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Tools of the Case Management in the First Hungarian Code of Civil Procedure[1]

Kristóf Szivós

The dilatory behaviour of the parties and their lawyers is independent from age and geographical location since it arises always and everywhere for identical reasons.[2] Case management has been recognised as essential to securing the right to a trial within a reasonable time in a number of European jurisdictions.[3] As a result, judicial case management has become increasingly popular. Much of the control over the proceedings that was with the parties and their lawyers has over the last decades been transferred to the court.[4] Increasing proceedings with a single judge, fewer hearings and adjournments and a better balance between written and oral proceedings, were among the central goals of the reforms.[5] This tendency can be observed in Hungary as well since the main aim of the new Code of Civil Procedure of 2016 is to concentrate the proceedings, which has two addressees: the parties and the court. This means that on one hand, the parties are obliged to facilitate the proceeding and on the other hand, the role of the court was strengthened through the case management. This study examines the historical basics and tools of this latter legal institution in accordance with the first Hungarian Code of Civil Procedure, the Act I of 1911 enacted after almost thirty years of codification. The study is based not only on the legal literature but on the practice as well, which means that the decisions of the higher courts are also taken into consideration. I also analyse the legal practice of the code of summary procedure (Act XVIII of 1893) because the examined Sections were regulated identically in the two codes.

Keywords: *Act I of 1911; Act XVIII of 1893; case management; civil procedure; relationship between the parties and the court*

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[2]Czoboly (2013) at 9.

[3]Uzelac (2017) at 7.

[4]Verkerk (2007) at 27.

[5]Nylund (2018) at 17.

Introduction to Case Management

The Birth of the French Code of Civil Procedure and its effects

The 19th century brought significant changes in the law of civil procedure based on the principles of orality, immediacy and the free evaluation of evidence. The codification of the French Code of Civil Procedure (*Code de procédure civile*) of 1806 was "the expression of a society and a political regime which meant to put the revolutionary years behind them, but without putting the clock entirely back to the era of the *Ancien Régime*."[1]

The birth of the *Code de procédure civile* marked the beginning of the era of the so called passive judges, which left "its mark on the nineteenth century civil procedural law of almost all European states."[2] For example, the German Code of Civil Procedure[3] (*Reichscivilprozeßordnung* – still in force under the name of *Zivilprozessordnung*) of 1877 was intended to modernise the conduct of proceedings under French influence. The freedom of the private individual in regard to the state authorities, particularly to the law courts, was expressed in a series of separate provisions, for instance by the passive (or waiting) attitude of the court, since it only interfered with the procedure only to a small extent. State authorities took an active part only when the judgment was given.[4] The procedure was dominated by the party-prosecution (*Parteibetrieb*), they could submit new arguments until the end of the last oral hearing (without any possibility of precluding arguments) and they could adjourn the proceedings without any reason.[5]

A Different Way: The Austrian Model and its success in the Twentieth Century

When the Austrian Code of Civil Procedure of 1895 took effect in 1898, the era of the rather passive judges ended.[6] Perhaps the most perplexing

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[1]Wijffels (2005) at 25.

[2]Van Rhee (2007) at 307.

[3]After the Congress of Vienna of 1815, the left bank of the Rhine were annexed to Prussia, Bavaria and Hessen-Darmstadt. However, this territory was not integrated to the legal systems of these states and the *Code de procédure civile* remained in force until the *Reichscivilprozeßordnung* of 1877, so the influence of the French code came 'from within'. Oberhammer & Domej (2005) at 107.

[4]Cohn (1934) at 73.

[5]Gottwald (2004) at 147., Bettermann (1978) at 365-397.

[6]Van Rhee (2007) at 307.

task which Franz Klein ("the superb drafter of the Code")[1] faced in drafting the Austrian *Zivilprozessordnung* was the delineation of functions of the court and the parties in a system intended to combine features of party-presentation and court-prosecution.[2] Cappelletti featured this code as "extremely influential, more radically innovative"[3] than the German one. Klein advocated a stronger position for the judge in such a way that the parties remained in control of the initiation of the lawsuit and made decisions about its continuation and termination.[4] While the parties were required to set forth truly all the facts serving for the support of their respective contentions and are permitted, through the court or by its permission, to question each other or each other's representatives, it is made the duty of the court, at the hearing, by questioning or otherwise, so to proceed that all relevant allegations be brought forward and all relevant facts disclosed.[5]

The Austrian *Zivilprozessordnung* realised the idea that civil procedure is a social institution of the state (*Sozialfunktion*) where the judge should manage the case in a concentrated way to give a just judgment as early as possible.[6] Klein sought to introduce measures designed to speed up proceedings, for example, the restriction of procedural objections, the limitation, if possible, to a single oral hearing, the shortening of time-limits and the prevention of the adjournment of the hearing by request of the parties.[7]

The Austrian model dominated developments in jurisdictions throughout in the 20th century,[8] including the Hungarian Code of 1911, the Norwegian Norwegian Code of 1915 and the Danish Code of 1916.[9] For instance, the German *Zivilprozessordnung* was amended in 1909, 1924[10] and 1933,[11] when the duty of the parties to give all particulars of the case and to tell the truth

[1]Cappelletti (1971) at 858.
[2]Homburger (1970) at 24.
[3]Cappelletti (1971) at 854.
[4]Van Rhee (2018) at 76.
[5]Engelmann, Hermann, Millar & Schwartz (1927) at 636.
[6]Gottwald (2004) at 148.
[7]Oberhammer (2004) at 225.
[8]Van Rhee (2018) at 76.
[9]Cappelletti (1971) at 855.
[10]Millar (1924) at 703-708.
[11]The Code was also amended significantly in 1976. Gottwald (1997) at 753-766.

and gave the court the power to preclude arguments (of both parties) not presented in time in preparatory pleadings.[1]

Defining Case Management

Case management means the collection, the classification and the preparation of the materials of the proceeding by the court.[2] According to Cabral, case management constitutes the early and continuous control over a judicial process and its proceedings in terms of efficiency, in order to enhance speed and quality, as well as to ensure compliance.[3]

The parties are obliged to cooperate with the court. During the codification of the new Hungarian Code of Civil Procedure it was disputed whether the cooperation of the parties should be a basic principle or not. The legislation came to the result that such a principle is not necessary, since the plaintiff initiates a procedure because he/she could not cooperate with the defendant. According to *King*, "judicial case management requires lawyers and judge to act as a team in planning the case. The judge serves as captain and the team is responsible for expediting the exchange of information."[4]

The Main Features of the Act I of 1911

The Act I of 1911 (hereinafter: The Code) was enacted by the Hungarian Parliament in 1910 after almost thirty years of codification. The creator of the Code, Sándor Plósz (Minister of Justice between 1899 and 1905) got a mandate in 1880 from the House of Representatives of the Parliament[5] to participate in foreign studies, where he examined the new German Code

[1]There are two fundamental differences between German and Anglo-American civil procedure, and these differences lead in turn to many others. First, the court rather than the parties' lawyers takes the main responsibility for gathering and sifting evidence. Second, there is no distinction between pretrial and trial, between discovering evidence and presenting it. Langbein (1985) at 826; Vorrasi (2004) at 375-379.

[2]"Die Sammlung, Gliederung und Aufbereitung des Prozessstoffes" Rechberger & Simotta (2017) at 360, Kodek & Mayr (2018) at 245. Endemann stated that is is "die Summe von Befugnissen des Richters." Endemann (1868) at 474.

[3]Cabral (2018) at 7.

[4]King (1997) at 24.

[5]Térfi (1915) at 2.

of Civil Procedure. His first draft of 1885[1] was influenced by the liberal German model, but after the enactment of the Austrian *Zivilprozessordnung*, our codification (as mentioned before) was affected by it.

During the codification of the Code, the Act XVIII of 1893 on the summary procedure was enacted, which was considered to be a transition between the procedural orders of 1868 and 1911. Basically, it provided an opportunity to the courts to experience the procedure, which was based on oral hearings until the Parliament adopted the modern Code of Civil Procedure of 1911. The ministerial explanation also highlighted that "the adoption of the new legislative acts would suit the right judicial policy if the transition did not interfere with the order of jurisdiction (or minimised the interference to the lowest possible measure). The more definite the difference between the current and the new system, the greater the interference would be, which includes the interference in the judicial system itself as well."[2]

Oberhammer emphasised that every legislator striving to speed up litigation had to decide whether ordinary procedure should be accelerated or special summary proceedings promising speedier handling of small claims or certain types of claims should be introduced alongside ordinary procedure[3] This duality was perceptible in the 18th-19th century Europe as well (especially in the German legal systems).

Oral hearings do not need the principle of contingent cumulation (*Eventualmaxime*), which was a necessary tool to avoid the protraction of the written procedure,[4] since the statement of a party is followed by the opponent's immediate counter-statement, and the judge is able to control the process of the procedure with his case management.

In the procedure based on the Act I of 1911 (and on the summary procedure), the court had a significant managerial role, however the managerial activity of the court could not be interpreted as taking of evidence *ex officio*. The parties should name and provide the evidence based on the questions of the court.[5] Regarding the case management, the

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[1]Plósz (1885) at 1-160.

[2]Ministerial explanation to the bill on the summary procedure at 46.

[3]Oberhammer (2004) at 219-224.

[4]For the Hungarian historical background of the principle of contingent cumulation, see Szivós (2019) at 79-89.

[5]Decision no. 1900. II. G. 100. (13 December 1900) of the Royal Regional Court of Appeal of of Budapest.

chair of the court panel had such a significant role that "the fulfilment of the intention of the act" depended on him.[1]

As a general rule, the chair of the court panel should care about the detailed discussion of the case. However, the hearing of the case should not be disturbed by 'lengthiness' and with such matter that did not belong to it and it should be finished in the same session (Section 224 subs 2 of the Code).

The chair of the court panel should care about the vague requests, statements and declarations, the deficient statements and proofs and make sure the parties explain and complement them (Section 225 subs. 1 of the Code). In the procedure before the district courts, the judge had an additional obligation. He should warn the party without legal representative about the consequences of his actions or omission, the deadlines of any procedural remedy and the rules of representation (Section 225 subs. 4 of the Code). However, if the party had a legal representative, the court did not have to warn him.[2]

The Case Management in the Act I of 1911

The Difficulty of bounding the detailed Discussion and the Clarification

There were two main tools of case management: the *detailed discussion* of the case and the *clarification* of the statements of the parties. However, they were very similar. For example, there was a judicial decision where the court declared the procedural violation based on Section 37 of the Act XVIII of 1893 (Section 225 of Act I of 1911) because the court did not search the basis of the claim.[3] On the other hand, we could also say that the court did not discuss the case in details (Section 35 of Act XVIII of 1893; Section 224 subs. 2 of Act I of 1911).

When the chair of the panel cared about the vague requests, statements and declarations, the deficient statements and proofs and made sure the

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[1]Borsitzky (1915) at 83.

[2]Decision no. II. G. 21/95. (12 June 1895) of the Royal Curia; decision no. II. G. 48/95. (11 September 1895) of the Royal Curia; decision no. I. G. 44/96. (12 May 1896) of the Royal Curia; decision no. I. G. 214/96. (14 October 1896) of the Royal Curia; decision no. I. G. 531 1900. (9 January 1901) of the Royal Curia; decision no. 1896. II. G 87. (18 December 1896) of the Royal Regional Court of Appeal of Budapest.

[3]Decision no. 1899. G. 87. (12 October 1899) of the Royal Regional Court of Appeal of Debrecen.

parties explain and complement them, he also cared about the detailed discussion at the same time.[1]

The Obligation to Clarify the Relevant Facts

The clarification was a particular obligation of the court[2] and had to be applied to the statement of claim as well since it was the base of the decision of the court.[3] There is a central question in the new system of civil procedure in Hungary whether the statement of claim shall or shall not be clarified before communicating it with the defendant and not only scholars, but the jurisdiction is also divided in this debate.

In a case, the plaintiff requested the court to adjudicate maintenance payment to a child, but just *in general* (without the specification of the time or duration). The claim was vague in the sense it did not specify whether the plaintiff wanted the payment from the birth of the child. However, the court omitted to clarify the vague statement of claim and interpreted it one-sided (as the plaintiff had asked from the birth). This procedure did not fulfil the requirements of the clarification.[4] The court acted contrary to the basic principles of the Code when it held further hearings and recorded the statements without clarifying their vagueness. Neither the court of appeal nor the court of the review procedure could decide the case because of it.[5]

To mention another legal dispute, the defendant admitted that he conducted a brokerage contract with the plaintiff, according to which the half of the revenue that he earns belongs to the plaintiff. The main dispute between them was whether the plaintiff could claim his part from the defendant only if the defendant got the money from the third parties he conducted a contract with or not. According to the general procedural rules, the parties could submit the facts and the proofs freely even in the appeal hearing. However, the court of the second instance did not discuss

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[1]The judicial decisions cited are mostly brought Royal Regional Courts of Appeal. They were the second highest courts in Hungary after the Royal Curia which had a significant role in unifying the jurisdiction in Hungary. Varga (2014) at 281-289.

[2]Decision no. 1896. I. G. 11. (24 January 1896) of the Royal Regional Court of Appeal of Budapest.

[3]Decision no. 1899. G. II. 3. (16 February 1899) of the Royal Regional Court of Appeal of Győr.

[4]Decision no. I. G. 298/97. (14 October 1897) of the Royal Curia.

[5]Decision no. 1898. G. 16 of the Royal Regional Court of Appeal of Kolozsvár.

the details of this disputed agreement of the parties. As a result, the court of the review procedure could not make a decision in the case.[1]

Questioning the Parties

The most typical form of clarification was the *questioning*. Apart from the members of the court panel, the parties also had the opportunity to file motions to ask questions. The court decided about the permissibility of the question (Section 225 subs. 2 of the Code).

The main boundaries of the questioning were the principles of free disposition (*Dispositionsmaxime*) and the "party control over allegations and proofs"[2] (*Verhandlungsmaxime*). The *right of questioning* could not be the tool of judicial investigation. The court could practise this right only to those facts and proofs which were submitted by the parties (e.g. when the opponent did not declare about a statement it was too general or the verbal statement opposed with the statement of the preparatory document).[3]

In case of deficient statements, the principle of free disposition was the main standard. For example, the Royal Regional Court of Appeal of Budapest set aside a judgment of the court of second instance because the defendant did not make a statement in a decisive fact and he was not questioned about it. The clarifying activity had to be recorded either in the minutes of the hearing or in the judgment.[4]

In a case the defendant was represented by a licensed attorney. As a main rule, formal defence (when the defendant requests the termination of the proceeding) had to be proposed during the preparatory hearing.[5] The defendant did not submit such defence until the appeal hearing, but then his motion was upheld by the court and the procedure was terminated.

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[1]Decision no. 1896. II . 35. (5 June 1896) of the Royal Regional Court of Appeal of Budapest.
[2]This is the English definition of the *Verhandlungsmaxime* given by Van Rhee (2007) at 312. Cohn and Meyer defined it as the "principle of party presentation." See Cohl & Meyer (1952) at 38.
[3]Kovács (1927) at 596-597.; Kengyel (2003) at 178.
[4]Decision no. 1899. II. G. 90. (23 November 1899) of the Royal Regional Court of Appeal of Budapest.
[5]In case of the summary procedure of 1893, it had to be proposed in the first hearing. In case of the pleas, the principle of contingent cumulation (*Eventualmaxime*) was applied, so if the defendant did not propose all the reasons serving as a ground for the termination of the procedure together, he did not have the opportunity to do so anymore. See Szivós (2019) at 88-89.

The Royal Curia rejected the formal defence, and a repeated appeal hearing had to be held. Since did not raise such a plea which had to be taken into consideration *ex officio* (without the request of the party), the court was not obliged to inform the defendant about these pleas because he was represented by a licensed attorney.[1] In contrary, *the court had to inform the parties about actions which might be taken ex officio*, even if they had a legal representative.

Regarding the vague statements, the principle of party presentation was the boundary of questioning because it could only refer to those circumstances and statement of facts which were stated by the parties.[2] The Code did not mention, but the courts had to clarify the statements if they were controversial,[3] since these statements also belonged to the category of vagueness.

The principles of free disposition and party representation were also important in case of the detailed discussion. For instance, if the court did not discuss the relevant circumstances which related to the complaint of review, then it was a procedural violation.[4] In the complaint, the complainer details the grievances which he wishes to be discussed by the court. When the court did not examine it, not only did it infringe the rule of detailed discussion but the principle of free disposition as well.

Conclusion

To sum up the aforementioned, when the court did not clarify the case (i.e. the *relevant facts*) or discussed it in details, it meant a *procedural violation* which could result in the setting aside of the judgment if the case could not be decided without these certain facts.[5] However, it was not

[1]Decision no. I. H. 30/1900. (30 December 1909) of the Royal Curia.

[2]Decision no. 1895. III. G. 22. (27 June 1895) of the Royal Regional Court of Appeal of Budapest; decision no. 1896. II. G. 61. (16 October 1896) of the Royal Regional Court of Appeal of Budapest.; decision no. 1897. G. 73. (27 December 1897) of the Royal Regional Court of Appeal of Marosvásárhely.

[3]Decision no. 1899. I. G. 359. (22 February 1900) of the Royal Regional Court of Appeal of Budapest.; decision no. 1900. G. 1. (20 February 1900) of the Royal Regional Court of Appeal of Marosvásárhely.

[4]Decision no. 1896. I. G. 154. (25 September 1896) of the Royal Regional Court of Appeal of Budapest.

[5]Decision no. 1896. I. G. 165. (24 September 1896) of the Royal Regional Court of Appeal of of Budapest; decision no. 1896. I. G. 154. (25 September 1896) of the Royal Regional Court

necessary if the procedural violation could be remedied by the amendment of the judgment.

The detailed discussion and the clarification were two very similar tools of the case management. We see from the judicial decisions that court treated the detailed discussion as a *general rule* of the case management since the clarification and its cases were the embodiment of it.

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