MECHANISM OF THE PROCEDURAL LAW GLOBALIZATION OR 29-TH REGIME OF PROCEDURAL LAW IN EUROPEAN COMMUNITY

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The study of civil procedure harmonization in European juridical doctrine has traditionally been connected with the names of such well-known processualists as M. Cappeletti and M. Storme, as well as with their fundamental works "Access to Justice" (1978–1979)[1] and "Approximation of Judiciary in the European Community. Final report" (1993)[2]. The year 2013 was the 20th jubilee year of "M. Storme's group" final report publishing; that year and its culmination are considered to be the reason for summarizing and planning the prospects for further development of one of the main civil procedure trends.

Clause 65 of the Treaty establishing the European community[3] is the legal basis for civil procedure harmonization. According to the abovementioned clause the European Union should develop civil claims' judicial cooperation with cross-border consequences. Such cooperation might include the arrangements for national laws and rules of EC members coming together, and specifically the improvement and simplification of cross-border judicial and non-judicial documentation serving; evidence collecting; admission and enforcement of judgments in civil and commercial cases, as well as extrajudicial resolutions; harmonization for regulations, which are applied by EC members for law and jurisdiction conflicts; elimination of any obstacles for civil proceedings normal functioning by harmonizing the civil code regulations of EC members.

So called European judicial law[4] has appeared as a result, which according to Gerhard Wagner is a

[1] CAPPELLETTI, M. *Access to justice and the welfare state*. Publications of the European University Institute. Florence, 1981.

[2] *Approximation of Judiciary in the European Union. Part XIX*. Ed. by M. Storme. Working group for the approximation of the civil procedural law in Europe. Study on the approximation of laws and rules of the Member States concerning certain aspects of the procedure for civil litigation. Final report. Kluwer Rechtswetenschappen België, 1994.

[3] Consolidated version of the Treaty establishing the European Community. *Official Journal of European Communities*. 24 Dec. 2012, p. 33–184.

[4] STORME, M. Tomorrow's Civil Trial. *The Recent Tendencies of Development in Civil Procedural Law*: International Conference to Celebrate the 100-th Anniversary of the Birth of Prof. Jonas Žėruolis. Vilnius: Justitia, 2007, p. 18; САХНОВА, Т. В. Гармонизация процессуального права: будущее судебной защиты. Финансовая система России: опыт и перспективы правового регулирования: Материалы межд. научно-практ. конф. 4–5 сент. 2008 г., с. 313.

fast developing field, if spoken by the quantity of rules and directions issued by European Commission in the last decade[5]. In this case, Xandra E. Kramer's point of view seems reasonable, that most of the rules introduced in compliance with clause 65 of EC Treaty are "classic"[6] and show traditional ways for harmonization in Europe[7]. Those traditional methods include using of conventions, standard treaties and acts of EC community law (rules), the detailed review of which can be found in literature[8].

However, it's a wrong belief that harmonization process is a smooth matter for Europe. Such point of view would be shallow, one-sided and obsolete. Europe has faced some serious difficulties, intensifying the discussions about the meaning of European civil procedure harmonization and its further realization.

1. Cross-border consequences

One of the leading ideologists of the harmonization opposition who challenged "M. Storme's group" final report and pointed at its weaknesses is H. Lindblom. According to Lindblom, it does not appear from the report whether it merely frames minimum requirements of the civil procedure or aims at framing standard rules. In the former case, harmonizing effect of such framing the minimum requirements is doubtful, while in the latter case the measures proposed are evidently unable to improve situation in the countries, which enjoy higher quality of the procedural rules[9].

The aforementioned criticism seems reasonable because of clause 65 of EC Treaty itself, for it reduces judicial cooperation to issues with cross-border consequences only. The formulation is frequently discussed, and literature presents diametrically opposed opinions thereon.

For instance, M. Storme asserts that the term "issues with cross-border consequences" has recently received a very broad meaning and virtually relates to all kinds of disputes[10]. In Strom's opinion, it is impossible to insist in good earnest that efficient civil proceeding must by applied for cross-border disputes only. Adhering to the narrow interpretation of EC Treaty clause 65 and development of a more effective set of procedures for cross-border disputes, thus overriding domestic civil proceedings, would result in discrimination. Naturally, if procedural rules are more effective in some jurisdiction than in any other one, distortions are inevitable[11].

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[5] WAGNER, G. Harmonization of Civil Procedure – Policy Perspectives. *Civil Litigation in a Globalising World*. Ed. by X. E. Kramer, C. H. van Rhee. T.M.C. Asser Press, 2012, p. 93.

[6] KRAMER, X. E. A Major Step in the Harmonization of Procedural law in Europe: the European Small Claims Procedure. *The XIII-th World Congress of Procedural Law: The Belgian and Dutch Report*. Antwerpen: Interesentia, 2008, p. 253.

[7] DEL DUCA, L. F. Developing Global Transnational Harmonization Procedures for the Twenty-First Century: The Accelerating Pace of Common and Civil law Convergence. *Texas International Law Journal*, 2007, Vol. 42:625, p. 628.

[8] See e.g.: CADIET, L. Introdaction to French Civil Justice System and Civil Procedural Law. *Ritsumeikan Law Review*, 2011, № 28, p. 386. DUBINSKY, P. R. Human Rights Law Meet Private Law Harmonization: The Coming Conflict. *The Yale Journal of International Law*, 2005, Vol. 30:211; KRAMER, X. E. A Major Step <…>, p. 253; NEKROŠIUS, V. *Europos Sąjungos civilinio proceso teisė*. Pirma dalis. Vilnius: Justitia, 2009, p. 14; WAGNER, G. Harmonization of Civil Procedure <…>, p. 93–95; КРЫМСКИЙ, Д. И. Упрощенные производства в гражданском процессе зарубежных стран: Дисс. канд. юрид. наук. Москва, 2011, с. 170–184; КОМАРОВ, В. Гражданский процесс в глобальном контексте. *Право Украины*, 2011, № 9–10, с. 282–284; САХНОВА, Т. В. Континентальный процесс: основное противоречие в контексте современных тенденций. Защита прав в России и других странах Совета Европы: современное состояние и проблемы гармонизации, Краснодар: Юрид. центр Пресс, 2011, с. 59–60.

[9] See: RHEE VAN, C. H. Harmonisation of Civil Procedure: an Historical and Comparative Perspective. *Civil Litigation in a Globalising World*. Ed. by X. E. Kramer, C. H. van Rhee. T. M. C. Asser Press, 2012, p. 39–65.

[10] STORME, M. Closing comments: Harmonisation or Globalisation of Civil Procedure? *Civil Litigation in a Globalising World*. Ed. by X. E. Kramer, C. H. van Rhee. T. M. C. Asser Press, 2012, p. 383.

[11] STORME, M. Closing comments <…>, p. 383.

Paulien M.M. van der Grinten and C.H. van Rhee are like-minded with M. Storme.

Thus, C.H. van Rhee believes that the differences between procedural laws of EC countries always have cross-border consequences in themselves. For instance, organizations decide where to manufacture and sell their products depending on valid procedural regulations[12].

P.M.M. van der Grinten notes that Dutch legal doctrine solves the issue concerning meaning of EC Treaty clause 65 in a relatively simple manner. Namely, the doctrine prescribes that the clause should not be highlighted and hinder harmonization of the national civil procedural laws[13].

Meanwhile, most of EC countries tend towards literal interpretation of the clause and require that a cross-border element must be present, at least potentially (for instance, when a judgment might be subject to enforcement in any other state). The reason for the narrow interpretation is that any measure implemented by the Community shall have legal basis stipulated by a contract. Therewith, if clause 65 of the Treaty establishing EC is interpreted in a broad sense, the phrase about cross-border consequences loses its meaning, although it was a subject of long and substantial discussions at the Treaty creation[14].

This point of view is shared by X.E. Kramer[15] and Gerhard Wagner. The latter notes, in particular, that EC authority does not cover those national disputes which are free from cross-border aspects and involve parties residing in the same EC country[16].

2. "Fragmented approach"

The second important problem in the civil proceeding harmonization in Europe is that it is implemented in a fragmented manner, "piece by piece"[17]. Some authors believe this is due to lack of system planning and clear notion of the national civil proceeding role and function in EC system[18]. Others argue that this is a significant step on, probably, the only way to achieve harmonization of civil procedure in Europe[19].

The latter point of view seems to be more reasonable. Indeed, developers of the final report can hardly be accused of inconsistency or superficiality. Most likely, at that very period of time this was the only possible way to start harmonization, for both ontological and political reasons. However, an obvious disadvantage of the method is that it doubts congruency of European procedural law.

Moreover, quite frequently implementation of European procedures presents severe difficulties, for being introduced to supplement national procedures they perform substantially the same functions as their domestic analogues.

According to G. Wagner, shifting between the two different procedures day after day will ultimately result in court congestion. This will happen not because judges are too silly or lazy, and not because it is difficult for them to cope with different procedural frames. The scientist believes that since court sources are restricted, they should be used in a more effective way. Another factor is that a civil process is not an end in itself. Its functions include legal rights maintenance and protection, and therefore

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[12] RHEE VAN, C. H. Harmonisation of Civil Procedure <…>, p. 39–65; RHEE VAN, C. H. & VERKERK, R. Civil Procedure. *Elgar Encyclopedia of Comparative Law*. Ed. by J. M. Smits. Cheltenham etc. 2006, p. 120–134.

[13] GRINTEN VAN DER, P. M. M. Challenges for the Creation of a European Law of Civil Procedure. *Tijdschrift voor Civiele Rechtspleging [Civil Justice Review]*, 2007, № 3, p. 65.

[14] GRINTEN VAN DER, P. M. M. Challenges for the Creation <…>, p. 65.

[15] KRAMER, X. E. A Major Step <…>, p. 280–281.

[16] WAGNER, G. Harmonization of Civil Procedure <…>, p. 95.

[17] KRAMER, X. E. A Major Step <…>, p. 282.

[18] VERNADAKI, Z. Civil Procedure Harmonization in the EU: Unraveling the Policy Consideration. *Journal of Contemporary research*, 2013, Vol. 9, Iss. 2, p. 299.

[19] KRAMER, X .E. A Major Step <…>, p. 282.

judges must focus on adjudication on the merits rather than spend all their analytical and judicial abilities on analysis of different civil procedure systems[20].

C.H. van Rhee agrees with G. Wagner and also pays attention to the need to reduce the number of procedural models, for if the judges have to choose between the models the great number of possible combinations will make courts invalid. C.H. van Rhee suspects that the result may also be a choice beneficial to economically strong party in a dispute in prejudice of its opponent[21].

Moreover, it should be mentioned that further creation of fragmented rules and procedures can result in violation of ECHR clause[22], because eventually nobody will know what schemes are applicable in a certain situation, and what procedure should be used.

3. "Implanting"

In our opinion, an accurate definition for the third problem was proposed by Carla Crifo who believes that harmonization should not be "implanted from above"[23].

According to Carla Crifo, the intrusion can foster two dangers. First, the introduced rule can prove to be alien for the context is has to be built in. The novel brought about can be inappropriate in all aspects and, therefore, capable of destroying the internal system (after all, civil procedural law is known to be the most nationally specific of all branches of law[24]). Second, the harmonizing effect of a new rule can be rendered null by interpretation in a national system[25].

With regard to the above processualists all over the world have to search for an optimal and acceptable solution for the said problems. According to M. Storme, three patterns can be proposed for establishing relations between supranational and national civil proceeding.

In the first pattern, which currently exists, national and European civil processes go "side by side', each having its own peculiarities. However, this pattern poses all the aforesaid problems. The second pattern proceeds from the premise that European civil procedure is to supersede national procedural law of each of the member countries per saltum, which is hardly feasible at all. The third pattern, which is the most acceptable one, suggests that an individual must be provided with a choice between national and European procedural rules. Such an opportunity should not be limited to cases with cross-border consequences. Eventually, "the strongest will win"[26].

The third pattern seems to have nothing in common with harmonization of the civil procedure. In our opinion, coexistence of alternative civil procedural systems in such a format relates to another mechanism of the procedural law globalization. In European law books this mechanism is called 28-th regime (28-th model) of procedural law. The wording means that the existing 27 civil procedural regimes of EC countries are supplemented by another one, which is a separate European civil procedure regime, "28-th regime" [27].

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[20] WAGNER, G. Harmonization of Civil Procedure <…>, p. 115.

[21] RHEE VAN, C. H. Harmonisation of Civil Procedure <…>, p. 39–65.

[22] Конвенция о защите прав человека и основных свобод. 4 ноября 1950 г. СЗ РФ, 2001, № 2, ст, 163.

[23] CRIFO, C. Europeisation, harmonisation and unspoken premises: the case of service rules in the regulation on a European Small Claims Procedure (Reg № 861/2007). *Civil Justice Quartenly*, 2011, № 30(3), p. 284.

[24] See: KERAMEUS, K.D. Political Integration and Procedural Convergence in the European Union. *The American Journal of Comparative Law*, 1977, Vol. 45, p. 926; RHEE VAN, C. H. & VERKERK, R. Civil Procedure <…>, p. 120–134; KÖTZ, H. Civil Justice Systems in Europe and the United States. *Duke Journal of Comparative & International Law. Special Issue*, 2003, Vol. 13: 61, p. 69.

[25] CRIFO, C. Europeisation, harmonization <…>, p. 284.

[26] STORME, M. Closing comments <…>, p. 383–384. About 3th version see: RŰHL, G. The common European Sales Law: 28-th regime, 2-nd regime or 1-st regime? *Maastriht Journal of European and Comparative Law*, 2012, Vol. 19, № 1.

[27] See: STORME, M. Closing comments <…>, p. 383–384; GRINTEN VAN DER, P. M. M. Challenges for the Creation <…>, p. 69–70.

It should be noted that since presently European Community comprises 28 countries (Croatia joined on July 1st 2013) instead of previous 27, a term "29-th regime" can rightfully come into use.

Hence, the problems currently faced by European Community in the course of harmonization of procedural legislation intensify a search for more delicate and integral approaches to Europe and European harmonization of procedural law, as P.M.M. van der Grinten put it figuratively, by giving priority to issues most urgent for a certain national market[28].

We are not the advocates of the "29-th regime" concept, because while solving the problem about applying EC Treaty clause 65, it neglects the other difficulties revealed. In this connection, the statement of C.H. van Rhee that the procedure model beneficial to economically strong party in a dispute can be intruded upon its opponent in prejudice of the latter is especially relevant.

In our opinion, a way out of the situation can be harmonization of civil procedure based on ECHR clause 6, which enshrines the principle of fair judicial proceeding, a generally recognized principle of international law.

Civil proceeding is addressed to in ECHR clause 6 item 1, which prescribes that "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice".

Having analyzed the said norm in the context of civil procedure harmonization in Europe, C.H. van Rhee concludes that this norm plays an important part in establishing the minimum requirements imposed on each national procedural regime of EC countries[29]. According to the researcher, a kind of "conciliating" effect has been observed in the recent decade, resulting from the fundamental principles of ECHR clause 6, to the extent of legal assistance and other provisions for a wider access to justice, demands for reasonable time observance, and increasing the share of "oral" elements of civil procedure[30].

R. Risdal and M. Storme share the opinion. In particular, R. Risdal notes that "… influence of the European Convention on Human Rights on national law <…> highly increased in all the member countries"[31]. M. Storme denotes emergence of procedural laws, which are common for the member countries not only because of EC tools and initiatives but also based on the fundamental principles of European Community, specifically, the right to fair judicial proceeding[32].

In the meantime, according to X.E. Kramer's well-founded statement, the member countries cannot rely on ECHR clause 6 for their own legal regulation and court practice, for the Convention has too general and open wordings and is interpreted on a case by case basis[33].

A considerable problem is posed here by political context as well. The core of the subject was

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[28] GRINTEN VAN DER, P. M. M. Challenges for the Creation <…>, p. 70.

[29] RHEE VAN, C. H. Harmonisation of Civil Procedure <…>, p. 39–65; ВАН РЕЕ, К. Х. Гармонизация гражданского процесса в глобальном масштабе. Европейский гражданский процесс и исполнительное производство: Сб. материалов Международной научно-практической конференции, г. Казань, Казанский (Приволжский) фед. ун-т, 25 марта 2011 г. Москва: Статут, 2012, с. 14–15.

[30] RHEE VAN, C. H. Harmonisation of Civil Procedure <…>, p. 39–65.

[31] РИСДАЛ, Р. Проблемы защиты прав человека в объединенной Европе. Государство и право, 1993, № 4, с. 30.

[32] STORME, M. Tomorrow's Civil <…>, p. 18–19.

[33] KRAMER, X. E. Cross-border Enforcement in the EU: Mutual Trust versus Fair Trial? Toward Principles of European Civil Procedure. *International Journal of Procedural Law*, 2011, Vol. 2, p. 223–224.

disclosed by Chairman of Russian Federation Constitutional Court V.D. Zorkin. He explained that there exists a certain trend within European legal space, when "states voluntarily consider ECHR regulations passed upon complaints against other states, and modify their legal regulation and law enforcement practice accordingly. This is just an act of good will of such states, for they are not obliged to do so by the Convention. In other words, the states independently choose the spheres where they opt for the legal views contemplated by ECHR, including the views specified in judgments under claims against other states. In some cases, however, we can observe a distinctly different reaction, sometimes even collective opposition"[34].

We believe that the effect of harmonization can be achieved only through development of interaction procedures between national jurisdictions and European Court. Therewith, "…not only administration of conventional legal norms must influence development of national law, but conventional legal norms must be interpreted with regard to national law"[35]. According to V.V. Blazheev, for this purpose "…a mechanism of conventional norm interpretation is required, which would take into consideration national law principles, law institutes, and fundamental provisions of national legal system. Rulings of European Court must smoothly fit into a national legal system saving harmless its fundamentals[36].

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