JUDICIAL MANAGEMENT OF EVIDENCE HEARING BEFORE A COURT OF FIRST INSTANCE: POLISH SYSTEM VS BELGIAN SYSTEM

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1. POLISH CIVIL PROCEDURE**

The essence of a lawsuit consists in uncovering the truth and resolving a dispute. The establishment of an actual basis is a focal point of a process (non-trial proceedings) around which all activities of a court and parties concentrate. It results from the fact that the application of substantive law makes sense only when the course of events causing a dispute is properly determined. The essence of the principle of truth that must be stuck to in civil proceedings consists in such development of procedural rules which will allow finding out the actual course of events that is the underlying cause of a dispute. Proper construction of actual grounds for a judgment requires going through a few processes.

Firstly, parties should report facts and evidence to support their statements and refute the statements of their opponents.

Secondly, it is necessary to select facts and evidence from the point of view of their significance for adjudication, admissibility and purposefulness, and next hear the selected evidence.

Thirdly, it is necessary to evaluate the evidence and logically analyse the facts that result therefrom (taking into account life experience) in order to confirm the truthfulness of the parties' statements.

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Obviously, proper establishment of the actual state alone is not sufficient for the parties. The process should be efficient and fast but have respect for procedural guarantees implementing directives resulting from Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms and Article 45 of the Constitution of the Republic of Poland. Therefore, the legislator is obliged to develop procedural legal norms in such a way that ensures that citizens have the right to a fair trial, and a court is a guarantor of the appropriate enforcement of those norms.[1] The procedure ensuring respect for the rights of a party to a lawsuit by guaranteeing openness of proceedings, parties' equality, the right to be given a fair hearing, clarity of procedural rules (procedural justice), and obtaining a court judgment on a case within a reasonable time limit constitute the content of a citizen's right of access to court, i.e. the right to legal protection.[2] Ensuring that a party has the right of access to court, to collect evidence and to establish the actual state depends mainly on the proper weighing of such principles of a lawsuit as adversariness, parties' free exercise of rights, evidence concentration, and judicial management of proceedings.

The way in which the principles of adversariness and free exercise of rights are shaped decides who is responsible for the collection and presentation of evidence in a lawsuit.[3] The principle of evidence concentration and procedural formalism supplement the principle of adversariness as they ensure speed and efficiency of proceedings.[4] Although what constitutes the essence of a lawsuit is the parties' right to argue before a court and they are those who should decide, as a rule, on the

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[1] For more on the issue, compare A. Łazarska, *Rzetelny proces cywilny*, Warszawa 2012, p. 78 et seq., and *eadem*, *Sędziowskie kierownictwo postępowaniem cywilnym przed sądem pierwszej instancji*, Warszawa 2013, pp. 21–22; see also J. Klich-Rump, *Podstawa faktyczna rozstrzygnięcia sądowego w procesie cywilnym*, Warszawa 1977, p. 58 and literature referred to therein.

[2] See P. Pogonowski, *Realizacja prawa do sądu w postępowaniu cywilnym*, Warszawa 2005, pp. 7–16; S. Pilipiec, *Teoretycznoprawne aspekty prawa do sądu*, Annales UMCS, Sectio G, Lublin 2000, pp. 227–228; M. Wyrzykowski, *Zasada demokratycznego państwa prawa*, [in:] *Zasady podstawowe polskiej konstytucji*, W. Sokolewicz (ed.), Warszawa 1998, pp. 82–83; L. Garlicki, *Prawo do sądu (rozważania de lege fundamentale ferenda)*, Annales UMCS Sectio G, Lublin 1990, p. 60; Z. Ziembiński, *O pojmowaniu sprawiedliwości*, Lublin 1992, p. 175; Z. Czeszejko-Sochacki, *Prawo do sądu w świetle Konstytucji RP (ogólna charakterystyka)*, Państwo i Prawo 11–12, 1997, pp. 15–17; *idem*, *Konstytucyjna zasada prawa do sądu a standardy europejskie*, [in:] *Prawo i prawnicy w okresie przemian ustrojowych. Zagadnienia wybrane*, Poznań 1992, pp. 100–102; M. Borucka-Arctowa, *Sprawiedliwość proceduralna a orzecznictwo Trybunału Konstytucyjnego i jego rola w okresie przemian systemu prawa*, [in:] *Konstytucja i gwarancje jej przestrzegania. Księga Pamiątkowa ku czci Profesor Janiny Zakrzewskiej*, J. Trzciński, A. Jankiewicz (eds), Warszawa 1996, pp. 25–29; R. Tokarczyk, *Sprawiedliwość jako naczelna wartość prawna*, Państwo i Prawo 6, 1997, pp. 13–15; M. Sawczuk, *Konstytucyjne idee prawa sądowego cywilnego*, [in:] *Konstytucyjny ustrój państwa. Księga jubileuszowa Profesora Wiesława Skrzydły*, T. Bojarski, E. Gdulewicz, J. Szreniawski (eds), Lublin 2000, p. 246; *idem*, *Naruszenie prawa do wysłuchania podstawą skargi konstytucyjnej*, Annales UMCS, Sectio G, Lublin 1997, pp. 97–100.

[3] W. Berutowicz, *O pojęciu naczelnych zasad postępowania cywilnego*, Studia Cywilistyczne 1975, Vol. XXV–XXVI, p. 38.

[4] P. Pogonowski, *supra* n. 2, pp. 58–59; W. Siedlecki, *O usprawnienie i zwiększenie efektywności sądowego postępowania cywilnego*, Nowe Prawo 4, 1979, pp. 11–12; E. Wengerek, *Koncentracja materiału procesowego w postępowaniu cywilnym*, Warszawa 1958, pp. 3 and 29–32; F.X. Fierich, *Środki skupienia materiału procesowego według projektu Kodeksu polskiej procedury cywilnej*, Kraków 1928, pp. 12–16; S. Cieślak, *Zasada formalizmu przy wnoszeniu środków odwoławczych w postępowaniu cywilnym*, Przegląd Sądowy No. 4, 2001, pp. 29–35; H. Fasching, *Cele reformy w polskim*

presentation of the procedural material to a court, they should not have full freedom in this field because court proceedings might last too long and a party's right to adjudication on a case without unnecessary delay would be violated. On the other hand, formal and substantive judicial management serves proper implementation of the principle of procedural material concentration.[5]

The way in which the principles of adversariness and free exercise of rights are shaped decides about the scope of the parties' rights and obligations. On the other hand, the principle of judicial management of proceedings determines the scope of a court's rights and obligations in the process of collecting procedural material necessary to adjudicate (and this way the implementation of the principle of evidence concentration). Judicial formal management covers the organisational aspects of a lawsuit and, in general, is limited to activities connected with sittings and a hearing, i.e. opening and closing sittings and a hearing, giving and taking back the floor, determining the order of questioning witnesses, administering witnesses' oath, dismissing witnesses, encouraging settlement, preventing lengthiness caused by misusing the floor, and announcing judgments. On the other hand, substantive judicial management consists in making sure that all the important circumstances disputed are fully explained in the course of a lawsuit.[6]

With regard to the functioning of the principle of adversariness and free exercise of rights, it is the parties to a lawsuit who bear the burden of the so-called instructing a court by providing the procedural bodies with all documents that are necessary to adjudicate on the claims and statements of the defence (burden of proof).[7] As a result, the court may more thoroughly specify the burden of this instruction to be carried by the parties by ordering them to supplement or explain some circumstances so that a case can be comprehensively explained. This burden is not applicable in the cases in which a court has the discretion *ex officio* to look for necessary evidence regardless of the parties' initiative (e.g. upon the occurrence

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i austriackim postępowaniu cywilnym, [in:] *Współczesne tendencje rozwoju prawa procesowego cywilnego*, K. Warzocha (ed.), Warszawa 1990, p. 95.

[5] S. Gołąb, *Skupienie i przyspieszenie w procesie cywilnym*, Głos Prawa 5–6, Lwów 1937, pp. 13–14.

[6] J.J. Litauer, *Komentarz do Procedury Cywilnej. Kodeks postępowania cywilnego. Postępowanie sporne. Postępowanie zabezpieczające*, Warszawa 1933, p. 96, pp. 129–130; M. Waligórski, *Polskie prawo procesowe cywilne. Dynamika procesu (Postępowanie)*, Warszawa 1947, pp. 40–41; *idem*, *Proces cywilny. Funkcja i struktura*, Warszawa 1947, p. 555; for more on the issue, see also: A. Thon, *Krytyka kodeksu postępowania cywilnego ze stanowiska teorii procesu i doświadczenia praktyki. Część I. Postępowanie sporne*, Warszawa 1936, p. 85, and S. Gołąb, *supra* n. 5, pp. 13–14; J. Skąpski, [in:] L. Peiper, *Komentarz do Kodeksu postępowania cywilnego*, part 1, Kraków 1934, p. 523; M. Richter, *Kodeks postępowania cywilnego z przepisami wprowadzającemi oraz pokrewnemi ustawami i rozporządzeniami*, Warszawa, pp. 123–124; Eugeniusz Waśkowski took a different stance and stated that judicial management concerns only the formal aspect of proceedings, while the substantive (internal) aspect is subject to the regulation resulting from the principles of adversariness and free exercise of rights. The author attributed the role of a passive arbitrator to a court; see E. Waśkowski, *Podręcznik procesu cywilnego*, Wilno 1932, p. 82; *idem*, *System procesu cywilnego (Wstęp teoretyczny)*, Wilno 1932, p. 109.

[7] M. Waligórski, *Polskie prawo procesowe cywilne. Funkcja i struktura procesu*, Warszawa 1947, pp. 173–174.

of public interest).[8] The above indicates that providing the court with procedural material sufficient to explain a case comprehensively requires cooperation between the court and the parties. This cooperation may follow different models. The most common scheme also taking place in the Polish lawsuit takes into account the fact that the managerial role of the parties to the lawsuit (instructing the court) is played by means of the principles of adversariness (it decides who provides procedural material) and free exercise of rights (it decides whether a party provides procedural material). On the other hand, the court is obliged to enforce the principle of procedural material concentration with regard for a fair trial (it decides whether a party has provided the material at the right time, followed the rules of decorum and carried the burden of supporting proceedings), as well as to eliminate delayed material, provided in order to lengthen proceedings or useless for resolving the case, and to supplement this material by acting *ex officio* (judicial management).[9] Thus, the judicial substantive management focuses on activities connected with the preparation and verification as well as possible supplementation of the procedural material (concerning both facts and evidence-related spheres) in accordance with substantive law.[10] This is connected with the necessity of taking various procedural decisions by the court (a presiding judge) in relation to collection and processing of evidence serving the confirmation or refutation of the parties' statements.[11]

In the Polish civil procedure,[12] both the rules of the judicial management of evidence hearing and the principle of presenting procedural material by parties are rather thoroughly regulated. Both general and detailed rules can be distinguished. The general rules include:

(1) for the parties: the burden of supporting a lawsuit expressed in the obligation to perform procedural activities following the rules of decorum, to provide truthful explanation of the case circumstances without concealment of anything, and to present evidence (Article 3 CCP);
(2) for the parties: an obligation to quote all facts and evidence without delay so that the proceedings can be conducted efficiently and fast (Article 6 § 2, Article 232 first sentence CCP);
(3) for the parties: a ban on taking advantage of the right laid down in the procedural provisions that is in conflict with the purpose for which it was established (a ban on misusing procedural law, Article 4^1 CCP);
(4) for the court: an obligation to prevent lengthening of proceedings and striving to adjudicate during the first session if it is possible with no harm to the explanation of the case (Article 6 § 1 CCP);

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[8] *Ibid*., pp. 175–182.

[9] For more on this issue, compare M. Manowska, *Struktura sędziowskiego materialnego kierownictwa postępowaniem dowodowym przed sądem drugiej instancji, w apelacji pełnej w procesie cywilnym*, Przegląd Sądowy 10, 2018.

[10] A. Łazarska, *Rzetelny proces*, *supra* n. 1, 2012, pp. 85–86.

[11] For more on the issue, see also T. Wiśniewski, *Przebieg procesu cywilnego*, Warszawa 2009, p. 33; A. Łazarska, *Sędziowskie kierownictwo*, *supra* n. 1, 2013, pp. 85–86.

[12] Act of 17 November 1964: Code of Civil Procedure (Dz.U. 2020, item 1575); hereinafter CCP.

(5) for the court: the right to admit evidence that has not been indicated by a party (Article 232 second sentence CCP).

Special norms are placed among the provisions regulating preparation of a sitting or among the provisions regulating special proceedings. The former group includes mainly the norms authorising the court to awake an evidence-related initiative. A court can oblige parties to file pleadings presenting procedural material (Article 205^3 § 1 and § 2 CCP). However, if a preparatory sitting is set, in accordance with Article 205^{12} § 1 CCP, a party can quote statements and evidence supporting their conclusions or refuting opponents' statements until the hearing schedule is approved. Both above-mentioned procedures exclude one another within the meaning that if the court obliges parties to file pleadings in accordance with Article 205^3 § 1 and § 2 CCP, it excludes the possibility of free presentation of procedural material during the preparatory sitting (Article 205^3 § 1). On the other hand, in the case the court does not oblige parties to file pleadings before the hearing or there is no preparatory sitting, the court should awake an evidence-related initiative of the parties during the hearing and inform them at the same time about the content of Article 205^{12} § 2 CCP, unless a party is represented by a professional proxy (Article 210 § 1 and § 2^1 CCP).

In every case when a party fails to provide the court with procedural material necessary to adjudicate in the right time, further statements or evidence shall be excluded, unless the party proves that quoting them in a preparatory pleading (during a preparatory sitting or a hearing) was not possible or that the need to present them occurred later (Article 205^3 § 2, Article 205^{12} § 1 CCP). The content of the above-mentioned provisions does not raise any doubts that the exclusion of late statements and evidence is not subject to the discretional decision of the court, however, it is the court that decides whether it has been proved that a party could not quote the statements and evidence in the right time or that the need to present them occurred later. On the other hand, the circumstance concerning the fact that the evidence is late and cannot be presented by a party does not mean that the court cannot admit it *ex officio*.[13]

The above-presented model does not take into account the statutory evidence preclusion. It is due to the fact that evidence preclusion depends on whether the presiding judge orders parties to exchange preparatory pleadings and obliges them to present all statements and evidence in those documents or rules that a preparatory sitting should take place. However, taking those steps is not obligatory, which is indicated in the wording of Article 205^3 § 1 and § 2 CCP, which stipulates that a presiding judge may order parties to exchange preparatory pleadings in justified cases, especially in complicated or accounting-related cases, and if the exchange of preparatory pleadings is ordered, the presiding judge may oblige the parties to present all statements and evidence important for adjudication on the case. In turn, in accordance with Article 205^4 § 3 CCP, if the circumstances of a case indicate that a preparatory sitting will not contribute to more efficient recognition of the case,

[13] For more on this issue, compare e.g. the Supreme Court judgment of 22 February 2006, III CSK 341/05, OSNC 2006, No. 10, item 174, in the light of evidence preclusion.

a presiding judge may make the case take a different proper course; in particular, he/she may refer it for recognition, also at a hearing. In such cases, in accordance with Article 205^{12} § 2 CCP, a party may quote statements and evidence to justify their motions or to refute the other party's motions or statements until the end of proceedings, with the exception of unfavourable consequences that, according to the statutory provisions, may result from playing for time or non-compliance with the presiding judge's orders or the court's rulings. In accordance with Article 210 § 1, § 2 and § 2^1 CCP, a party not represented by a professional proxy is informed about, inter alia, the content of Article 205^{12} § 2, and should report statements and evidence as well as take a stance on the opponent's statements.

Article 235^2 § 1 CCP classifies the reasons for the exclusion of evidence. The catalogue is open. In accordance with the provision, a court may in particular exclude evidence:

(1) the hearing of which is excluded by a statutory provision;
(2) which proves an unquestionable fact that is not important for the adjudication on the case or that is proved to be in conformity with a party's statement;
(3) that is useless for proving a given fact;
(4) that cannot be presented;
(5) that is aimed at lengthening the proceedings;
(6) when a party's motion does not meet the requirements of Article 235^1, and a party fails to amend it, despite being requested to do so (it concerns the content of a motion to hear evidence, which should contain evidence marking in the way making it possible to hear it and to list facts that the evidence is to prove).

The most important reasons for excluding evidence laid down in Article 235^2 § 1 CCP from the point of view of the principle of substantive management of evidence hearing proceedings are those determined in subsections (2) and (3) above. They require that a court select parties' statements and evidence with regard to whether a given fact is important for adjudication on the case in the light of the substantive grounds for claims or defence measures (Article 227 CCP) or whether a party is able to prove a factual circumstance they have indicated or negate the circumstance reported by the opponent with the use of this evidence. If a given fact does not meet the criterion of significance, the evidence reported to prove it should be excluded. The operation requires initial substantive evaluation of the parties' statements. In case the court recognises a fact reported by a party as significant for the adjudication on a dispute, then the court should assess whether it must be proved. It will not be necessary if the parties do not question the fact or when the fact may be proved without the provision of evidence, i.e. it is classified as a commonly known fact (Article 228 § 1 CCP) the information about which is commonly available (Article 228 § 2 CCP), facts that a court knows *ex officio* (Article 228 § 2 CCP), facts clearly admitted by a party or implied (Articles 229 and 230 CCP), or facts that can be determined as a result of drawing conclusions within the presumption of a fact (Article 231 CCP) or with the use of legal presumption (Article 234 CCP). At the same time, the court should examine if the evidence motion lodged is necessary to be heard and admissible in the light of procedural law. Evidence must also be suitable to prove that a given statement is true. Thus, evidence from a witness's

testimony made in connection with circumstances that require having special information will not constitute such evidence.

Apart from the above detailed norms regulating the parties' obligation (procedural burden) to present evidence, the Code of Civil Procedure also specifies the concept of misuse of procedural law laid down in Article 4^1. The provision is formulated as a ban and stipulates that the parties and participants of proceedings must not make use of their rights laid down in procedural law for purposes that are in conflict with the aim for which they were established. The misuse of procedural rights should be interpreted as any case of such a use of civil procedure by a party (or another participant) that serves aims different from the protection of subjective rights, i.e. making use of them in the way that is objectively in conflict (or objectively unjustified) with the content of procedural provisions (including the principles of the civil procedure, especially the principle of equality and trial economy), with the obligation resulting from those provisions (as well as the Constitution of the Republic of Poland) to maintain procedural fairness and other principles of social coexistence, where the application (making use) of the procedure should be understood as any conduct (procedural activities as well as action and omission having influence on the course or result of the proceedings).[14] The legislator does not define in Article 4^1 CCP what procedural activities or conduct of the parties can be recognised as misuse of procedural law. Some of such situations are regulated in the special provisions. These include:

(1) filing a suit in the form of a pleading that does not contain a request to hear a case in court (Article 186^1 CCP);
(2) filing a groundless suit (Article 191^1 CCP);
(3) filing many complaints about the same or similar matters (Article 394^3 CCP);
(4) filing many motions to recuse a judge (Article 53^1 CCP);
(5) filing many motions to amend, supplement or interpret a judgment (Article 350^1 CCP), and to appoint a proxy *ex officio* (Article 117^2 § 2 CCP).

The above catalogue is not exhaustive and, in general, each type of a party's conduct may be recognised as misuse of procedural law, e.g. repeatedly filing the same evidence-related motions.[15] There are some doubts, however, what sanctions

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[14] For more on the issue of procedural misuse, compare M.G. Plebanek, *Wykonanie nieprawomocnego nakazu zapłaty zaopatrzonego w klauzulę wykonalności a zagadnienia nadużycia prawa procesowego i podmiotowego. Glosa do uchwały SN z dnia 7 października 2009 r., III CZP 68/09*, Polski Proces Cywilny 1, 2011, p. 159; *idem*, *Nadużycie praw procesowych w postępowaniu cywilnym*, Warszawa 2012, pp. 74–75; K. Flaga-Gieruszyńska, *Zastój procesu cywilnego jako skutek niewłaściwego postępowania stron*, [in:] *Jus et remedium. Księga jubileuszowa Profesora Mieczysława Sawczuka*, A. Jakubecki, J.A. Strzępka (eds), Warszawa 2010, pp. 162–167; A. Góra-Błaszczykowska, *Zasada równości stron w procesie cywilnym*, Warszawa 2008, pp. 350–353; T. Wiśniewski, *supra* n. 11, p. 25; T. Bukowski, *Rozstrzyganie o kosztach procesu cywilnego*, Warszawa 1971, p. 53; T. Cytowski, *Procesowe nadużycie prawa*, Przegląd Sądowy 5, 2005, pp. 82 and 102; T. Ereciński, *Nadużycie praw procesowych w postępowaniu cywilnym. Tezy i wstępne propozycje do dyskusji*, [in:] *Nadużycie prawa procesowego cywilnego*, P. Grzegorczyk, M. Walasik, F. Zedler (eds), Warszawa 2019, pp. 16 and 17.

[15] For more on this issue, see Ł. Błaszczak, [in:] *Kodeks postępowania cywilnego. Koszty sądowe w sprawach cywilnych. Dochodzenie roszczeń w postępowaniu grupowym. Przepisy przejściowe. Komentarz do zmian*, T. Zembrzuski (ed.), Wolters Kluwer Polska, LEX/el, commentary on Article 4^1, theses 20–21.

the court can apply in the case it recognises that a party's activity constitutes the misuse of procedural law. The legislator laid down some sanctions in some cases (see the provisions referred to above). These are specific sanctions concerning the course of procedural activities such as retaining a pleading in the case files without taking any further steps (Article 53^1 § 2, Article 117^2 § 2, Article 350^1 § 3, Article 394^3 § 3 CCP), returning a pleading (Article 186^1 CCP), dismissing a suit during a closed sitting without notification of an opponent party and without hearing motions filed together with a suit (Article 191^1 § 3 CCP). Apart from that, the legislator enacted sanctions that can be imposed on a party that misuses procedural law (subjective sanctions). They are mainly laid down in Article 226^2 § 2 and Article 103 § 2 and § 3 CCP. The application of sanctions other than special ones concerning the course of procedural activities based on the general norm under Article 4^1 CCP, e.g. omitting an activity, dismissing evidence, is also admissible. However, the imposition of whatever sanctions on a party for the misuse of procedural law that is not laid down in the provisions of the Code of Civil Procedure is inadmissible.

2. BELGIAN CIVIL PROCEDURE

The Belgian civil procedure is constructed based on the principle of parties' free exercise of rights (autonomy), which mainly means that these are parties who determine the limits of a dispute: the limits of claims and the limits of defence. As a rule, a court cannot interfere in the objective and subjective limits of proceedings (Articles 1138 and 811 of the Belgian Judicial Code of 10 October 1967, *le Code judiciaire*, hereinafter C.j.).[16] This does not mean that a court is a passive observer of a dispute between the parties. Like in the Polish civil procedure, a Belgian judge should manage a case in such a way that ensures all necessary procedural guarantees to parties, but at the same time that a judgment is issued in a reasonable time limit. This means that the court does not only have the right but also a duty to take such managerial steps that will force parties to act in the way allowing the development of proceedings aimed at settling a dispute. The role of the court and the scope of its possibilities of interfering *ex officio* into statements made by parties are different from its role in relation to evidence that should be presented to support parties' statements.

In accordance with the general rule expressed in Article 870 C.j., each party bears the burden of proof so it is their duty to prove the facts that are grounds for claims, defence and statements made that they refer to.[17] Thus, parties bear a similar procedural burden as in the Polish system and it is parties who face negative consequences of failure to carry this burden. Parties are also obliged to present facts and evidence to support their statements or charges in pleadings. In the so-called

[16] P. Taelman, C. Van Severen, *Civil Procedure in Belgium*, Wolters Kluwer 2018, p. 25, vol. 34.

[17] The Court of Cassation, 21.01.2016, C.14.0470, unpublished, 7.05.2015, C.14.0011; P. Taelman, C. Van Severen, *supra* n. 16, p. 139, para. 438; J. Laenens, D. Scheers, P. Thiriar, S. Rutten, B. Vanlerberghe, *Hnadboek Gerechtelijk Recht*, Antwerpen–Cambridge, 2016, p. 560, thesis 1321.

conclusions included in pleadings, apart from fulfilling formal requirements concerning personal data, parties should indicate, inter alia, facts important for the resolution of a dispute, define claims, present factual and legal arguments that are grounds for the plaintiff's claims and based on which a defendant must construct their defence, and motions concerning the expected judgment (Article 744 C.j.). Failure to meet formal requirements causes that the court excludes the pleading from proceedings.[18] As a rule, parties can file documents only if they have referred to them in a pleading, unless a claim or a charge of the defence is based on them.[19]

In a situation when the court establishes the schedule of proceedings (which usually precedes a preliminary sitting) and determines the number of pleadings and the deadline for filing them, pleadings filed late are automatically excluded from the proceedings, unless both parties agree for their admission or the schedule of the proceedings or the time limit for their conclusion is changed. If there is no unanimous agreement, a party that was conscientious may demand that a judgment be issued and be recognised as an adversary one and not a judgment by default (Article 747 C.j.). The provision stipulates that if, in the period preceding the deadline for filing pleadings, a party that has already filed one discovers a new important document or fact justifying a new statement, they may apply for a new time limit for the conclusion of the proceedings but it must be done 30 days before the date assigned for the hearing of pleadings at the latest. The party must file a motion to the judge to be allowed to file an additional pleading in which they must indicate a new document or fact as well as specify its impact on the resolution of the dispute. Other parties can present their stance to the judge within 15 days from the date of notification of such a motion. If the judge approves of the party's motion, he/she determines another date of a hearing (if it is necessary to provide summing up of conclusions, which will be discussed below). Failure to meet the above deadlines results in automatic exclusion of pleadings from the proceedings.

There is a rule in the Belgian civil procedure in accordance with which parties should file final pleadings (conclusions) that are summing-up ones in nature (Article 747 C.j.). In jurisprudence, it is believed that the final pleadings substitute for all former pleadings; therefore, they must be exhaustive and contain all claims, charges and arguments that parties uphold and refer to a court for adjudication.[20] It is important because, in accordance with Article 780 para. 3 C.j., which stipulates the elements and content of a judgment, the determination of the object of the demand (motion) and the response to parties' statements concerning the circumstances important in the dispute is one of the elements of the judgment. An opinion has even been expressed in case law that a court must not adjudicate on a case concerning claims or charges of the defence which have been expressed in former pleadings and have not been repeated in the final pleading.[21]

As far as evidence hearing is concerned, in accordance with the Belgian civil procedure, a court is an administrator of this proceeding and is in charge of judicial

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18 P. Taelman, C. Van Severen, *supra* n. 16, p. 96, para. 265.
19 *Ibid.*, p. 96, para. 268.
20 *Ibid.*, p. 96, para. 266.
21 The Court of Cassation, 19.11.2015, C.15.0198.N.

management. Parties, in public interest, are obliged to cooperate with the court and with one another in order to provide the court with evidence and help resolve a dispute. Third parties are subject to the same obligation. Otherwise, the court may apply various measures (sanctions) for unjustified lack of cooperation; inter alia, it may use particular presumptions determined in the Civil Code (Article 1341 et seq. of the Belgian Civil Code), impose a fine for misuse of procedure (Article 780bis C.j.), and oblige a party to cover the cost of the proceedings. This also concerns the lack of cooperation with an expert witness (Article 972bis C.j.).[22]

The court's activity consists in supervising whether evidence and facts that must be proved are reported properly, verifying if the evidence that parties want to present is sufficient and admissible, interpreting and evaluating evidence presented, and if possibile taking investigative steps *ex officio*.[23]

The court's activity is subject to some limitations and they are even more far-reaching in case of the presentation of facts. It is due to the fact that the court is not authorised to introduce new facts to proceedings *ex officio* and cannot base on facts that have not been presented by the parties themselves. However, in particular situations the court can (sometimes is obliged to) act *ex officio* in relation to the establishment of facts as well as the presentation of evidence. However, it cannot raise issues that are not the subject matter of a dispute between parties because it is parties who determine the limits of a civil dispute.[24] Nevertheless, the court's interference into this area consists in the possibility of basing on a circumstance deduced from facts that parties have provided or a circumstance resulting from evidence that parties have presented, although the parties have not presented this fact directly and they have not drawn conclusions making it possible to establish it.[25] A more far-reaching inquisitorial court's action consists in the possibility of asking parties questions concerning the essence of the dispute and presented facts, as well as evidence connected with them, but without raising issues that have not been raised by the parties themselves. This sphere of the court's activity causes some complications and requires carefulness because the court should not ask questions

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[22] J. Laenens, D. Scheers et al., *supra* n. 17, pp. 564 and 578, theses 1330 and 1361; B. Allemeersch, I. Samoy, W. Vandenbussche, *Overzicht van Jurisdiction. Het burgerlijkevrecht, 2000–2013*, TPR 2015, thesis 640; B. Allemeersch, *Taaiwerdeling in het burgerijk process*, Antwerpen: Intersentia, 2007, pp. 348–349; R. Mougenot, *Droit des obligations. La prevue*, Bruxelles: Larcier 1997, p. 91, no. 31; G. De Leval, *L'instruction sans obstructions*, [in:] J. Van Compernolle, *La preuve*, 1987, p. 25; D. Sheers, P. Thiriar, *Het greechtelijk recht in de hoogste versnelling?*, Antwerpen: Intersentia, 2007, pp. 148–149 and 198–199; M. Castermans, *De hervorming van het deskundigenonderzoek*, Gent: Story Publishers, 2007, p. 15.

[23] J. Laenens, D. Scheers et al., *supra* n. 17, p. 565, thesis 1332; R. Mougenot, *supra* n. 22, p. 79, no. 21; M.E. Storme, *Over het gebruik van onrechtmatig verkregen bewijsmiddelen in het privaatrechtelijk procesrecht*, [in:] W. Calewaert, *Liber Amicorum*, Antwerpen: Kluwer, 1984, pp. 79–86; H.J. Snijders, M. Ynzonides, G.J. Meijer, *Nederlands burgerlijke procesrecht*, Deventer: Kluwer, 2002, p. 197, no. 217; B. Allemeersch, P. Schollen, *Bechoorlijk bewijs in burgerlijke zaken. Over de geoorloofdheidsvereiste in het burgerlijk bewijsrecht*, RW 2002–03, theses 41–60.

[24] J. Laenens, D. Scheers et al., *supra* n. 17, p. 565, thesis 1333; judgments Cass. 24.09.1982, Arr. Cass. 1982–83, 131; Cass. 5.10.1984, Arr. Cass 1984–85, 211 en RW 1985–86, 1029.

[25] P. Taelman, C. Van Severen, *supra* n. 16, p. 26, paras 37–39; also the Court of Cassation, 4.11.1994, the Cassation Court judgments 1994, no. 931; the Court of Cassation 4.12.1995, the Cassation Court judgments 1995, no. 1069.

that may raise doubts about its impartiality or that might be treated as legal advice. Still, these can be questions drawing a party's attention to a particular issue (but not suggesting anything), which may have influence on the adjudication on the matter.[26] To illustrate the issue, it seems that a court cannot directly ask a defendant if they think that the claim is statute barred or if they know when certain claims become statute barred. But a judge may ask a question when a defendant fell into debt. The court should not suggest that the plaintiff, instead of suing the defendant for failing to fulfil a contract, should sue them for unjustified enrichment, but it can ask questions that will make the plaintiff realise that a contract is invalid (without indicating that fact directly). The most far-reaching inquisitorial court's action concerns the area of providing evidence by parties in order to support their statements and conclusions or to refute opponents' statements and conclusions (Article 870 C.j.). In accordance with Article 871 C.j., a judge may order each party to the proceedings to present evidence they have. Such a procedural decision can be taken when the court decides that the evidence provided by the parties is insufficient to assess the substantive grounds for the claim or defence efficiency and to issue a judgment. This also concerns admission of evidence from witnesses' testimonies *ex officio*, in accordance with Article 916 para. 1 C.j.; however, it is possible only when facts that the evidence concerns are decisive for the resolution of a dispute.[27] Then the court may order that a supplementary evidence hearing be conducted (e.g. it can order that a document be submitted or inspection be conducted). Within these proceedings, the court may demand that the parties present all evidence they have.[28] This means that the court, like under Polish law, should not conduct an investigation in order to find evidence, but it should have the knowledge that a party has particular evidence, although they have not presented it to the court. Supplementing the evidence hearing, the court may at the same time have indirect influence on the establishment of the factual grounds for claims. It takes place when the court orders that particular evidence be heard and this results in new facts significant for the adjudication on the case. The court may then base its resolution on those facts, even when they have not been raised by any of the parties.[29] Moreover, it should be pointed out that, as a rule, parties are not obliged to present evidence that might negatively affect a claim or support charges brought by the defence. However, it is indicated in the doctrine that the principle of fair play requires that parties cooperate in good faith when they provide and collect evidence. That is why the court, when it finds that a party has evidence that might confirm or deny a fact that is significant for adjudication, may order the party to present the evidence, in accordance with Article 871 C.j., which also interferes into the establishment of the actual state.[30] It is indicated in case law that ordering a party to submit a document for the purpose of providing evidence

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[26] P. Taelman, C. Van Severen, *supra* n. 16, p. 26, paras 3–39.

[27] J. Laenens, D. Scheers et al., *supra* n. 17, pp. 578–579, thesis 1398.

[28] P. Taelman, C. Van Severen, *supra* n. 16, print.

[29] W. Van Eeckhoutte, *Schuifelen op de rechterstoel – De taak van de rechter in het belgisch privaatrechtelijk procesrecht: een kwestie van moeten of mogen*, [in:] Preadviezen 1, 2015, Boom: VVSRBN (ed.), Den Haag, pp. 289–295; P. Taelman, C. Van Severen, *supra* n. 16, p. 79, para. 204.

[30] P. Taelman, C. Van Severen, *supra* n. 16, pp. 96, 144.

is admissible only when there are serious particular reasons for establishing that the party has this document.[31]

Managing the presentation of evidence, a judge should choose the fastest and cheapest method of investigating and limit his/her action to the necessary minimum. In accordance with Article 875bis C.j., a judge should limit the choice of an investigative measure and its content to what is sufficient to resolve a dispute, taking into account the proportionality of the cost of hearing evidence and the subject matter of a dispute and the fastest, cheapest and simplest way of proving.[32]

The misuse of procedural law functions in the Belgian judicial procedure like in the Polish civil procedure. It is regulated under Article 780bis C.j. and is to prevent the misuse of procedural law in the course of proceedings. The provision was introduced to the Belgian Judicial Code by the Act of 26 April 2007 amending the Judicial Code in order to fight against court proceedings behind schedule.[33] It is also supposed to be an instrument making it possible to carefully weigh the right of access to court on the one hand, and prevent the misuse of the administration of justice on the other hand.[34]

In accordance with Article 780bis C.j., a party that uses the procedure for the purpose of delaying or another type of misuse can be subject to financial penalty from 15 to 2,500 euros without prejudice to the other party's rights to claim compensation. In such a case, the financial penalty is ruled by the same decision within the scope in which the claim for compensation will be approved to cover losses and, pursuant to a party's interest, for filing a lawsuit hastily or in bad faith. If it does not happen, parties will be requested to submit explanations, in accordance with Article 775 C.j. (If the reopening of a debate is ruled, a judge calls parties to exchange opinions and send them back by determined deadlines under threat of automatic exclusion from the debate, along with conclusions concerning a charge or defence, and justifies that. If necessary, the judge determines the day and time of hearing the parties on the subject matter he/she determines. The parties are notified thereof being served with writs and, in some cases, their lawyers are notified by standard post. A decision issued after the debate has been resumed is in every case recognised as issued with respect for the principle of adversariness, provided that the decision on the resumption has been issued with respect for adversariness). Article 780bis C.j. is not applicable to criminal and disciplinary cases.

Misuse of procedure usually means the use of procedural provisions in the way that clearly exceeds the limits of their standard (typical) application by a reasonable and conscientious person taking into account all circumstances of the case. Such circumstances include, e.g. a position held, a job, education or professional experience, or the knowledge of law. The assessment of a party's conduct from

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31 The Court of Cassation, 16.10.2015, C.14.0512.F.

32 J. Laenens, D. Scheers et al., *supra* n. 17, p. 577, thesis 1358; D. Scheers, P. Thiriar, *Potpourri 1 – Gerechtelijk recht*, Antwerpen: Intersentia, 2015, p. 126; D. Scheers, P. Thiriar, 2007, *supra* n. 22, p. 123; judgments Cass. 9.05.2005, Pas. 2005, 1, 1008; Cass. 17.11.1998, Arr. Cass. 1988–89, 321.

33 M. Stassin, *L'amende civile*, Journal des tribunaux, year 136/9, http//jt.larcier.be, 4.03.2017, p. 166.

34 P. Taelman, C. Van Severen, *supra* n. 16, p. 78, vol. 200–201.

the point of view of procedural law misuse should be abstract in nature, based on an objective benchmark and not a subjective one taking into account individual features.[35] Of course, the above statement should be understood as follows: the assessment based on an abstract benchmark means the assessment referring to a model of a person who acts taking care of their own matters important for life. However, this benchmark is not uniform. Using contrasting examples, another benchmark should be applied, e.g. in the case of adults who have studied law and have no intellectual impairment and a different one in the case of the elderly who suffer from some impairments connected with their old age. The legal doctrine and the judicature indicate three types of situations in which parties' conduct is classified as misuse of procedural law:

(1) making use of law with an exclusive intent to cause harm;
(2) fulfilling an obligation for the purpose different from the one for which this obligation was imposed;
(3) exercising the right in the way that harms the other party or the judicial system disproportionately to the benefits resulting from this right.[36]

Article 780bis C.j., as a rule, is applicable at every stage of proceedings: at the stage of initiating proceedings, during a particular part of them as well as when other procedural steps are taken.[37]

The institution laid down in Article 780bis C.j. regulates the so-called civil fine to be paid to the state. Another instrument listed in this provision that is to prevent the misuse of procedural law is compensation to and on demand of a party for the misuse of the procedure in an inconsiderate and irritating way (*une demande de dommages et intérêts pour procès téméraire et vexatoire*), which is connected with the

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[35] M. Stassin, *supra* n. 33, p. 167 and the case law referred to therein: J.F. Romain, *Liberté, appreciation marginale (marginale toetsing), qualification du fait générateur de responsabilité et abus de droit*, [in:] *Droit de la responsabilité. Questions choisies*, F. Glansdorff (dir.) C.U.P., Vol. 157, Bruxelles: Larcier, 2015, p. 83, no. 31; P. Van Ommeslaghe, *De page: Traité de droit civil belge*, Vol. II: *Les obligations*, Bruxelles: Bruylant, 2013, p. 87, no. 31.

[36] The most apparent cases include, e.g. situations where a party files documents late with final conclusions, while the other party demanded them at the earlier stage of the proceedings (Civ. Luxembourg, div. Arlon 12 Chambre, 25.03.2015, R.G. no. 13/743/A); or when evidence from an expert witness's opinion has been admitted on the request of a party but the party has not made an advance payment to cover costs or has not presented materials necessary to develop an opinion (Civ. Brabant Wallon, 1 Chambre, 27.01.2016, Res. Jur. Imm. 2016, livre 2, p. 119); or when a party has filed a motion to rule the exchange of pleadings or documents and then failed to present such pleadings or documents (Civ. Luxembourg, div. Arlon 12 Chambre, 24.06.2015, R.G. no. 12/446/A, Liège 14 Chambre, 10.05.2012, 2011/R.G./1488); also compare M. Stassin, *supra* n. 33, p. 167 and the case law referred to therein; P. Van Ommeslaghe, *supra* n. 35, p. 86, no. 31 and pp. 89–92, no. 32–34; P. Marchal, *Principes généraux du droit*, collection: Rèpertoire pratique du droit belge, Bruxelles: Bruylant, 2014, pp. 242–250, mainly pp. 221–226; J.F. Romain, *supra* n. 35, p. 198, no. 31.

[37] M. Stassin, *supra* n. 33, p. 166 and the case law referred to therein; H. Boularbah, *Requête unilatérale et inversion du contentieux*, Bruxelles: Larcier, 2010, p. 545, no. 730; P. Taelman, B. Deconinck, *Quid pro quo omtrent de nietigheden en de sancties?*, [in:] *De wet van 26 april 2007 tot wijziging van het Gerechterlijk Wetboek met heg oog op het bestrijden van de gerechterlijke achterstand doorgelicht*, P. Taelman, P. Van Orshoven (eds), Brugge: die Keure, 2007, p. 140, no. 32.

initiation of a lawsuit hastily, thoughtlessly or in bad faith, in order to misuse the procedural law, and even maliciously and without a real cause.[38]

In addition, in the case of the misuse of procedural law, a court may raise the cost of proceedings in favour of the party whose interest has been harmed as a result of inappropriate behaviour of the other party (Articles 1022 and 1017 C.j.).[39]

The concept of the 'behaviour disrupting proceedings' is derived, according to Tijl De Jaeger, from Paul Sluijter's doctoral dissertation. He was for determining certain criteria for the quality of court proceedings the infringement of which can result in a statement that a party disrupts proceedings. The criteria include: the quality of results (the conclusion of all disputes between parties), the quality of the procedure (various procedural guarantees), length of proceedings and the cost of proceedings. The procedural activities are disrupted when the expected additional time and costs do not lead to obtaining a better result and/or procedural quality, or if that better result or procedural quality should be also obtained by less troublesome behaviour.[40] On the other hand, according to De Jaeger, destructive procedural behaviour takes place when the additional time and expected costs do not lead to a better result and/or procedural quality, or if that better result and/or procedural quality might be obtained by less troublesome behaviour.[41]

Article 780bis C.j. stipulates that the measures laid down in this provision can be applicable cumulatively. However, regardless of which of those measures (or both) a court would apply, their application must be preceded by the establishment that a party is guilty of the misuse of procedural law, which means that the party's use of the instruments to obtain legal protection or protection measures must clearly exceed the limits of using those measures (rights) by a reasonable and conscientious person acting in the same circumstances. It concerns the use of the justice system for the purposes that are clearly unlawful or to delay proceedings.[42] The infringement should be obvious and aggravated but the weight of default within the sense of the weight of a procedural action is not decisive. What is decisive is a party's attitude and the level of ill will that result in the misuse of procedural law. If the misuse is not aggravated within the above-presented meaning, a court cannot impose a fine on a party, or rule compensation to the opponent. Imposing sanctions on parties in case of every, even minor, misuse of procedural law might infringe parties' freedoms and procedural guarantees, especially when a procedural action performed by a party belongs to the measures of defence or means that a party uses to support the claim.[43]

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[38] M. Stassin, *supra* n. 33, p. 166; X. Taton, *Les irrégularités, nullités et abus de procédure*, [in:] *Le procès civil acéléré? Premiers commentaires de la loi du 26 avril 2007 modifiant le Code judiciaire en vue de lutter contre l'arriéré judiciaire*, J. Englebert (ed.), Bruxelles: Larcier, 2007, pp. 236–237; P. Taelman, C. Van Severen, *supra* n. 16, p. 78, vol. 200–201.

[39] M. Stassin, *Les abus de procedure. Quelles sanctions pour les abus dans la conduite des procès par les parties?*, https://www.justice-en-ligne.be/-Les-abus-de-procedure, 13.04.2017, thesis 1.

[40] T. De Jaeger, *Verstorend procesgedrag: Doeltreffend snctioneren voor een effiente procesvoering*, TPR 2017, pp. 1235–1236; P. Sluijter, *Sturen met proceskosten*, pp. 22–29 (unpublished).

[41] T. De Jaeger, *supra* n. 40, p. 1238.

[42] P. Taelman, C. Van Severen, *supra* n. 16, p. 78, vol. 200–201.

[43] It is assumed in case law that filing a groundless claim or the use of defence measures may be recognised as misuse of procedural law (e.g. Civ. Arlon, 12 Chambre, 16.10.2013, R.G. no. 10/806, unpublished; Civ. Bruxelles, 75 Chambre, 19.06.2014, R.G. no. 2011/15428/A,

As concerns parties' behaviour that the judicature most often recognises as the misuse of procedural law, both at the stage of initiating proceedings and in the course thereof, the following categories can be distinguished:

(1) The use of the procedure for the purpose of delaying proceedings by filing a lawsuit, an appeal or challenging a claim (raising arguments of the defence) if next a party does not take steps for the purpose of efficient proceedings aimed at resolving a dispute or he/she attempts to delay the proceedings (e.g. fails to appear in court).[44]

(2) Filing a lawsuit, an appeal or the application of defence measures in an obviously groundless way. The use of procedural measures alone or an attempt to raise arguments against the main trends in case law or against a justified and well-motivated judgment per se is not the misuse of procedural law, even if a party does not indicate any new legal arguments.[45] The use of such legal measures may be recognised as the misuse of procedural law only when the party uses them with intentional guilt or when it constitutes the use of law for one's own purposes in conflict with the purpose for which they were established, or the lawsuit, appeal or defence result in disproportionate negative effects to the other party (administration of justice) in relation to the desire to use the opportunity to win a lawsuit. The examples include: persistent quoting of groundless arguments that a court has already repeatedly dismissed, making use of legal assistance in order to file an obviously groundless motion, presenting an argument that clearly contradicts documents in the case files, bringing a lawsuit that is not based on any legal norm, case law or contract, or filing an obviously late motion.[46]

(3) Conducting proceedings unconscientiously (called 'incautious' court disputes). As far as these are concerned, the examples indicate parties' behaviour that consists in non-compliance with a court's orders, quoting statements and documents

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unpublished; Bruxelles, 9 Chambre, 3.04.2015 and 2.10.2015, R.G. no. 2013/AR/730, unpublished); a different opinion is expressed in the doctrine, where it is indicated that a situation in which an obviously groundless claim or a defence measure is presented cannot be recognised as misuse of procedural law (thus, X. Taton, *supra* n. 38, p. 239, no. 14; D. Vandensteen, *L'abus du droit de présenter des moyens: une atteinte aux droits de la défense*, Lettre d'Info Actualités Fiscales, 12.04.2015, no. 14.

[44] Liège, 14 Chambre, 22.03.2010, R.G. no. 2009/RG/1402, unpublished; Bruxelles, 9 Chambre, 3.04.2015 and 2.10.2015, R.G. no. 2013/AR/730, unpublished; Liège, 14 Chambre, 21.01.2010, R.G. no. 2009/RG/88, unpublished; Civ. Bruxelles, 75 Chambre, 19.06.2014, R.G. no. 2011/15428/A, unpublished; as Tijl De Jaeger indicates, the plaintiff's choice of court proceedings instead of the simplified IOS procedure (applicable to unquestionable debts) cannot be recognised as disruptive procedural behaviour, see T. De Jaeger, *supra* n. 40, p. 1241.

[45] M. Stassin, *supra* n. 33, p. 168 and the case law referred to therein; A. Decroës, *La responsabilité de l'avocat ou comment allier la prudence* à *l'audace*, [in:] *Liber amicorum Michel Mahieu*, Bruxelles: Larcier, 2008, p. 171 no. 5; J.F. Van Drooghenboeck, *Les sanctions de l'appel abusif*, R.R.D. 1998, p. 171 no. 15; Cass., 3 Chambre, 2.03.2015, R.G. no. C.14.03337.F, Juridat.

[46] M. Stassin, *supra* n. 33, p. 168 and the case law referred to therein; the author adopts a stance different from that in case law and states that the use of professional legal assistance before filing an obviously groundless motion is a circumstance making a party responsible.

that could have been presented without delay after proceedings started, filing illegible pleadings, and lack of interest in the proceedings (inaction).[47]

(4) Misusing procedural law with intentional guilt. Parties' behaviour with intentional guilt or in bad faith that leads to the misuse of procedural law includes, e.g. lying, concealing key information in unilateral proceedings, bringing a suit against a party who clearly has no legal interest in the proceedings (with no legitimacy), personal attacks on a party or their proxy, taking steps that make the proceedings more difficult, slower or more expensive without procedural justification.[48]

(5) Misuse (redirection) of the procedure. This is such a use of statutory procedural measures that makes the way of using them clearly (obviously) different from the purpose for which they were established, e.g. the use of protective measures as a form of pressure on the other party[49].[50]

As far as a fine imposed in accordance with Article 780bis C.j. is concerned, although it is called civil hardship (civil fine), it is treated in case law and the doctrine as a penal sanction. It results in the necessity of ensuring a party against whom the measure has been applied the same penal guarantees that are applicable to a person subject to criminal proceedings, in particular those laid down in the European Convention on Human Rights (e.g. the *ne bis in idem* principle, which excludes the imposition of a fine more than once for the same infringement, and the *lex retro non agit* principle).[51]

The characteristic feature of a civil fine is the fact that a court imposes it *ex officio* and it is to be paid to the State Treasury.[52] It is to compensate for the infringement of the public interest, i.e. harm to the administration of justice.[53] The minimum and maximum amounts thereof are determined. Every five years, the King of Belgium may adjust the limits to the costs of living. A court decides on the actual amount of a fine. According to the judicature, the amount mainly depends on such conditions that are connected with the infringement as the size of harm to the administration of justice (time and cost of a party's procedural activities that constitute the misuse of procedural law, the number of infringements), a party's conduct (the level of guilt and intensity of ill will, the infringement in the course of proceedings or outside thereof), the type and amount of the object of a dispute.[54] It is not excluded that

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[47] Civ. Luxembourg, div. Arlon, 12 Chambre, 15.07.2015, R.G. no. 05/672, unpublished; Bruxelles, 41 Chambre, 14.07.2016, R.G. no. 2015/FA/46, unpublished; Civ. Luxembourg, div. Arlon, 12 Chambre, 25.03.2015, R.G. no. 13/743/A, unpublished; Liège, 3 Chambre, 22.04.2013, R.G. no. 2011/RG/1735, unpublished; Civ. Luxembourg, div. Arlon, 12 Chambre, 24.06.2015, R.G. no. 13/796/A, unpublished; the case law referred to in M. Stassin, *supra* n. 33, p. 168.

[48] M. Stassin, *supra* n. 33, p. 168 and the case law referred to therein.

[49] *Ibid*., pp. 168–169 and the case law referred to therein.

[50] Also on this issue, see J.F. Van Drooghenboeck, *supra* n. 45, pp. 156–157 no. 18; G. Eloy, *La procédure téméraire et vexatoire. Droit judiciaire – Commentaire pratique*, Kluwer 2014, pp. 11–27.

[51] For more on the issue, see M. Stassin, *supra* n. 33, p. 169 and the case law referred to therein.

[52] *Ibid*., p. 166; M. Stassin, *supra* n. 39, thesis 2.

[53] T. De Jaeger, *supra* n. 40, p. 1252.

[54] On the other hand, it should be emphasised that, in accordance with the stance of the Court of Cassation, in the case a fine is imposed on a party, it is not necessary to indicate

a court will also take into account a party's individual features, e.g. his/her income.[55] A judge's discretion to take a decision on the imposition of a civil fine lets him/her abandon it, although a party has misused procedural provisions, e.g. in the case the party gives up an activity constituting the misuse of the procedure, which per se does not prevent the imposition of a fine.[56] Maxime Stassin points out that some courts refuse to impose a civil fine on a party misusing procedural provisions because they believe that it would constitute an admissible obstacle to access to court.[57]

A civil fine, as a rule, is imposed on a party in the substantive sense, not a formal one.[58] On the other hand, the Court of Cassation admits the imposition of a fine on a party's representative if the activity of disrupting a lawsuit can be associated with providing representation.[59]

The civil fine that is laid down in Article 789bis C.j. may be imposed in the judgment closing proceedings in a case, thus only when a court is competent to issue a final judgment at all.[60] This fine is adjudicated *ex officio*. In fact, an opposing party may file a motion to punish a party infringing the procedure, but it remains with no influence on the court's decision. Before the court imposes a fine, it should issue a ruling drawing parties' attention to the recognition of potential misuse of procedural law and enable the parties to explain the situation in writing and during the next hearing. Only then can a party, who has misused the procedure, be punished with a civil fine.

In accordance with Article 780bis para. 2 C.j., if in the course of a lawsuit a claim for compensation is filed and it is admitted, a court may impose a fine within the same judgment. In other cases, it should open a new debate, in accordance with Article 775 C.j., in order to enable parties to make statements concerning the application of Article 780bis C.j.[61] However, as Maxime Stassin points out, in

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intentional action and a fine can be imposed when a party files lawsuits without justified interest or in a way evidently exceeding the limits of a standard use of the procedure by a cautious party, such as the use of the administration of justice for obvious delays or unlawful purposes, which endangers the interests of the parties as well as the appropriate and efficient management of justice administration; Cass. 28.06.2013, C.12.0502.N; T. De Jaeger, *supra* n. 40, p. 1248.

55 M. Stassin, *supra* n. 33, p. 169; Civ. Hainaut, div. Charleroi, 3 Chambre, 7.01.2016, R.G. no. 12/2205/A, unpublished; Civ. Luxembourg, div. Arlon, 12 Chambre, 24.06.2015, R.G. no. 12/142/A, unpublished; Liège, 7 Chambre, 28.04.2015, R.G. no. 2014/RG/1133, unpublished; Civ. Bruxelles, 75 Chambre, 25.04.2014, R.G. no. 2010/12033/A, unpublished; Civ. Bruxelles, 34 Chambre, 16.06.2014, R.G. no. 2013/1688/A, unpublished; Civ. Hainaut, div. Charleroi, 3 Chambre, 29.06.2016, R.G. no. 9918/2016, unpublished; the author who drew attention to the weakness of the institution of a fine, which leaves a too large margin of arbitrariness, is Tijl De Jaeger, who proposed the substitution of a flat-rate amount for the present solution, see T. De Jaeger, in *supra* n. 40, p. 1252.

56 M. Stassin, *supra* n. 33, pp. 169–170; C.T. Bruxelles, 12 Chambre, 23.10.2012, R.G. no. 2012/AB/288, unpublished; Civ. Luxembourg, div. Arlon, 12 Chambre, 3.12.2014, R.G. no. 06/700, unpublished; Cass., 1 Chambre, 16.03.2012, R.G. no. C.08.0323.FetC.09.0590.F, Juridat.

57 M. Stassin, *supra* n. 33, pp. 169–170.

58 T. De Jaeger, in *supra* n. 40, p. 1254.

59 *Ibid*., p. 1255; Cass 16.02.2001, C.99.0477.N; Cass 22.04.1985, AR 4684.

60 Civ. Bruxelles, 21.11.2016, R.G. no. 16/1313/I; M. Stassin, *supra* n. 33, pp. 165–166.

61 Compare, T. De Jaeger, *supra* n. 40, p. 1248; B. Vanlerberghe, S. Rutten, [in:] *De procesrecht-wetten van 2007…revisited!* [*Les lois de procédure de 2007…revisited!*], P. Van Orshoven (ed.), B. Maes et al., Bruxelles: la Charte, 2009, pp. 106–107.

accordance with the concepts concerning the principle of adversariness, prevailing in the doctrine and the judicature, the general rule ordering that a party is ensured the right to defence is not violated when a judge bases the judgment on the circumstances that the parties could have expected the judge to take into account due to the course of a lawsuit, and the parties had an opportunity to deny them.[62] That is why, Article 780bis para. 2 C.j. should not be interpreted in a restrictive way.[63] It is not necessary to open a debate in a situation when the issue of misuse of procedural law has been discussed with the parties. In Stassin's opinion, such interpretation of Article 780bis C.j. should to some extent allow for mitigating the troublesome procedure, and the obtained economy is in conformity with *ratio legis* of the discussed provision the aim of which is to compensate the harm to the administration of justice in case of the misuse of procedural law. Formalistic following the restrictive interpretation of Article 780bis C.j. would have a diverse effect. There is no need to reopen a debate in the case when a motion concerning the procedural misuse has been filed, regardless of which party has filed it, or when the occurrence of the procedural misuse is actually the subject matter of a debate, although no motion has been filed.[64]

It is also important that if a debate is reopened for the purpose of enabling parties to present their stance on the application of Article 780bis C.j., the proceedings are limited, as a rule, to a debate on a civil fine. Filing a motion to rule compensation for bringing a thoughtless or troublesome lawsuit at this stage (*une demande de dommages et intérêts pour procès téméraire et vexatoire*) would be too late and inadmissible.[65]

The ruling on the imposition of a civil fine on a party in accordance with Article 780bis C.j. is subject to standard and extraordinary appellate measures (Article 1050 C.j.). In the case of a cassation, a cassation court may assess whether a judge, based on the facts he/she has established at his/her discretion, has drawn an appropriate conclusion that the misuse of procedural law has occurred. The misuse of procedural law belongs to the category of legal issues and, as such, is within the competence of the court of cassation.[66]

Maxime Stassin, carrying out research into case law in the light of Article 780bis C.j., drew a conclusion that theoretically this provision fulfils the aim of preventing procedural misuse by means of punishing parties who decide to take such steps with a fine, and acting as a deterrent. Pursuant to Article 780bis C.j., however, this causes a few problems. Firstly, as the author argues, the research shows that the rather rigorous wording of the discussed provision, which stipulates reopening of a debate, is troublesome and discourages from imposing a civil fine.

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62 M. Stassin, *supra* n. 33, p. 170; J. Van Compernolle, *Principes directeurs du procès civil*, [in:] *Droit judiciaire*, G. De Leval (dir.), Vol. 2: *Manuel de procédure civile*, Bruxelles: Larcier, 2015, pp. 46–48, no. 1.33–1.36; Cass. 1 Chambre, 29.09.2011, R.C.J.B., 2013, p. 202; Cass., 1 Chambre, 27.09.2013, R.G. no. C.12.0381.F, Juridat; also J.F. Van Drooghenboeck, *Faire l'économie de la contradiction?*, [in:] *Les droits de la défense*, P. Martens (dir.), Bruxelles: Larcier, p. 203.

63 M. Stassin, *supra* n. 33, p. 170.

64 *Ibid*., p. 170 and the case law referred to therein.

65 *Ibid*., p. 171; G. De Leval, *Le jugement*, [in:] *Droit judiciaire*, G. de Laval (dir.), *supra* n. 62, p. 647, no. 7.18; Bruxelles, 9 Chambre, 17.10.2014, R.G. no. 2012/AR/3069, unpublished.

66 M. Stassin, *supra* n. 33, p. 171; F. Dumon, *De l'État de droit*, J.T. 1979, pp. 495–497, no. 17–19.

Secondly, the author highlights a problem with the execution of a civil fine, which also discourages from applying it. Thirdly, a civil fine as a deterrent requires that the maximum amount potentially imposed for this infringement should be raised. On the other hand, a civil fine is inefficient in the case of persons suffering from mental disorders.[67] At the same time, Tijl De Jaeger draws attention to the arbitrariness of the amount of a fine that is determined at a court's discretion in a situation when it is hard to estimate the amount of compensation for harm to the administration of justice resulting from the delay of a lawsuit and decrease in its efficiency.[68]

As a rule, and as it has been said above, the accumulation of a civil fine with other sanctions that are penal in nature is inadmissible. However, the accumulation of a civil fine with other civil hardships is admissible. Such a possibility is directly laid down in Article 780bis C.j., which makes it possible to rule compensation to and on the motion of an opponent party for the use of the procedure in a thoughtless and troublesome way (*une demande de dommages et intérêts pour procès téméraire et vexatoire*), connected with the initiation of a lawsuit hastily and in bad faith in order to misuse procedural law, sanctions for the cost of a lawsuit such as increase in compensation for an obviously irrational situation, or the obligation to cover the costs incurred uselessly or in a troublesome way.[69] Also a non-pecuniary sanction may be taken into account. It consists in the limitation of the possibility of standard use of procedural law (e.g. refusal to admit evidence, exclusion of a pleading from the proceedings).[70]

As concerns compensation for procedural misuse laid down in Article 780bis C.j., a party who has been harmed may file a motion to be awarded compensation for the damage sustained in connection therewith. Seeking such compensation is subject to general rules concerning non-contractual liabilities. This means that the party aggrieved as a result of misuse of procedural law by the opponent that consists in starting a dispute in a thoughtless and troublesome way should prove the guilt of the opponent, the amount of damage sustained and the existence of a causal relationship between the opponent's behaviour and the damage.[71] As a result, it should be assumed that the claim referred to in Article 780bis C.j. is classical

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[67] M. Stassin, *supra* n. 33, p. 171.

[68] T. De Jaeger, *supra* n. 40, p. 1249.

[69] Cass., 1 Chambre, 28.06.2013, R.G. no. C.12.0502.N, Juridat; B. Vanlerberghe, S. Rutten, *Artikel 780bis van het Gerechtelijk Wetboek en de onduidelijkheid inzake het (ver)nieuw(d)e toepassingsgebied van de nietigheidsleer herbekeken*, [in:] *Les lois de procédure de 2007…revisited!*, P. Van Orshoven (ed.), B. Maes et al., Bruxelles: la Charte, 2009, p. 95.

[70] Cass., 1 Chambre 17.10.2008, R.G. no. C.07.0214 N, Juridat; G. De Leval, *L'action en justice*, [in:] *Droit judiciaire*, G. de Laval (dir.), *supra* n. 62, p. 76, no. 2.2; B. Vanlerberghe, S. Rutten, *supra* n. 69, pp. 108–109; G. De Leval, J. Van Compernolle, *Le temps dans le procès civil: réflexions sur la procrastination judiciaire*, [in:] *Le temps et le droit. Hommage au professeur Closset-Marchal*, Bruxelles: Bruylant, 2013, p. 409; J.F. Van Drooghenbroeck, *Voies de recours extraordinaires*, [in:] *Droit judiciaire*, G. de Laval (dir.), *supra* n. 62, p. 1209, no. 9.120; J.F. Van Drooghenbroeck, B. De Coninck, *La loi du 21 avril 2007 sur la répétibilité des frais et honoraires d'avocat*, J.T., 2008, p. 39, no. 5; Bruxelles, 9 Chambre, 25.03.2016, R.G. no. 2013/AR/1185, unpublished, the judgment quoted after M. Stassin, *supra* n. 33, p. 169.

[71] M. Stassin, *supra* n. 39, thesis 7; J. Laenens, D. Scheers, et al., *supra* n. 17, p. 581, thesis 1372; B. Allemeersch, *Valsheid en andere leugens in burgerlijk proces en bewijs*, TPR 2004, pp. 53–54; see also T. De Jaeger, *supra* n. 40, pp. 1247–1248.

compensation that is financial in nature and not redress for harm and pain suffered because of the misuse of procedural provisions. Thus, the damage caused can include a loss of income and the cost of expert opinions or legal advice.

Another mechanism preventing the misuse of the procedure concerns adjudication on the cost of the proceedings that has the features of a sanction.

As a rule, in accordance with the Belgian law, each party to a civil lawsuit must cover their own costs of judicial proceedings, including counsels' remuneration and expenditures. Only after the judgment closing proceedings, a court decides which party and in what amount should cover the costs of the proceedings. To that end, the parties are obliged to provide the court with a detailed list of costs they have incurred in the form of a pleading (Article 1021 C.j.). If the parties do not reach an agreement on covering the costs of the proceedings (which they can do entering a separate contract) and if special provisions do not stipulate otherwise, in general the court orders the party losing the lawsuit to pay or refund the costs that the winning party has incurred (Article 1017 para. 1 C.j.). The exceptions to this rule include, e.g. cases concerning social insurance where the costs of the proceedings are always covered by a social insurance institution or situations where the costs incurred by a party have been unnecessary or incurred to be troublesome. Such costs are fully covered by the party that has caused them, even if the party wins the lawsuit. In accordance with Article 1017 first paragraph C.j., each final judgment, even an *ex officio* one, constitutes an order to pay costs incurred by the winning party, unless special provisions stipulate otherwise, and without prejudice to an agreement reached by the parties. However, unnecessary costs, including lawsuit-related compensation referred to in Article 1022 place, even *ex officio*, a burden on the party that has caused their occurrence.

The provision was amended by Article 81 of the Act of 25 December 2016 on changing the legal situation of convicts and supervision over prisons, and establishing various provisions concerning the administration of justice (which is humorously called *loi Pot-pourri IV*, after a Belgian dish made of leftover food). The amendment makes it possible to impose a specific sanction on a party that has caused unnecessary costs of proceedings (it also concerns a reduction in lawsuit-related compensation referred to in Article 1022 C.j.). The sanction consists in an obligation to cover the costs of proceedings that have been unnecessarily generated (useless costs), thus to incur them even if a party involved wins a lawsuit. It is an institution similar to the solution laid down in Article 103 CCP. The application of the sanction depends on proving that a party that has generated unnecessary costs has made a mistake. Then the court assesses whether the party has or has not acted as a reasonable and conscientious person would in the same circumstances (e.g. when having a choice between cheaper and more expensive proceedings, the party chooses the more expensive ones to harm the defendant).[72] However, it must be emphasised that the Court of Cassation took a stance that the plaintiff's choice of more expensive judicial proceedings instead of voluntary alternative and cheaper proceedings in order to recover an unquestionable debt (called IOS procedure) cannot

[72] M. Stassin, *supra* n. 39, thesis 11.

be recognised as generating useless costs.[73] The solution adopted in Article 1017 C.j. raises doubts in the Belgian doctrine. It is indicated that, in particular, the concept of useless costs is ambiguous and that it can generate new disputes.[74]

Another possibility of imposing a sanction on a party concerning costs of proceedings is laid down in Article 1022 C.j., under which the so-called proceeding-related compensation (a proceeding extra) may be increased or decreased. The costs of a Belgian lawsuit are listed in an open catalogue provided for in Article 1018 C.j. Apart from typical costs, such as fees or travelling expenses, there is also a proceeding extra defined in Article 1022 C.j., which is also called proceeding-related compensation for the cost of legal services. It is a flat-rate amount awarded by a court to a party winning a lawsuit who has been represented by a professional proxy.[75] In accordance with Article 1022 C.j., the compensation is specified in a basic minimum and maximum amounts, established in the King's decree and adopted by the Council of Ministers depending on the type of a lawsuit and the weight of a dispute. As a rule, a party winning a lawsuit is entitled to that flat-rate extra in its basic amount. On the party's request, it can be raised or reduced but only within the limits of the minimum and maximum amount determined in the decree. Raising or reducing the amount of the proceeding-related compensation to a winning party, the court may take into account one or a few criteria laid down in Article 1022 C.j. These include:

(1) the financial situation of a party losing a lawsuit as grounds for reducing the amount of compensation;
(2) the complexity of a case;
(3) the amount of proceeding-related compensation for a winner agreed upon in a contract between parties;
(4) apparently irrational (unreasonable) nature of the situation.

The sanction, applicable to situations laid down in subsection (4), is not only applied in the case of aggravated and evident misuse of the procedure in the way that exceeds the limits of its standard application by a reasonable and conscientious person, i.e. in the form that is required for the initiation of the sanction under Article 780bis C.j. The increase or decrease in the cost of a lawsuit (proceeding-related compensation) is admissible when it turns out that the exercise of the right to act or to defend in a court has been apparently groundless (procedural misuse). The increase in the cost of a lawsuit differs from the institution of compensation referred to in Article 780 C.j., mainly because the party requesting the increase or decrease in costs does not have to prove that a perpetrator has committed a procedural infringement and the fact of sustaining harm and its level. It is sufficient to invoke

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[73] Cass. 12.10.2017, C.17.0120.N; A. Wynter, *Invorderen via rechtbank in plaats van via IOS is niet per se fout*, Juristenkrant 2017, afl. 350, 2; see also T. De Jaeger, *supra* n. 40, pp. 1229–1230.

[74] For more on the issue, see T. De Jaeger, *supra* n. 40, p. 1230–1231, who presents an opinion that the useful costs can be interpreted as efficient costs, generating advantage, and useless costs are those that can be avoided, and finally, that it is not known whether this concerns costs that are useless for a party or for the administration of justice (public sphere).

[75] P. Taelman, C. Van Severen, *supra* n. 16, p. 138, vol. 436.

an 'evidently irrational situation', which has not been legally defined, though.[76] Thus, it may concern, e.g. the necessity of a proxy's stronger involvement as a result of evidently irrational charges made by the defence.

3. CONCLUSIONS

The above-presented comparison of the Polish and Belgian systems of procedural law indicates that the systems are very similar in the field of ensuring efficient judicial management of evidence hearing before a court of first instance. First of all, in both systems of procedural law it is the court that manages evidence hearing and the court's activity consists in the supervision of the appropriateness of presenting evidence and facts that are to be proved, in the verification whether evidence that parties intend to present will be sufficient and admissible, in the interpretation and evaluation of presented evidence, as well as in the possibility of taking investigative steps *ex officio*. In both legal systems, these are parties who are obliged to present procedural material. The Polish Code of Civil Procedure regulates the issue of time when this presentation should take place in a more detailed (formalistic) way. Both systems of procedural law authorise the court to admit evidence *ex officio* (only this evidence of which the court knows that the parties have). However, the Belgian Code introduces some restrictions resulting directly from the provisions, consisting in the fact that the court may order that facts decisive for a lawsuit result must be proved (Article 916 C.j. concerning witnesses), and that ordering a presentation of evidence, a judge should choose the fastest, cheapest and simplest method of fact finding, as well as limit his/her action to the necessary minimum (Article 875bis C.j. concerning the principle of proportionality). On the other hand, it is the judicature that has shaped the requirements for admission of evidence *ex officio* in both legal systems. In the Polish as well as Belgian civil procedure, there is an institution of misuse of procedural law, which carries a sanction of a fine; and in both systems, the misuse of procedural law is defined in statute (Article 4^1 CCP, Article 780bis C.j.). In the Polish system of procedural law, a court is obliged to inform parties that their behaviour can be recognised as misuse of procedural law; and in the Belgian system, it is necessary to open a debate, unless a court simultaneously admits a party's request to rule compensation for disrupting the course of a lawsuit. In both legal systems, there is a possibility of imposing a burden of increased costs of proceedings on a party misusing the procedure. In accordance with the Polish Code of Civil Procedure, claiming compensation for misuse of the procedure by an opponent in proceedings is inadmissible. However, it is a right solution because it must lead to the lengthening of proceedings.

[76] M. Stassin, *supra* n. 39, theses 8–10.

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JUDICIAL MANAGEMENT OF EVIDENCE HEARING BEFORE A COURT OF FIRST INSTANCE: POLISH SYSTEM VS BELGIAN SYSTEM

Summary

The article presents a comparison of selected aspects of the judicial management of evidence hearing before a court of first instance in the Polish and Belgian systems of procedural law. It discusses the issue of ensuring the efficient management of evidence hearing, which is one of the major principles of civil proceedings in both discussed legal systems. The main role of the court in evidence hearing consists in supervising whether evidence reported by the parties is appropriate, verifying its admissibility and usefulness, interpreting and evaluating this evidence, and finally, in the possibility of taking steps *ex officio* in this respect. In both the Polish and Belgian civil procedure, the burden of proof is on the parties; however, it is the court that, being the manager of evidence hearing, also safeguards adherence to the principles of free exercise of rights, adversariness, and evidence concentration in a lawsuit. The possibility of admitting evidence *ex officio*, which is laid down in both legal systems, is to some extent limited in the Belgian one, which is directly expressed in the provisions. On the other hand, parties' activity in the field of evidence presentation is more formalised in the Polish system. There are also major differences with respect to the misuse of procedural law.

Although it has been statutorily defined in both countries, carries the penalty of a fine and imposes similar obligations on the court towards the parties to a lawsuit, in Poland, unlike in the Belgian system, there is no possibility of claiming compensation for the procedural law misuse by an opponent within the same proceedings.

Keywords: judicial management, evidence hearing, principle of free exercise of rights, principle of adversariness, principle of evidence concentration, misuse of procedural law

SĘDZIOWSKIE KIEROWNICTWO POSTĘPOWANIEM DOWODOWYM PRZED SĄDEM PIERWSZEJ INSTANCJI: SYSTEM POLSKI – SYSTEM BELGIJSKI

Streszczenie

Artykuł stanowi porównanie wybranych aspektów sędziowskiego kierownictwa postępowaniem dowodowym przed sądem pierwszej instancji w polskim i belgijskim systemie prawa procesowego. Opracowanie porusza problematykę zapewnienia przez sędziego sprawnego kierowania postępowaniem dowodowym, które należy do jednej z naczelnych zasad postępowania cywilnego w obu omawianych systemach. Wiodąca rola sądu w prowadzeniu postępowania dowodowego przejawia się w nadzorowaniu prawidłowości zgłaszanych przez strony dowodów, weryfikacji ich pod kątem dopuszczalności i przydatności, w interpretacji i ocenie przedstawionych dowodów, a wreszcie – w możliwości podejmowania w tym zakresie działań z urzędu. Zarówno w polskiej, jak i belgijskiej procedurze cywilnej obowiązek prezentowania materiału dowodowego spoczywa na stronach, jednak to sąd, będąc zarządcą postępowania dowodowego, czuwa jednocześnie nad przestrzeganiem w procesie cywilnym zasad dyspozycyjności, kontradyktoryjności oraz koncentracji materiału dowodowego. Przewidziana w obu systemach prawnych możliwość dopuszczania dowodów z urzędu, w systemie belgijskim doznaje pewnych, wyrażonych wprost w przepisach, ograniczeń. W systemie polskim natomiast bardziej sformalizowany charakter nadano aktywności stron w przedstawianiu dowodów. Zasadnicze różnice występują także w zakresie nadużycia prawa procesowego. Choć instytucja ta w obu krajach doczekała się definicji ustawowej, obwarowana jest sankcją grzywny oraz nakłada na sąd zbliżone obowiązki względem stron postępowania, to w Polsce – w przeciwieństwie do systemu belgijskiego – nie przewidziano możliwości dochodzenia w tym samym postępowaniu odszkodowania z tytułu nadużycia prawa procesowego przez przeciwnika.

Słowa kluczowe: sędziowskie kierownictwo, postępowanie dowodowe, zasada dyspozycyjności, zasada kontradyktoryjności, zasada koncentracji materiału dowodowego, nadużycie prawa procesowego

LA GESTIÓN JUDICIAL DE LA FASE DE PRUEBA ANTE EL TRIBUNAL DE PRIMERA INSTANCIA: EL SISTEMA POLACO – EL SISTEMA BELGA

Resumen

El artículo compara algunos problemas de la gestión judicial de la fase de prueba ante el Tribunal de Primera Instancia en el derecho procesal polaco y belga. El juez ha de asegurar el transcurso ágil de la fase de prueba, es una de las reglas principales del proceso civil en ambos sistemas. El papel principal del Tribunal a la hora de llevar a cabo la fase de prueba consiste en vigilar la

regularidad de las pruebas solicitadas por las partes, verificarlas en cuanto a su admisibilidad y utilidad, interpretarlas y valorarlas y por fin – actuar de oficio cuando proceda. Tanto en el proceso civil polaco como en el proceso civil belga, las partes tienen la obligación de presentar material de prueba, sin embargo el Tribunal, siendo el administrador de la fase de prueba, vigila al mismo tiempo el cumplimiento de principio dispositivo, de contradicción y de concentración. La posibilidad prevista en ambos sistemas de admitir pruebas de oficio en caso del sistema belga está limitada a ciertos casos determinados directamente por la ley. El sistema polaco otorga el carácter más formal a la actividad de las partes a la hora de presentar las pruebas. Las diferencias principales existen también en cuanto al abuso de derecho procesal. Aunque esta institución en ambos países tiene la definición legal, sancionada con la pena de multa y el Tribunal tiene obligaciones similares frente a las partes del proceso, sin embargo en Polonia – a contrario con el sistema belga – no está prevista la posibilidad de reclamar en el mismo proceso la indemnización debido al abuso de derecho procesal por la parte contraria.

Palabras claves: gestión judicial, fase de prueba, principio dispositivo, principio de contrariedad, principio de concentración, abuso de derecho procesal

СУДЕЙСКОЕ РУКОВОДСТВО ИССЛЕДОВАНИЕМ ДОКАЗАТЕЛЬСТВ В СУДЕ ПЕРВОЙ ИНСТАНЦИИ: СРАВНЕНИЕ ПОЛЬСКОЙ И БЕЛЬГИЙСКОЙ СИСТЕМ

Аннотация

В статье сравниваются отдельные аспекты судейского руководства исследованием доказательств в суде первой инстанции в системах процессуального права Польши и Бельгии. Автор рассматривает проблемы, связанные с обеспечением судьями эффективного руководства исследованием доказательств, что является одним из основных принципов гражданского судопроизводства в обеих рассматриваемых системах. Ведущая роль суда при исследовании доказательств выражается в контроле за корректностью доказательств, представляемых сторонами процесса, проверке их допустимости и применимости, толковании и оценке представленных доказательств и, наконец, в возможности действовать в этой связи по обязанности (*ex officio*). Как в польском, так и в бельгийском гражданском судопроизводстве обязанность представлять доказательства возложена на стороны процесса. Однако, именно суд, осуществляя руководство исследованием доказательств в ходе гражданского процесса, обеспечивает тем самым соблюдение принципов диспозитивности, состязательности и концентрации процессуального материала. Хотя обе правовые системы допускают возможность принятия доказательств по обязанности (*ex officio*), в бельгийской системе это сопряжено с некоторыми ограничениями, прямо выраженными в законодательстве. С другой стороны, в польской системе действиям сторон по представлению доказательств придан более формализованный характер. Имеются также существенные различия в отношении злоупотребления процессуальным правом. В обеих странах разработано законодательное определение таких злоупотреблений, а за их совершение предусмотрено наказание в виде штрафа. Схожий характер имеют и обязанности суда по отношению к сторонам процесса. Однако, в отличие от бельгийского права, польское законодательство не предусматривает возможности требовать в рамках одного и того же процесса возмещения ущерба за злоупотребление противной стороной процессуальным правом.

Ключевые слова: судейское руководство; исследование доказательств; принцип диспозитивности; принцип состязательности; принцип концентрации процессуального материала; злоупотребление процессуальным правом

DIE RICHTERLICHE LEITUNG DES BEWEISVERFAHRENS VOR DEM ERSTINSTANZLICHEN GERICHT: POLNISCHES SYSTEM – BELGISCHES SYSTEM

Zusammenfassung

In dem Artikel werden ausgewählte Aspekte der richterlichen Leitung von Beweisverfahren vor Gerichten der ersten Instanz im polnischen und belgischen System des Verfahrensrechts verglichen. Die Studie befasst sich mit der Frage der Sicherstellung einer effizienten Führung des Beweissicherungsverfahrens durch den Richter – in beiden besprochenen Rechtssystemen eines der Grundprinzipien des Zivilverfahrens. Die führende Rolle des Gerichts bei der Beweisaufnahme kommt in der Überwachung der Richtigkeit der von den Parteien vorgetragenen Beweise, ihrer Prüfung hinsichtlich der Zulässigkeit und Relevanz, bei der Interpretation und Bewertung der vorgelegten Beweise und schließlich in der Möglichkeit zum Ausdruck, diesbezüglich von Amts wegen tätig zu werden. Sowohl im polnischen als auch im belgischen Zivilverfahren lastet die Pflicht zur Vorlage von Beweisen auf den Parteien, doch es ist das Gericht als Herr des Beweisverfahrens, das gleichzeitig die Einhaltung der Grundsätze der Verfügbarkeit, des rechtlichen Gehörs und des Prinzips der Konzentration von Beweismitteln in Zivilverfahren sicherstellt. Die in beiden Rechtssystemen vorgesehene Möglichkeit einer Aufnahme von Beweisen von Amts wegen unterliegt in der belgischen Rechtsordnung bestimmten, in den Vorschriften ausdrücklich genannten Einschränkungen. Im polnischen Rechtswesen sind die Aktivitäten der Parteien bei der Vorlage von Beweismitteln dagegen stärker formalisiert. Grundlegende Unterschiede bestehen auch hinsichtlich des Missbrauchs des Verfahrensrechts. Obwohl für diese juristische Institution in beiden Ländern eine gesetzliche Definition eingeführt wurde, sie mit einer Geldbuße belegt wird und dem Gericht ähnliche Verpflichtungen gegenüber den Verfahrensbeteiligten auferlegt werden, ist es in Polen – anders als in Belgien – nicht möglich, im selben Verfahren Schadensersatz wegen Verfahrensmissbrauch durch den Verfahrensgegner geltend zu machen.

Schlüsselwörter: richterliche Leitung, Beweisverfahren, Grundsatz der Verfügbarkeit von Beweismitteln, Grundsatz des rechtlichen Gehörs, Grundsatz/Prinzip der Konzentration der Beweismittel, Verfahrensmissbrauch

GESTION JUDICIAIRE DES PROCÉDURES DE PREUVE DEVANT LE TRIBUNAL DE PREMIÈRE INSTANCE: SYSTÈME POLONAIS – SYSTÈME BELGE

Résumé

L'article compare certains aspects de la gestion judiciaire des procédures de preuve devant le tribunal de première instance dans le système de droit procédural polonais et belge. L'étude examine la question d'assurer par le juge une gestion efficace de la procédure de preuve, qui est l'un des principes directeurs de la procédure civile dans les deux systèmes discutés. Le rôle de premier plan du tribunal dans la conduite de la procédure de preuve se manifeste dans le contrôle de l'exactitude des preuves présentées par les parties, sa vérification en termes de recevabilité et d'utilité, dans l'interprétation et l'évaluation des preuves présentées, et enfin – dans la possibilité d'entreprendre des actions d'office à cet égard. Tant dans la procédure civile polonaise que belge, les parties sont tenues de présenter des preuves, mais c'est le tribunal, en tant qu'administrateur de la procédure de preuve, qui assure en même temps

le respect des principes de disponibilité, contradictoire et de concentration des preuves dans la procédure civile. La possibilité d'admettre d'office des preuves, prévue dans les deux systèmes juridiques, est soumise à certaines limitations exprimées directement dans la réglementation du système belge. Dans le système polonais, cependant, l'activité des parties en matière de présentation de preuves est plus formelle. Il existe également des différences fondamentales en ce qui concerne l'abus du droit procédural. Bien que cette institution ait été définie par la loi dans les deux pays, elle est passible d'une amende et impose au tribunal des obligations similaires envers les parties à la procédure, en Pologne – contrairement au système belge – il n'est pas possible de réclamer des dommages et intérêts pour abus de droit procédural par adversaire dans la même procédure.

Mots-clés: gestion judiciaire, procédure de preuve, principe de disponibilité, principe contradictoire, principe de concentration des preuves, abus de droit procédural

DIREZIONE GIUDIZIARIA DEL PROCEDIMENTO PROBATORIO PRESSO IL TRIBUNALE DI PRIMO GRADO: SISTEMA POLACCO – SISTEMA BELGA

Sintesi

L'articolo costituisce un confronto di aspetti scelti della direzione giudiziaria del procedimento probatorio presso il tribunale di primo grado nel regime di diritto procedurale polacco e belga. L'elaborato tocca la questione della garanzia della buona direzione del procedimento probatorio da parte del giudice, che costituisce una delle norme primarie della procedura civile in entrambi i sistemi giuridici descritti. Il ruolo determinante del giudice nella direzione del procedimento probatorio si manifesta nella vigilanza sulla correttezza dei mezzi di prova presentati dalle parti, nella loro verifica sotto l'aspetto dell'ammissibilità e dell'utilità, nell'interpretazione e nella valutazione dei mezzi di prova presentati e infine nella possibilità di intraprendere azioni d'ufficio in tale ambito. Sia nel sistema di procedura civile polacco che in quello belga, l'obbligo di presentare il materiale probatorio grava sulle parti, tuttavia il giudice, in quanto curatore del procedimento probatorio, vigila allo stesso tempo sul rispetto, nel processo civile, del principio dispositivo, del principio del contraddittorio e del principio della concentrazione delle prove. La possibilità, prevista in entrambi i sistemi giuridici, di ammissione di prove d'ufficio, nel sistema belga è sottoposta a certe determinate limitazioni, indicate espressamente nelle norme di legge. Nel sistema polacco invece è stato attribuito un carattere più formalizzato all'azione delle parti nel presentare i mezzi di prova. Differenze essenziali si presentano anche nell'ambito dell'abuso del diritto processuale. Sebbene tale istituto in entrambi i paesi abbia finalmente ricevuto una definizione normativa, è sanzionato con ammenda e impone al giudice obblighi simili nei confronti delle parti del procedimento, in Polonia – a differenza del sistema belga – non è stata prevista la possibilità di rivendicare nello stesso procedimento un risarcimento danni a titolo di abuso del diritto processuale da parte dell'avversario.

Parole chiave: direzione giudiziaria, procedimento probatorio, principio dispositivo, principio del contraddittorio, principio della concentrazione delle prove, abuso del diritto processuale

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