

# Charles V, civil procedure and the Low Countries

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## **CHARLES V, CIVIL PROCEDURE AND THE LOW COUNTRIES**

**C.H. van Rhee**

### **Introduction**

Emperor Charles V was born here in Ghent on 24 February 1500 (at the *Prinsenhof*). After being declared of age on January 5, 1515, he became Lord of various parts of the Low Countries. In 1518 he was crowned King of Spain and, subsequently, elected Emperor of the Holy Roman Empire (1519). I will not discuss the significance of Charles for Spain and the German lands; others will do this today. I will concentrate on his significance for his native lands, the Low Countries or "Netherlands", and especially on his importance in the area of civil procedure. In order to present you with a clear picture, however, the first part of this paper will address the political situation in the Netherlands in the 16th century. Additionally, it will include a discussion of the court structure in this territory and some remarks about 16th century civil procedure in general.

### **1 Political situation**

When I speak about the Low Countries or "Netherlands", I am referring to an area which stretches from today's Kingdom of the Netherlands to the north of today's French Republic. In the 16th century this area consisted of a series of independent provinces, mostly counties and duchies, a large number of which was acquired by the Dukes of Burgundy, predecessors of Charles V, from the end of the 14th century. (Our conference is taking place in the former County of Flanders, being the oldest possession of the Burgundian Dukes in the north. It was acquired in 1384 by Philip the Bold.) During the 16th century, the Emperor himself acquired further territories.

Charles and his predecessors based their powers in each province on a separate title. They were, for example, Counts of Flanders, Counts of Holland and Dukes of Brabant. Consequently, the early-modern Netherlands have been described as a "confederation of (individual) small states". The feature that united these territories was the fact that their Lord was one and the same person (they formed a personal union), but for the rest they possessed their own administrative and judicial structures. As may be imagined, this situation caused problems for a ruler as Charles V, who, like his ancestors, aimed at strengthening the ties between his various territories.

A popular vehicle to build a stronger union was centralisation. Methods to achieve this were, amongst other things, the creation of supra-territorial administrative and judicial bodies and the introduction of supra-territorial legislation. In the second part of my paper I will focus on attempts to introduce supra-territorial legislation in the area of civil procedure. However, as I stated before, first something needs to be said about the court structure of the 16th-century Low Countries and about civil procedure in general.

## 2 Court structure

When Charles V came to power in 1515, the Low Countries were in the possession of a central, supra-territorial court: the Great Council of Malines. Apart from this court, each province had its own superior court, like the Council of Flanders in the County of Flanders (this court resided at the *Gravensteen* here in Ghent), the Council of Brabant for the Duchy of Brabant (in Brussels), and the Court of Holland for the County of Holland (in The Hague). All of these courts administered justice in the name of the sovereign. Additionally, at the local level, a whole series of other courts competent to hear civil cases existed. These courts did not administer justice in the name of the sovereign.

## 3 Civil procedure

What procedure was applied by the courts in the 16th century Low Countries? At the inferior level procedure was often customary in character, but at the superior level, at the Great Council and the various superior provincial courts, the situation was different. There proceedings were shaped along the lines of the Romano-canonical procedure.

The Romano-canonical procedure was originally used by the church courts of Western Christianity. This procedure was based on Roman law sources as well as on the procedures of various northern Italian cities with original additions from Canon Law. It soon started to influence the procedure of the secular courts.

The Romano-canonical procedure is the common source from which the modern systems of civil procedure on the European Continent and in Scotland have evolved. Even English procedure is indebted to the Romano-canonical procedure, especially due to the equity jurisdiction of the English Chancellor. It should in my opinion form the starting point for all scholars who are investigating the possibilities for harmonisation of procedural law in the European Union.

Within the Low Countries, we find variants of the Romano-canonical procedure which were influenced by the Roman and Canon law based procedures of France and Burgundy. The importance of French and Burgundian procedure may have been due to different factors, particularly the growing influence of the Dukes of Burgundy in the Netherlands and the use of French as the main language in the administration of the realm. It should be stressed here, however, that French procedural law remained important even after the succession of the House of Burgundy by the Habsburg House as rulers of the Low Countries at the end of the 15th century. This is surprising for a modern spectator if one takes notice of, for example, the animosity between Charles V and the King of France, but it is nevertheless shown at many instances.

It should be noted, that I have purposely used the plural “procedures” instead of “procedure” when discussing the procedural situation in the Low Countries. The reason is that at this point in history the procedure of each court, although rooted in Roman-Canon law, had its own distinctive features, which made its manner of litigation more or less unique. These features were developed in every-day practice and gave rise to what was called the “style” or “practice” of a court. In order to give you an impression of early procedural law, I will sketch the ordinary procedure at first instance at the Great Council of Malines.<sup>1</sup>

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<sup>1</sup> See for a discussion of this procedure in great detail my *Litigation and Legislation. Civil Procedure at First Instance in the Great Council for the Netherlands in Malines (1522-1559)*, Brussels 1997.

One could only start litigation before a superior court administering justice in the sovereign's name – like the Great Council – with leave of this same sovereign. In order to obtain leave, litigants had to present a petition to the sovereign, which, in actual practice, they usually presented at the court where they wished to start their suit. In their petition they asked for a so-called “provision de justice”, a measure enabling them to protect their interests. The granting of the “provision” was done in name of the sovereign, usually by the institution where the petition had been presented. The provision was most often issued by way of an official document in the form of letters patent. In this document the sovereign ordered the court to do justice in the particular case at hand. Additionally, he ordered the bailiff (*huissier de justice*) to summon the opponent party to court. The date established for appearance was a date on which a cause-list sitting (*rôle*) was held. The cause-list sitting was used for the exchange of pleadings (*conclusions*). Most likely, these pleadings were presented orally. After the pleadings had been exchanged, the court ordered the litigants to draft a document giving an overview of the lawsuit up until the point which had been reached at that moment by way of documents known as *écritures* (*schrifturen*). Subsequently, proof proceedings could be ordered, for example the hearing of witnesses. These witnesses were not heard by the court itself, but by a commissioner and his assistant, who rendered their findings in writing. In hearing the witnesses as well as in collecting other proof materials, the *écritures* of the parties were used as the point of departure. After the proceedings had been closed, the court rendered judgment which, as a rule, did not contain grounds. The absence of the grounds for the judgment is a general feature of rulings from the period before the French Revolution, i.e. the *Ancien Régime*. In the literature of that period, judges who did give grounds for their judgments were considered to be “fools” because this way of conduct would give rise to unnecessary appeals and other problems.

Although the procedure just described may not meet all of our modern standards, it was nevertheless a procedure which was very thorough. It aimed at just and equitable decisions based on the truth. Many of its features are still present in modern procedural law. However, this procedure also had its drawbacks familiar to a modern lawyer: slowness and high costs. It was exactly these problems which Charles V tried to attack by a scheme aiming at the harmonisation and rationalisation of procedure which he launched in the Low Countries during his reign. In order to understand this scheme well, something needs to be told about the sources of procedural law in the 16th century. Where could procedural rules be found?

#### **4 Where could procedural law be found?**

Many of the rules by which the procedures of the various courts were regulated were not written down in official documents. The manner of proceeding at a particular court was often based on customary procedural rules which had developed within the atmosphere of the particular court, or it was directly based on texts of the *Ius Commune* tradition (the *Corpus Iuris Civilis*, the *Corpus Iuris Canonici* and authoritative legal authors). Part of the procedural rules were however incorporated in official documents. These were often so-called “ordinances”.

Ordinances were promulgated on behalf of the sovereign. As a rule, the purported goals of an ordinance were expressed in its preamble. These preambles should, however, be consulted with caution because they usually contain a series of standard clauses which depict the reasons for the introduction of the ordinance in an idealised manner. In the dossier concerning the important project of legislation I will discuss shortly, I found a draft preamble which stated that the intended legislation was the result of complaints of several of “His Majesty’s

subjects” about the costs of obtaining a ruling to decide intermediate debates which the court kept under consideration. Later, this reason was changed to the Emperor having decided to abbreviate the procedure. This change was effected because it was felt that the introduction of legislation on request of His Majesty’s subjects might damage the reputation of “la justice”.<sup>2</sup>

## 5 Slowness and high costs

### 5.1 Introductory remarks

The first part of my paper was meant to give a short introduction into issues which are of importance for understanding the legal and political landscape in which Charles V operated when trying to reform civil procedural law. The present part is devoted to these reforms themselves. As mentioned above, with these reforms the Emperor addressed a theme to which today’s lawyers are still familiar: the fact that litigation is expensive and time-consuming.

Complaints about the slowness and the high costs of litigation have been voiced at different places and at different times in the history of the Romano-canonical procedure. It is a criticism which is closely linked with a type of litigation which can be characterised as contentious and which offers every party to the litigation a more or less equal opportunity to state his case before the court. It is characteristic of proceedings which are governed by the principle of the autonomy of the litigants; litigants who not only determine the actual case which the judge will have to decide upon, but who can also, to a certain degree, manipulate the pace of the hearing of their suit.

In the Low Countries, the slow pace of litigation often filled litigants with despair, at least, if we may believe a report of the Italian ambassador Cornero dating from the early days of the reign of Charles V.<sup>3</sup> Therefore, it is not a surprise that slowness was a matter of concern to Charles V’s Chancellor Gattinara, who emphasised in 1519 that the abbreviation of the procedure ought to be a point of attention for the young Emperor. He did this in the following way:

“C’est bien raison que ensuivant les vestiges du bon empereur Justinien votre majesté *cesarea* choisese de bonne heure les plus grands clerz que l’on pourra trouver pour entendre à la reformation desdites loix imperialles, et pour adviser tous les moyens que l’on pourra trouver à la abbreviation des proces [...]”<sup>4</sup>

Gattinara’s advice did not have the desired result, because in 1543 slowness was still a problem. A high official stated that “qu’il a à present une grande multitude des procès pendans indecis ès consaulx”. This does not mean, however, that no attempt was made to mend this situation. In the second quarter of the 16th century a project was initiated (the “Abbreviation Project” hereafter) that should have resulted in new legislation for the superior courts in the Low Countries. It was influenced by a similar programme in France where in August 1539 the Ordinance of Villers-Cotterets was promulgated.

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<sup>2</sup> Van Rhee, o.c., p. 18.

<sup>3</sup> E. Gossart, Notes pour servir à l’histoire du règne de Charles-Quint, in: *Mémoires couronnés et autres mémoires publiés par l’Académie Royale des Sciences, des Lettres et des Beaux-Arts de Belgique* LV, Brussels 1898, p. 23. See also P.P.J.L. van Peteghem, *De Raad van Vlaanderen en staatsvorming onder Karel V (1515-1555). Een publiekrechtelijk onderzoek naar centralisatiestreven in de XVII Provinciën*, Nijmegen 1990, p. 197.

<sup>4</sup> C. Bornate, *Historia vite et gestorum per dominum magnum cancellarium*, in: *Miscellanea di storia Italiana* III, 17 (48) 1915, p. 408. See also Van Peteghem, o.c., p. 44.

## 5.2 The Abbreviation Project

The Abbreviation Project was not the first attempt of Charles V to improve procedure. One of his early attempts dates from the period when he was declared of age in 1515. The measures which were then taken, however, differed from those which were proposed in the Abbreviation Project since they were aimed at individual courts. The early attempts resulted in a new procedural ordinance for the Court of Holland on 24 October 1515. Charles' departure from the Low Countries in order to be crowned King of Spain caused some delays in his further plans. It was only in 1522, just before Charles was again leaving the Low Countries for Spain, that three additional ordinances were introduced: one for the Great Council of Malines (April 1522), a second one for the Council of Flanders (May 1522) and a last one for the Council of Brabant (June 1522).

The Emperor returned to the Low Countries in 1531. From that moment important reforms were introduced regarding both the administration of the realm (the creation of the so-called Collateral Councils) and the judiciary. As regards the judiciary, further procedural ordinances for individual courts were promulgated. Additionally, the Abbreviation Project, aimed at all superior courts, was started. I will refer to the (draft) Ordinance which was the result of this project throughout this paper as the "Abbreviation Ordinance".<sup>5</sup>

The Abbreviation Project was conducted under the supervision of a small group of the most eminent lawyers. Protagonists of the reform programme were the Presidents of the Privy Council and the Council of Flanders. Equally involved were other members of the Privy Council as well as members of the Council of State and the Financial Council.

As was common practice at that time, the drafting of the Abbreviation Ordinance started with an order addressed to the courts to submit previous procedural legislation aimed at them. In addition, the courts were invited to advance their views on the proposed new legislation. To this end they could submit comments on previous statutes, indicate how these ordinances ought to be changed, and suggest alterations in drafts of the new legislation. Important steps were taken in 1540 when copies of the suggested legislation were sent to the Great Council, the Councils of Brabant, Flanders and Artois and to the Court of Holland. These courts were asked to examine the draft ordinance and comment on it.

The records show that it was a matter of debate whether or not a general Abbreviation Ordinance which only differed in minor points for each individual court should be introduced. Other options were the drafting of two ordinances, one ordinance for the sovereign courts (i.e. courts from which no appeal could be lodged) and another for the remaining superior courts, or the drafting of a separate ordinance for each court.

Reactions to the draft Abbreviation Ordinance were not favourable. On behalf of the Great Council, it was argued that it did not pay attention to the particular needs of the Low Countries, because part of this Ordinance originated from France and from the manner of proceeding at other courts. According to the Great Council, it contained general rules for all of the superior courts and did not meet the demands of the different regions of the Low Countries. The manner of proceeding it prescribed was abbreviated to such an extent that persons who would not be able to attend their lawsuits immediately because of other affairs would be prejudiced by it. Examples of such persons were foreigners residing within the borders of the Low Countries and important personages who were at the service of His Majesty. Therefore, the Ordinance would

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<sup>5</sup> An edition of this draft Abbreviation Ordinance can be found in Van Rhee, o.c., p. 391 ff.

in the opinion of the Great Council cause a multiplication of lawsuits and encourage litigants to make use of procedural tricks instead of inducing them to conduct their case in a proper manner.<sup>6</sup>

During the 1550's the plans to introduce new legislation for the superior courts on the basis of the drafts from the 1540's were abandoned. Nevertheless, it is worthwhile to study the drafts in some detail, not only because many of the proposed rules became part of the important 1559 Ordinance for the Great Council of Malines, but also because they amply illustrate why procedure in the 16th century was slow and expensive. It is especially the latter issue which I will address in the final part of my paper.

### **5.3 Reasons for delay and measures to cure them**

From the draft Abbreviation Ordinance and the related documents one obtains a clear picture of the 16th century problems in the area of civil procedure and the measures suggested to cope with them. I have chosen to discuss here some of the most striking ones. This approach guarantees, I think, that my discussion will be of interest to the largest part of today's audience.

#### **5.3.1 Delays originating from the quality of staff attached to the court**

A qualified staff is a *conditio sine qua non* for expeditious proceedings. Incapable personnel, on the contrary, are a guarantee for delays. In order to increase the chance that the judiciary and its assisting staff consist of capable individuals, various requirements need to be met. First of all, vacant posts need to be sufficiently attractive in respect of both remuneration and non-pecuniary considerations. Additionally, all qualified candidates must be able to compete for a particular post in order to guarantee that the person best suited for that post will actually obtain it. It is exactly these requirements which often were lacking at the time of Charles V. According to the President of the Council of Flanders, the lack of competent personnel was not only the result of the moderate remuneration which court personnel received, but also – and this may have been the main reason – of nepotism. The said President depicts how the abuse of the Great Council's right to submit a binding recommendation of three candidates for vacant posts of judge, Procurator-General or clerk of the registry, was a major instrument for favouring particular persons. This abuse consisted in suggesting two candidates who were evidently incompetent or unwilling to accept the post in order to promote the appointment of a third, favoured candidate of moderate abilities.<sup>7</sup> In order to change this situation, the draft Abbreviation Ordinance contains an Article which originally set out that the judges of the Great Council should have to pledge an oath in the hands of the President of the court each time the post of a judge became vacant, and declare that they would only nominate candidates who were best qualified for the job (Art. 13).<sup>8</sup> The Great Council fiercely protested against the introduction of this Article and stated that it was detrimental to the reputation of the court. If, nevertheless, the Article was judged to be necessary, the court suggested incorporating it in a separate instrument or letters close, most likely because this was a more discreet manner of legislation. Later the Article was modified: the oath was discarded and the judges were only enjoined to consider all possible nominees thoroughly and to make sure that every candidate they recommended was suitable for the job and willing to accept it. Furthermore, it was advised that in cases where it was evident

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<sup>6</sup> Van Rhee, o.c., p. 318.

<sup>7</sup> P.P.J.L. van Peteghem, *Centralisatie in Vlaanderen onder keizer Karel (1515-1555). Een onderzoek naar de plaats van de Raad van Vlaanderen in de Habsburgse Nederlanden III: Bijlagen en lopend onderzoek*, Ghent 1979 (unpublished doctoral thesis), p. 85.

<sup>8</sup> Throughout this paper, references to Articles are to the Abbreviation Ordinance as edited by Van Rhee, o.c., p. 391 ff., unless indicated differently.

that the list of suggested candidates was the result of nepotism, the sovereign should ignore this list and appoint a candidate of his choice.<sup>9</sup>

### 5.3.2 Delays caused by the workload of the court

Another factor which reduces the expedition of a court is its workload. Therefore, attempts to shorten the length of proceedings have often concentrated on a possible reduction of the number of cases to be handled. On appeal, this may be achieved by way of leave to appeal, but especially at first instance a reduction of workload is more difficult to achieve. Measures aiming at amicable settlements between the parties, for example, have often failed. This was already evident to the Dutch legislator in the 19th century. As you may know, in the Kingdom of the Netherlands the French *Code de procédure civile* served as the model for the 1838 Code of civil procedure. Nevertheless, the procedure of *conciliation*, a conspicuous element of the French Code, was not adopted.

A more effective instrument to reduce the number of lawsuits is costs. This instrument may be used to make potential litigants deliberate thoroughly about whether or not to start a lawsuit. It was exactly this approach which the legislator at the time of Charles V favoured. The draft Abbreviation Ordinance originally contained an Article which aimed at preventing potential litigants from rash litigation by increasing the costs incurred by the unsuccessful party (Art. 11). This Article determined that the judges ought to change their habit of setting off the costs – i.e. letting both parties bear their own costs – in the absence of circumstances which justified this measure. It was hoped that the Article, which would reinforce a rule derived from Roman law<sup>10</sup> that in principle unsuccessful litigants should be ordered to pay the costs of the proceedings, would induce the plaintiff to deliberate thoroughly about the merits of his case before commencing an action.

Originally, the Abbreviation Ordinance laid down that if the judges would nevertheless decide to set-off the costs, they should state the reasons for this in their judgment. Later, this rule was cancelled, most likely because it may have increased the possibilities of dissatisfied litigants attacking the decision, something which at the time of Charles V was felt to be undesirable. For similar reasons, judgments did not contain the grounds on which the decision on the merits was based. A later draft of the ordinance left the decision on the costs to the “conscience” of the judges. Of course, in the 16th century “access to justice” was not such a central issue as it has become since due to important scholars like Professor Cappelletti and Article 6 ECHR. Although even in the 16th century some concern for this issue may have been present (individuals lacking the necessary means could, for example, litigate free of charge), it seems that using the instrument of costs for reducing the workload of a court was not found to be problematic. The situation is, however, problematic for a modern lawyer. After all, many modern lawyers will find that this approach cannot be reconciled with the idea of access to justice.

### 5.3.3 Delays in the initial stage of the proceedings

The Abbreviation Ordinance contains various Articles which aimed at avoiding delays at the beginning of an action. It was, for example, established that the period allowed between the summons and the first hearing in court should not exceed one month (Art. 44). Other measures tried to reduce the number of cases where defendants did not file an appearance by increasing

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<sup>9</sup> Van Peteghem, o.c. (*Centralisatie*), p. 85.

<sup>10</sup> C.7.51.3 and 5.

the likelihood that the summons would reach the defendant (Art. 32). In principle, the summons ought to be served on the defendant in person or at his place of residence. A copy of the summons had to be left with him or, if this appeared not to be possible, with the members of his household, or had to be attached to the door of his house. The reduction of cases where defendants did not file an appearance was particularly important because in the 16th century defaults were even more harmful to an expeditious procedure than at present. After all, in most cases defaulters had to be resummoned on three different occasions before the hearing of the case would be continued.

A first draft of the Abbreviation Ordinance also reduced the number of defaults necessary before a case could be heard in the absence of the defendant from four to two (Arts. 69 and 71) (in practice this would have meant that in case of default the defendant only had to be resummoned once). Later it was established that the minimum number of defaults ought to be three (accordingly, it became necessary to resummon defaulting defendants twice).

But let us return to the rules guaranteeing that in most cases the summons reached the defendant. These rules also affected the length of the proceedings in a way other than by reducing the number of cases in which the defendant would not make an appearance. After all, the Abbreviation Ordinance prescribed that the claim ought to be expressed in the summons (Art. 60). Consequently, the defendant could commence phrasing his defence before the plaintiff had introduced his claim at the cause-list sitting. Originally, therefore, the Abbreviation Ordinance established that the defendant would only be accorded a single postponement of two weeks in order to phrase his defence. According to the Great Council and the Council of Flanders, this was not reasonable; it would leave the defendant little time to phrase his defence, whereas the plaintiff, who could change his claim until the defence had been filed (i.e. until the *litiscontestation*), had ample opportunity to deliberate about his case before commencing the action. This would induce defendants to petition for extra postponements out of grace, which would inevitably cause delays.

Before the first hearing the procurator and the advocate (these professions were at the 16th century and for a long time afterwards separated) had to be sufficiently instructed by their client: in order to abbreviate the procedure it was proposed that adjournments for such an instruction should not be allowed (Art. 24). The Great Council observed that the introduction of this rule was not feasible, because defendants could often not obtain a sufficient knowledge of the plaintiff's argument prior to the first hearing. This contention was, however, partly countered by the fact that the Abbreviation Ordinance also established that the claim had to be expressed in the summons. Nevertheless, the Ordinance was changed in such a manner that a postponement of the hearing could be allowed for good reasons advanced by the litigant who prayed for the adjournment.

We do not find evidence in the records that the 16th century legislator considered introducing a rule like the one encompassed by the present Dutch legislative proposal 26 855 aiming at changes in the Code of Civil Procedure. This rule enjoins the plaintiff to outline his claim thoroughly in the summons and to include, if feasible, his opponent's point of view. This would, of course, further have countered the 16th century argument that the defendant could not obtain sufficient knowledge of the plaintiff's argument prior to the first hearing.

#### **5.3.4 Delays as a result of the number and the length of the adjournments**

One of the recurrent themes in the history of procedure is the tension between a quick procedure and the length of the postponements for performing procedural acts. Most attempts to

abbreviate civil litigation take the length of postponements into consideration. This often turns out to be an unsuccessful approach since it is not the length of particular postponements which determines the period of time necessary for obtaining a judgment, but the relative ease with which such postponements are granted.

In the documents concerning the Abbreviation Ordinance we find suggestions to reduce both the length and the number of the postponements for performing procedural acts. The Great Council, for example, suggested abridging the length of the postponement for communicating documents to the opponent; the length of this postponement should be eight days after the parties had been ordered to draft *écritures* by way of an *appointement dispositif*. Furthermore, it was felt that procurators should not decide about these postponements but the litigants themselves. Apparently, it was feared that procurators would approve adjournments for interests other than those of their clients (a fear which, according to some, may still be justified at present). Therefore, it was recommended that procurators be forbidden to consent to more than a single postponement of the hearing without the approval of their clients.<sup>11</sup>

### 5.3.5 Delays due to “paperwork”

The introduction of photocopying machines has made the case file grow. At present, in more than one case judges and advocates have to work through piles of paperwork before being able to fully understand the dispute. In the 16th century, of course, photocopiers were absent. Nevertheless, case files would often be (too) extended because of the fact that counsel was paid by the number of pages he drafted. Therefore, the *écritures* (see above) submitted by the parties were often very lengthy. In addition, even though they were lengthy they did not always contain all of the relevant information, because the advocates tended to withhold this information in order to advance it by surprise in a later *écriture*. Because a swift resolution of cases would be promoted by a reduction in the amount of paperwork which the court had to handle, it was determined that, generally, *écritures* should be short and contain no repetitions. Relevant information should be submitted in time. The principal *écriture* had to include all known facts and arguments concerning the merits of the case. Additional *écritures* (*additions* and *superadditions*) should be reserved for attacking the propositions advanced in the opponent's *écriture* and ought not to include new facts strengthening the claim or the defence. Furthermore, the documents containing the parties' view on testimonial evidence (*reproches* and *salvations*) should only contain argument attacking or supporting this evidence (Arts. 21, 22 and 62).

A reduction in the paperwork of the court could also be achieved by a reduction of the number of *écritures* which could be submitted. The Abbreviation Ordinance laid down that the introduction of *superadditions* should not be allowed unless by consent of the opponent or the court (Art. 61). The Council of Flanders suggested that only the court should have the power to decide whether or not *superadditions* should be submitted. It felt that if this decision was left to the discretion of the parties, delays would be unavoidable since in most cases litigants were inclined to allow each other to submit *superadditions*.

### 5.3.6 Proof proceedings

The phase in the proceedings reserved for the hearing of witnesses (*enquête*) was (and still is) a major cause of delay. Therefore, it is no surprise that the Abbreviation Ordinance tried to restructure this phase in the proceedings. It fixed a term for submitting the file of proceedings to the commissioner responsible for the hearing (Art. 72d) and restricted the number of postponements (Art. 63). Concerning these postponements there was a difference of opinion between the Great Council and the Council of Flanders: the Council of Flanders suggested

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<sup>11</sup> Van Rhee, o.c., p. 332-333.

reducing the number of adjournments to an even greater extent than was proposed in the Abbreviation Ordinance (the court felt that two postponements sufficed), whereas the Great Council felt that more adjournments were necessary. As a result of the Great Council's objections, a new Article was drafted which allowed three postponements of the hearing for the *enquête*.

### **5.3.7 Delays in the decision of a case after the closure of the debate**

Even after the hearing had been closed the decision of a case could take a considerable amount of time. 16th century courts seem not to have been too willing to decide cases on their own motion. As a result, litigants employed so-called *solliciteurs* whose only task it was to petition the court over and over again to pass judgment. Therefore, a rule establishing that an immediate deliberation to pass judgment should follow after the case had been studied by a judge and reported to the full court was much required. Such a rule was included in the draft Abbreviation Ordinance (Art. 10). It was laid down that if possible an immediate final decision ought to be reached by a majority of votes. This decision should not be changed afterwards. The Great Council was against the introduction of this rule and observed: (a) that the court decided cases as soon as possible; (b) that the proposed rule was superfluous; (c) that its introduction would be defamatory for the court; and (d) that in complicated cases it was difficult to observe.

### **5.3.8 Delays as a result of intermediate debates and the presentation of letters of *requête civile***

Intermediate debates are harmful to expeditious proceedings if they lead to suspension of the proceedings in the principal suit. If they do, they become an instrument in the hands of parties who are interested in slowing down the pace of the litigation. Since in most cases one of the parties is interested in the postponement of a final decision (for example the debtor who has been summoned to court for payment of his debt), intermediate debates form a serious problem. According to the original draft of the Abbreviation Ordinance (Art. 1), intermediate debates were a major source of delay in the 16th century. More than once the courts did not decide these debates instantly, but kept them under consideration. In order to change this practice it was suggested that in principle an immediate decision should be reached by the judges appointed to hear the cases at the cause-list sitting. Because the Great Council argued that its manner of proceeding was more expedient, the Abbreviation Ordinance was later brought in line with the procedure at the Great Council. At the Great Council the cause-list judges had to decide intermediate debates immediately, unless problems arose, in which case these problems were communicated to the court. Only in important cases was a more thorough procedure prescribed.

Letters of *requête civile* could also cause a lengthy procedure and, indeed, for various reasons. Their greatest threat to expeditious proceedings was caused by the fact that they could result in litigants being allowed to perform procedural acts which they ought to have performed previously. An example is where a litigant was allowed to modify his original claim after the oral pleadings had been completed and after the parties had been ordered to draft *écritures*. This resulted, amongst other things, in an additional defence, an additional replication and in additional *écritures*. The Abbreviation Ordinance therefore tried to limit the number of *requêtes* each party could introduce to one (Art. 66). In addition, it established that debates arising from the introduction of a *requête civile* should be decided together with the case on the merits without further postponements (Art. 68). This rule was in conformity with the existing practice at the Great Council. This Council's 1559 Ordinance (Art. IX.4) shows that it was interpreted in such a manner that it only applied to a situation where a simultaneous decision of both the *requête civile* and the case on the merits was possible, and not where the *requête* concerned preliminary issues or where a prior decision of the *requête* was necessary

for other reasons. The latter occurred, for example, if a litigant wished to effect a hearing of witnesses (*enquête*) even though he had been barred from doing this.

In its reaction to the proposed rules, the Great Council opposed the maximum of one *requête* per party. The court remarked that a special ordinance regarding *requêtes* had already been introduced. As a result of this opposition, the Abbreviation Ordinance was changed, permitting courts which administered justice “par arrêt” (i.e. at last instance) to allow the introduction of more *requêtes*. It was hoped that the number of *requêtes* at these courts would be reduced by fixing a fine for litigants whose *requête* was rejected. In addition, it was established that litigants who presented unsuccessful *requêtes* had to pay their opponent's expenses and damages.

### **Final remarks**

Today I have given you some examples of problems in the area of civil procedure encountered by Charles V in the 16th century Low Countries. Most of these problems are still present today. On the one hand, there is the wish to introduce quick and cheap proceedings, but on the other hand the realisation of this wish is often thwarted by other considerations, for example by the wish for a thorough consideration of the case based on proceedings which leave each party ample opportunity to present his argument to the court.

The 16th century instruments aiming at abbreviation of the proceedings are also familiar to us: more powers for the judge in the conduct of litigation, the duty of the parties to inform the court concerning the facts of the case at an early stage, a reduction in the length and number of the postponements of the hearing, and so on. Since at present we still meet many of the old problems, it seems that the traditional approach to procedural problems does not result in lasting improvements. I think a different approach is needed. Whether this means that our view of procedure as a “regulated struggle” between the parties needs to be modified, remains unclear. However, that untraditional means for increasing efficiency and reducing costs are needed, cannot be doubted. I think that the *International Association of Procedural Law* is an excellent forum to brainstorm about this and other subjects. It is consequently – and I think all of you will agree with me – a privilege to be a member of this Association. It is an even greater privilege to be able to be a speaker at one of its conferences. Therefore, I would like to thank the board of the *Association* and especially Professor Marcel Storme for having given me the opportunity to address you at this opening session. I am convinced the coming few days we will have a stimulating conference here in Ghent.

Thank you for your attention.