well as jurisdiction, provisional measures and “any other procedural matter”.\textsuperscript{22}

Seeking and working towards an amicable settlement is crucial for the parties and their lawyers.\textsuperscript{23} Co-operation in resolving the dispute by consent is required both in the pre-action stage and when the case is brought before the court.\textsuperscript{24} In order to ensure that the parties consider an amicable settlement, their lawyers must advise their clients on methods of consensual dispute resolution which they might

\textsuperscript{19} See Rule 22, Comments of the Obligations Working Group for a definition of the “pre-action phase”: “. . . [T]he notion of ‘pre-action phase’ refers to the period after the dispute has arisen, but before the formal initiation of civil proceedings”.

\textsuperscript{20} Rule 51(1).

\textsuperscript{21} Rule 51(2).

\textsuperscript{22} Rule 51(3). See Rule 51(3)(c), which refers to the need to “consider issues of limitation”. A civil law audience may have preferred the terminology of “consider issues of prescription”.

\textsuperscript{23} Rule 3(a).

\textsuperscript{24} The Preamble to the Obligations Working Group Draft states as follows: “The main rule is that parties must co-operate actively with each other in seeking to resolve their dispute consensually, both before and after proceedings have begun”. 
use instead of litigation. They must assist their clients in selecting the most suitable method of consensual dispute resolution and encourage its use where appropriate.25

Once a case has reached the court (therefore, after the pre-action stage), the court also has certain responsibilities with regard to the settlement of the dispute. Rule 10 of the Model European Rules, which deals with the role of the court, provides that “the court must facilitate settlement at any stage of the proceedings”. Comments on Rule 10 states that “Early Neutral Evaluation” by the court during the preparatory stage of the case management hearing, set out in Rule 61, may increase the possibilities of settlement during the court proceedings stage.26 Importantly, the court must, before the dispute reaches the stage of court proceedings, advise the parties of the different types of alternative or consensual dispute settlement processes that are appropriate and encourage them to settle their dispute amicably. The court may also participate in attempts at settling and assisting the parties in reaching a consensual resolution and in drafting settlement agreements.27 Assistance by lawyers and the court is important, since very often the parties themselves may not be aware of suitable methods of consensual dispute resolution and their benefits.

The aforementioned approach will most likely result in fewer cases reaching the state courts. And in the event a dispute proceeds to a court hearing, the court will only have to deal with issues the parties have not been able to resolve in the pre-action stage.28

When in court, the parties and their lawyers should adopt an attitude of co-operation: they should “contribute to the proper management of the proceedings”.29 This means that they must present their claims and defences, including facts and offers of evidence, and assist the court in determining the relevant facts and the applicable law “as early and completely as possible and as appropriate to the careful conduct of litigation in order to secure procedural expedition”.30

Different from the draft rules of the Obligations Working Group, the Model European Rules do not require that “assertions of fact should take into consideration the opposing views [of the opponent party], if they were made known to the pleader”.31 The Model European Rules provide as follows in Rule 53(6): “The claimant

25 Rule 9(2).
26 See Rule 10, Comment 1. Rule 10 provides that the court must facilitate settlement at any stage of the proceedings and more particularly at the preparatory stage of proceedings and at case management conferences, and inform the parties about the availability of different types of settlement methods and may suggest or recommend the use of specific consensual dispute resolution methods.
27 Rules 10 and 49(1). Rule 49 is reproduced below. See text indicated by note 44.
28 Rule 9(4). In its comments to its draft Rule 22, the Obligations Working Group stated as follows: “Where a settlement is not achieved, these steps may help in better management of the subsequent litigation proceedings”.
29 Rule 2.
30 Rules 3, 47, 52ff and 87ff.
31 Comments to draft Rule 12 of the Obligations Working Group. Draft Rule 12(1) reads: “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”.
may respond in a statement of claim to the defendant’s defence as known from any exchange of arguments before commencement of proceedings” (emphasis added). Parties and their lawyers should furthermore abstain from procedural abuse and act in good faith.\textsuperscript{32} In all stages of the proceedings, the court must monitor whether parties and their lawyers actually co-operate.\textsuperscript{33}

Effective management of the case is the responsibility of the court,\textsuperscript{34} albeit with the help of the parties.\textsuperscript{35} It is specifically the task of the court to ensure that the way the dispute is litigated is compatible with what is at stake. This means that the court should ensure that the dispute resolution process is proportionate to “the nature, importance and complexity of the particular case and of the need to give effect

\begin{itemize}
\item \textsuperscript{32} Rule 3.
\item \textsuperscript{33} Rules 4 and 48. See also Rule 47, Comment 4:
\begin{quote}
To ensure that parties fulfil their duty to co-operate properly, the court ought to monitor their conduct throughout the proceedings. It ought to require the parties to take such steps as it considers necessary to fulfil the obligation when it considers that such steps are necessary for the proper management of proceedings.
\end{quote}
\item Cf. the Comments of the Obligations Working Group accompanying its draft Rule 3:
\begin{quote}
Moreover, the court must monitor whether other participants in the lawsuit observe their obligations. Monitoring is a continual duty in so far as the court ought to ensure that procedural obligations are observed and that voluntary compliance with the professional obligations is secured throughout the entire course of the proceedings. Of course, continual monitoring does not imply that the court needs to check the progress of the case on a daily basis. It only means that throughout the proceedings the court should establish whether procedural timetables and procedural steps and actions, which were agreed or determined by the court, are being complied with, taking appropriate enforcement action if necessary. . . . In individual cases the court’s duties have to be implemented by individual judges or panels of judges. This is an aspect of their judicial case management function. It is suggested that, in implementing this function, judges are monitored by the court: monitoring of adequate performance of this function does not touch upon the independence and impartiality of judges in decision-making. The courts themselves could be monitored by a Council for the Judiciary or a similar body that is independent of the Ministry of Justice.
\end{quote}
\item \textsuperscript{34} Rule 4.
\item \textsuperscript{35} The Preamble of the Obligations Working Group states as follows:
\begin{quote}
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.

Part of the Comment to draft Rule 5 of the Obligations Working Group reads: “As case management is an aspect of the court’s ex officio or inherent powers, the parties’ and their representatives’ role is primarily a co-operative one. Parties may have a right to be heard before the court exercises its case management powers”. The draft rules of the Obligations Working Group contain a Rule 10 entitled “Co-operation in Issuing and Amending Case Management Orders”. Cf. Rule 50(1) of the Model European Rules.
\end{quote}
\end{itemize}
to its general management duty in all proceedings with due regard for the proper administration of justice”.36

It should be noted here, that with a few exceptions (such as joint applications for party-agreed proceedings and proceedings using digitised forms of communication and videoconferencing), the Model European Rules do not provide procedural tracks for specific types of cases37 (such as the fast track, small claims track and multi-track in England or the proceedings under the European Small Claims Regulation). Such tracks are not necessary, because the Model European Rules suggest that the judge and the parties can tailor the procedure to fit the individual needs of the case at hand.

To prepare for a final hearing, the court may hold an early case management hearing, and if necessary further ones as the case progresses, and sometimes a case management hearing may bring about a settlement of the dispute (Rule 61). As the Obligations Working Group proposes in its draft Rule 6: “. . . If requirements are met, the court must determine the claim on the merits at a case management conference38 or immediately thereafter”.39 In practice, this may mean that the case is decided on the merits at the scheduled first case management hearing. It seems that the possibility of such an early termination of the case may also be read into the Model European Rules, where the drafters state as follows in their Comments: “In many cases proceedings may conclude with an early final judgment without there being any need for an elaborate concentrated final hearing”.40

In or immediately after the case management meeting, the court must, in consultation with the parties set a timetable for the various steps of the proceedings.41 The structure of the proceedings as envisaged by the Model European Rules is uncomplicated: there is a written pleading phase (meant for the submission of the statements of case), an interim phase which lasts until the closure of the proceedings and a final phase for the final concentrated hearing and judgment.42 Comment 3 accompanying Rule 61 states as follows:

The structure of the procedural model [consisting of three phases: the written pleading phase, the interim phase designed to prepare the case for final determination and the final phase of a concentrated final hearing] that underpins these Rules represents a clear rejection of discontinuous or of piecemeal proceedings, which involve a lengthy sequence of hearings,

36 Rule 5.
37 Rule 49, Comment 4.
38 The Obligations Working Group defined a case management conference as follows: “A case management conference is the arena where the parties may exercise their right to be heard, in particular regarding matters relevant for the organization of the proceedings” (draft Rule 6, Comments).
39 In the Comment to draft Rule 6, the Obligations Working Group states: “If the case is sufficiently clear, the judge may determine the case on its merits at the case management conference”.
41 Rule 61(3).
42 Rule 61, Comment 1.
which result in unnecessary cost and delay. As a consequence, the fact that these Rules provide a discretion for the court to hold more than one case management hearing (see Rule 61(1)) should not be understood as an invitation to adopt a discontinuous, piecemeal approach to proceedings. The discretion to hold more than one case management hearing should only be exercised in appropriate circumstances, such as complex cases or where there has been an unexpected change in the parties’ original positions during the course of the proceedings. In such cases further case management hearings may be necessary to properly manage the proceedings.

An important aspect of case management is that at all stages of the proceedings the court monitors whether parties and lawyers act appropriately for the “careful conduct of litigation”\(^43\). Where necessary for the proper management of proceedings, the court must:

1. encourage parties to settle their dispute or parts of it particularly through ADR;
2. give the parties advice for the preparation of their case and make case management orders;
3. schedule case management conferences;
4. determine the type and the form of the procedure;
5. set a timetable or procedural calendar with deadlines for procedural steps to be taken by parties and/or their lawyers;
6. limit the number and length of future submissions;
7. determine the order in which issues should be tried and whether proceedings should be consolidated or separated;
8. determine the separation of questions concerning jurisdiction, provisional measures, and statutes of limitation for early decision upon special hearings;
9. consider necessary amendments regarding the parties’ proper representation, the consequences of changes related to the parties to litigation and the participation of third parties, intervenors, or other persons;
10. consider amendments to the pleadings or offers of evidence in the light of the parties’ contentions;
11. require a party’s appearance in person or requiring a party’s representative, who should be fully informed of all matters relevant to the proceedings, to be present at a court hearing;
12. address the availability, admissibility, form, disclosure and exchange of evidence and, if adequate to the state of proceedings, (a) determine the admissibility of evidence, and/or (b) order the taking of evidence.\(^44\)

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\(^{43}\) Rules 47 and 48.

\(^{44}\) Rule 49.
The court may make any case management order on its own motion or on application of a party. When orders or decisions are made without prior consultation with the parties or on a without-notice (ex parte) basis, parties not previously heard may apply for the order or decision to be reconsidered at a hearing or on the basis of written submissions. Where the parties agree on a case management measure, the court must not determine differently without good reason and the court may vary or revoke any case management order upon a party’s or its own motion.45

Rule 11 provides that in managing proceedings, the court must ensure that parties have a fair opportunity to present their case and evidence and to respond to the respective claims and defences and to any court orders or matters raised by the court.

It is the responsibility of the parties to present facts in support of their claim or defence, but the court “may invite the parties to clarify or supplement these facts”. Facts that have not been introduced by the parties can only be considered by the court if they are relevant and “necessarily implied by matters of fact put forward by the parties or which are contained within the case file”. If such facts are considered, the parties should be given a reasonable opportunity to respond.46

Rule 25(1) provides that each party is required to prove all the relevant facts supporting its case. It is the responsibility of the party asserting a fact to offer supporting evidence. Rule 25(2) provides that each party has, in principle, a right to access all forms of relevant and admissible evidence and that whenever appropriate, parties and non-parties must contribute to disclosure and production of evidence. It goes on to say that it is not a basis of objection to such disclosure by a party that disclosure may favour the opponent or other parties. Rule 25(3) provides that, as appropriate, the court may ask the parties to supplement their offers of evidence and that exceptionally the court may take evidence on its own motion. Rule 25(2) makes it clear that the duty to disclose evidence extends to evidence which may advance the case of the opponent or other parties, emphatically refusing to follow the long-established principle that parties to litigation are not required to put weapons into the hands of their opponent (nemo contra se edere tenetur).47

45 Rule 50.
46 Rule 24. See also the Preamble of the Obligations Working Group:

Apart from the parties, the court has certain responsibilities regarding facts . . .: the rules [of the Obligations Working Group] 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 . . . 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 . . . necessary to clarify the respective positions of the parties.

47 Rule 25, Comment 5, which goes on to say:

It should, however, be stressed that this rule has not been applied in a strict sense in any developed procedural system for a significant period of history. On the contrary, procedural
Rule 92 provides that the court must order the taking of relevant evidence offered by a party and may make case management orders concerning the sequence and timing of the production of evidence and, where appropriate, the form in which evidence will be produced; the court may suggest production of evidence to supplement their evidence, and exceptionally order the taking of evidence not previously proposed by a party. Rule 92 provides a safeguard to the affected parties by requiring the court to afford the parties an opportunity to respond whenever it requires providing additional evidence (referred to as taking evidence *ex officio*), and by requiring that the parties be given a fair opportunity and adequate time to respond to evidence that is presented. The commentary on Rule 92 clarifies that the court acting *ex officio* is not the general rule but rather an exception, in deference to the general rule that it is the responsibility of the parties to present relevant evidence.48

The appropriate measures for the disclosure of evidence and the taking of evidence before a final hearing are, particularly:

(a) the production and mutual exchange of documents;
(b) requests for written witness statements and their exchange;
(c) the appointment of a court expert and expert conferences between a court-appointed expert and experts appointed by the parties, or between court-appointed experts;
(d) requests for information from third parties, including public authorities; and
(e) personal inspection of evidence by the court.49

The rule *ius curia novit* (the judge knows the law) does not mean that parties cannot be asked to present legal arguments supporting their claim or defence. The Obligations Working Group forcefully sets out the duty on the parties to support their case with relevant legal arguments. The Preamble of the Working Group states as follows: “The rules [of the Working Group] provide that both the court

systems have adopted differing approaches to the requirements, scope and frequency of application of obligations upon parties to disclose and produce evidence. Such differences have, over recent decades diminished across European jurisdictions.

48 The fourth comment relevantly says:

First, Rule 92(2) provides the court with a limited power to suggest to the parties what additional evidence could be adduced by the parties themselves. Where a party agrees with the court’s indication, it may then go on to order that evidence to be taken. This discretionary power is intended to be consistent with the principle of party disposition and does not provide a basis upon which the court can order evidence to be taken on its own motion (*ex officio*).

Secondly, Rule 92(3) provides the court with a limited power to order evidence to be taken on its own motion (*ex officio*). This power should only be exercised in exceptional circumstances, as the general rule should be for the court to rely upon the parties to elicit and present evidence to support their claims and defences.

49 Rule 62.
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” (emphasis added).

In its Comments to its draft Rule 17, the Working Group states:

. . . [I]t 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.

Unlike the draft rules of the Obligations Working Group, the Model European Rules do not impose a duty on the parties to present legal arguments.50 In practice, it is hardly the case that parties do not present supporting legal arguments, especially when represented by a lawyer. After all, the selection and introduction of relevant facts is not really possible without taking into consideration the supporting legal arguments.

When the court is satisfied that both parties have had a reasonable opportunity to present their case, it will close the proceedings after which, as a rule, no further submissions, arguments or evidence will be admitted.51 The case is then ready for the final hearing.52 This final hearing is a concentrated event and takes place before the judge or judges who will give the final judgment. At this stage, the taking of evidence may be allowed exceptionally. “New evidence not offered in the pleadings or upon amendment in the preparatory stage may be admitted only if a party shows strong and overwhelming reasons for not having produced it earlier”.53 The court determines the order in which issues shall be tried during the final hearing and is in charge of managing the proceedings.54 Parties must have an opportunity to submit their final conclusions, including statements on the results of evidence-taking.55

50 Rule 26(1): “. . . [T]he parties may present legal arguments supporting their claim or defence” (emphasis added).
51 Cf. Rule 16(1) of the Obligations Working Group.
52 Rule 63.
53 Rule 64(4).
54 Rule 64(5).
55 Rule 64(6).
IV. Conclusion

The Model European Rules provide a modern approach to civil procedure which, according to their drafters, may be described as best practice.\textsuperscript{56} They take as their starting point the principle of co-operation and case management and provide a procedural model that fits the leading political ideas in the European Union about the role of the state and its organs (such as the judiciary). This approach to litigation is far removed from the liberal, \textit{laissez-faire} approach of the nineteenth century, and perfectly fits the twentieth and twenty-first European models of the (liberal) social welfare state.

The Model European Rules reflect the idea that the state is there to protect its citizens and that it should ensure that its services (here, the administration of justice through the state courts) are provided efficiently and proportionately. Within such a political context, it is to be expected that the Model European Rules will flourish and be embraced by various Union-wide institutions and by member states of the European Union. Given the political differences in Europe, and especially different attitudes to the extent of judicial activity in a civil lawsuit, it may also be expected that the Model European Rules will not be equally popular in all parts of Europe.

\textsuperscript{56} As the Preamble states: “The project’s aim was to devise a set of best practice rules for the future development of European civil procedure”.