

## BOOK REVIEW NOTES

### CIVIL LITIGATION IN CHINA AND EUROPE<sup>1</sup>

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The powers of the judge in civil proceedings had, for a long time, been considered only before the distorting mirror of ideological approaches: the choice in favour of a more or less active role of the judge was considered as a mere implication of the general policy of a particular State and a means, among others, to enforce such policy. As many know, in the last decades the scholars in procedural law have chosen a more realistic approach. The so-called 'case management' is more and more often looked at as the point of balance between the search for efficient procedures and the need for a quality decision.

The thread running through *Civil Litigation in China and Europe* is exploring how and why, with a few exceptions, the modern reforms of civil procedure in the world tend to increase the procedural efficiency providing for enough judicial 'managerial' powers, even though with the constant worry to avoid harming the fundamental principles of party disposition and of the impartiality of the judge. The second, though not less important, goal of this collection of essays is to provide both Chinese and European scholars with information on each other's procedural system in the English language, thus facilitating research that is often rendered nearly impossible by language barriers. As the two editors Remco van Rhee and Fu Yulin explain in the first introductory chapter, the book is also intended for the law reformers who want to explore the multiple ways of improving judicial case management in their own countries.

The book is divided into seven parts, belonging to the original research project, sponsored by the European Union and the People's Republic of China, which deal with I – China: Mainland, II – China: Hong Kong, III – Austria & Germany, IV – Croatia,

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<sup>1</sup> Reviewed book: *Civil Litigation in China and Europe: Essays on the Role of the Judge and the Parties* (= 31 *Ius Gentium: Comparative Perspectives on Law and Justice*) (C.H. (Remco) van Rhee & Fu Yulin, eds.) (Springer 2014).

V – Italy, VI – The Netherlands, and VII – Romania, respectively. An annex (Pt. VIII) on case management in England and Wales and in France concludes the book. Each of the first seven sections includes a national report which describes the main features of the jurisdiction under consideration, focusing on judicial case management. Many of them also include further (and shorter) essays on specific issues, in most cases on ADR techniques. This collective research project has an interesting approach, also to ADR, and especially mediation, which are mainly considered from the point of view of case management. Therefore, the authors put a special emphasis on court-suggested and court-annexed mediation, as tools that can, at the same time, help both in reducing the backlogs and in re-establishing good relationships between the parties. Furthermore, all national reports end with useful charts of facts and figures on the judicial organization of the country at stake.

In Ch. 2, the first one of the Chinese (Mainland) section (Pt. I), the authors Wang Yaxin and Fu Yulin immediately impress the European reader describing the extraordinary speed of Chinese civil litigation, where first instance proceedings last no more than six months, a time that is halved in appellate proceedings. Efficiency is one of the best known qualities of Chinese people and it can also be attributed to the Chinese judiciary, which is organized in order to dispose of all cases in a very short time. While, in the last 30 years, China has been moving from a totally judge-centered system towards a new rule, where the principles of party disposition and burden of proof are almost recognized, judges still maintain a very strong position in Chinese civil litigation. At the same time, as also explained in a more detailed way in Chs. 3, by Cai Yanmin, and 4, by Wang Fuhua, the term ‘trial management’ in China is mainly intended to define the organizational structure of the courts, that appears to be strongly based on hierarchy and, as the authors highlight, put forward the efficiency at the possible cost of judicial independence and quality of the decisions: senior judges are not only authorized to assign specific affairs to junior colleagues and assess their performance, based on fixed efficiency indexes. Senior judges are also requested to direct their work in the most complex cases, including also the decision on the merits. As far as mediation is concerned, the authors avoid reviving the old adage according to which Confucius taught Chinese people to prefer a settlement to litigation, which has had great (and probably undeserved) success in Europe. Instead, the authors focus on the great pressure put on Chinese judges to induce the parties to settle cases, which often turns into a quasi-mandated settlement that may leave the parties unsatisfied. Not only should the Chinese contributions be appreciated for their clarity, but they also follow a realistic approach, presenting the reader with the pros and cons of that judicial system, thus proving to be really useful for a non-Chinese reader.

Part II of the book is focused on the legal order of Hong Kong. In Ch. 5, Peter C.H. Chan, David Chan, and Chen Lei introduce the reader to a model that presents all the main features of English and Welsh jurisdictions. The authors explain how, after the handover to China, Hong Kong maintained the current system of adjudication, instead of adopting the (really different) Chinese one and cherry-picked the Lord

Woolf reform with the Civil Justice Reform (CJR), which came into effect on April 2, 2009. This way, judicial case management was improved, though without expressly providing for the application of the principle of proportionality as an 'overriding objective.' In Ch. 6, Christopher To analyzes the impact of the CJR on ADR. Also in this field, an English-like approach emerges. While Hong Kong is and remains an arbitration-friendly jurisdiction, it prefers the English approach to mediation, strongly based on voluntariness, even though judges have now started to encourage parties to mediate when they feel it appropriate for the case at stake.

Part III is dedicated to Austria and Germany, presented as very similar and comparable systems. In Ch. 7, Andrea Wall jointly analyzes, with an optimistic approach, the history of procedural reforms in Austria and Germany, which, according to the view of the author, produced two really efficient systems. Both the managerial powers of the judge and cooperation with the parties are key ingredients of the recipe of Austrian and German procedural efficiency. The Austrian cooperative model is the subject of Ch. 8, by Irmgard Griss, who reports the experience of a judge whose 'work and understanding of civil procedure have been shaped by the ideas of Franz Klein.' In Ch. 9, Burkhard Hess offers a vivid insight of the German model of court-annexed mediation, held by 'mediation judges,' including not only the legal issues, but also the political debates that surrounded this interesting institution.

In Ch. 10, the sparkling style of Alan Uzelac opens Pt. IV, devoted to the Croatian legal order. The author describes a system that is still in transition: after the Austrian influence, the socialist regime significantly increased judicial powers, though not in a managerial view, but as 'an instrument of paternalistic control.' A path of modernization is still under way and the reader is faced with an example of a system where inefficiency issues are still present notwithstanding (and, perhaps, also due to) extensive judicial powers. In Ch. 11, Mario Vukelić explains how Croatian lawmakers are trying to attract business to that country by improving commercial courts (an old Croatian institution) and also with the simplification of substantive law.

Part V is devoted to Italy and includes Ch. 12, where Elisabetta Silvestri describes the ingredients of the toxic cocktail which has poisoned Italian civil justice for decades: outdated rules, the huge differences between the law in books and the law in action, and the inconsistency of procedural reforms. In spite of the (outward) continuous attempts made by Italian lawmakers to improve the situation of civil justice, the author is quite pessimistic as far as concrete results are concerned, even though, considering that the bottom is very near, she hopes 'that the ascent will begin soon.'

In Pt. VI, the Dutch authors depict an opposite scenario, where judicious reforms turned the rather inefficient and totally party-controlled civil judicial system of the Netherlands into a swift and well organized one. Remco van Rhee and Remme Verkerk (with a contribution by Rob Jagtenberg on mediation) explain how it happened in Ch. 13, from both the points of view of procedural rules and of judicial organization. Chapter 14, where Rob Jagtenberg discusses mediation as a case management tool, is of particular interest to the reader. Indeed, despite being in the Dutch section, it deals with

mediation not only in the Netherlands, but also from a general European point of view, and is helpful to understand the reasons of European Union policies on mediation.

In Pt. VII, Serban S. Vacarelu and Adela O. Ognean outline the Romanian judicial system throughout Ch. 15. The authors criticize the continuous reform process that is under way in Romania, where the new Procedural Code came into force in 2013 but where lawmakers amend the rules 'almost every year.' Even though they conclude that their system is rather efficient, if compared with other European systems, they still find room for improvement.

As mentioned before, Pt. VII is a useful annex to the original research project, focusing on English / Welsh and French jurisdictions. In Ch. 16, Neil Andrews depicts the fundamental role of case management in English and Welsh civil procedure after the Lord Woolf reform and its relationship with the compliance to procedural rules by the parties. In Ch. 16, Emmanuel Jeuland explains the evolution of case management in France, especially after the major reform of the Code of Civil Procedure that came into force in 1976. Several interesting considerations deal with case management by way of agreements between the judge and the parties.

In the end, it could easily be said that the book meets and probably exceeds its goals. The analysis of case management systems throughout China and Europe shows, both by means of theoretical explanations and practical examples, that providing the judge with 'managerial' powers works like a good medicine to improve the efficiency of civil litigation without neglecting the quality of the decisions. However, like any other medicine, it has to be taken in the appropriate way and in the correct dose, otherwise it could prove to be a poison. Some examples of the good and bad use of judicial case management, found in this book, may be of help both to the scholars and to the law reformers who are in search of the best use of this powerful treatment. On the other hand, this comparative research proves once again the utmost importance of judicial organization as far as efficiency and quality of adjudication are concerned. The best procedural rules (even supposing, for the sake of argument, that there is one best set of procedural rules) are of no avail to this purposes when one has to deal with an inefficient or otherwise unsatisfactory judiciary. Last but not least, this book is of help also as a source of information on several civil litigation systems, overcoming the language barriers. In this respect, the reader will appreciate the careful choice of the national reporters: as the list of authors shows, almost every one of them is a recognized academic expert in his / her own country and this is an assurance of the thoroughness of the information provided.

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