Responsibilities of Judges and Advocates in Civil and Common Law: Some Lingering Misconceptions Concerning Civil Lawsuits

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Introduction

In a period in which an event as interesting and important as the formulation of *Principles and Rules of Transnational Civil Procedure* by the American Law Institute and the International Institute for the Unification of Private Law (UNIDROIT) is sternly advancing to accommodate basic procedural concepts for both the civil and common law systems, a central problem faced in such conciliation seems to be that of clarifying the actual roles and responsibilities of judges and lawyers in the conduct of a civil dispute.[1] To do so will essentially mean scrutinizing the value and validity of settled conceptions of the inherent features of civil and common law systems, including the notion that these systems are basically opposite each other.[2] In other words, we will attempt to evaluate the correctness and

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1. *See, e.g.*, A.L.I./UNIDROIT, PRINCIPLES AND RULES OF TRANSNATIONAL CIVIL PROCEDURE, DISCUSSION DRAFT NO. 4 (2003); *see also* Geoffrey C. Hazard, Jr., *Transnational Rules of Civil Procedure: a Challenge to Judge and Lawyers*, 51 STUDI URBINATI DI SCIENZE GIURIDICHE, POLITICHE, ED ECONOMICHE 247 (1999).

2. *See, e.g.*, Michele Taruffo, *Il processo civile di "civil law" e di "common law": aspetti fondamentali*, *in* 126 IL FORO ITALIANO 345 (2001).

reliability of this assertion, as well as to the unavoidable opposition it incurs.

Focusing on the respective roles of lawyers and judges is especially convenient in conceiving a different configuration of the relationship between civil and common law systems, and reaching a more appropriate (though maybe less reassuring and simple) vision of the reality. The traditional view of the fundamental difference between the so-called "civil" and "common" law systems in the allegedly crucial different responsibilities of the judge, on the one hand, and of the advocates for the parties, on the other, makes such an approach necessary.[3]

One question to be considered—the first part of our discussion below—is why the analysis of these responsibilities is conceived as a "natural" pathway for understanding both the characteristics of the two systems and their mutual relationship represented in itself.

The second part of the discussion will provide a closer inspection of the nature of these responsibilities, including their functional details. What too often happens, in our opinion, is that these roles are referred to in general terms, rather than focusing on their functionality, with the result of either exaggerating the differences between the systems or disregarding important similarities.

The third topic considered will be the widespread trend of procedural systems toward reducing their mutual differences. We would tend to identify—roughly speaking—commercial disputes as the area in which this phenomenon is most commonly observed. This kind of lawsuit typically takes place between experienced businesspersons who engage in litigation concerning only serious and substantial disputes and who have the resources to employ competent advocates.[4] Other categories of legal disputes, such as family law litigation, employment disputes, or environmental regulation controversies, present different problems. On the other hand, all legal systems ought to recognize the possibility that procedural rules may be adapted differently to various kinds of legal disputes. With this in mind, it is important to note that we refer specifically to the tendency towards convergence of procedural rules in commercial disputes.

I. Roles of the Advocate and Judge: Traditional Comparative Discourse

As mentioned above, the traditional differentiation between the civil and common law systems is the difference in the responsibilities of judges

3. *See, e.g.*, Rolf Stürner, *Some European Remarks on a New Joint Project of the American Law Institute and UNIDROIT*, 34 INT'L LAW. 1071 (2000) (discussing the present state of transnational civil procedure, including the "fundamental difference" of the roles of lawyers and judges in civil and common law systems).

4. *Cf.* Richard L. Marcus, *Malaise of the Litigation Superpower*, *in* CIVIL JUSTICE IN CRISIS: COMPARATIVE PERSPECTIVES OF CIVIL PROCEDURE 71, 92 *passim* (Adrian A.S. Zuckerman ed., 1999) [hereinafter ZUCKERMAN] (discussing the rising costs of litigation in American courts, which potentially inhibits pursuing claims involving insubstantial matters).

and lawyers. This differentiation is basically founded on the assumption that, in civil law systems, civil cases are actually directed by the judge, with subordinate participation by the parties' advocates.[5] An illustration of this conception of the judge's role is that traditionally it was thought to be up to him to determine the matters in dispute, identify the necessary evidence, schedule the necessary intermediate and final hearings, and eventually formulate the judgment according to the law and the proof.[6] In such a system, the lawyers' activities may be characterized as residual. They may make suggestions concerning the evidence, as well as propose either issues to be examined or questions to be asked at the hearings, or eventually submit comments concerning the legal basis of the dispute.[7] In a metaphorical comparison, the judge is conceived as the priest, while the advocates act as the acolytes—deferential assistants in a ceremony controlled thoroughly by the judge.

A similar and grossly simplistic conception of the common law judge is that of a passive moderator between presentations organized and directed by rival advocates. The fundamental responsibility for identifying the legal contentions to be considered, the evidence to be considered, and the ultimate basis of judgment remains with the advocates.[8] Furthermore, the presence of the jury to determine facts—as in the United States system of litigation—renders the judge even more passive.[9] The jury is bound to decide the facts on the basis of legal instructions that, while given by the judge, are initially proposed by the advocates.

Accordingly, advocates in common law litigation are referred to as "combatants," such as those participating in a tennis or wrestling match, while the judge acts as an umpire in the traditional metaphor.[10] What seems easy to perceive from these conceptions is that the differences

5. *See* GEOFFREY C. HAZARD, JR. & ANGELO DONDI, LEGAL ETHICS: A COMPARATIVE STUDY 63-108 (2004).

6. *See* John H. Langbein, *The German Advantage in Civil Procedure*, 52 U. CHI. L. REV. 823, 835-45 (1985) (discussing the traditional conception of the German civil procedure system, an oft-used example of a civil law system); John H. Langbein, *Trashing the German Advantage*, 82 NW. U. L. REV. 763 (1988) (same).

7. *See, e.g.*, Erhard Blankenburg & Ulrike Schultz, *German Advocates: A Highly Regulated Profession*, in 2 LAWYERS IN SOCIETY: THE CIVIL LAW WORLD 124, 133, 135-36 (Richard L. Abel & Philip S.C. Lewis eds., 1988) (discussing the distribution of responsibilities between judges and advocates in Germany); Arthur Taylor von Mehren, *Some Comparative Reflections on First Instance Civil Procedure: Recent Reforms in German Civil Procedure and the Federal Rules*, 63 NOTRE DAME L. REV. 609, 609 (1988).

8. MARVIN E. FRANKEL, PARTISAN JUSTICE 11, 25, 75 (1980); Arthur R. Miller, *The Adversary System: Dinosaur or Phoenix*, 69 MINN. L. REV. 1, 14-15 (1984).

9. *Cf.* Sanja Kutnjak Ivković & Valerie P. Hans, *Jurors' Evaluations of Expert Testimony: Judging the Messenger and the Message*, 28 LAW & SOC. INQUIRY 441 (2003) (demonstrating the further weakening of the judge's role in the jury system with regards to expert testimony); Judith Resnik, *Changing Practices, Changing Rules: Judicial and Congressional Rulemaking on Civil Juries, Civil Justice and Civil Judging*, 49 ALA. L. REV.133, 136-47 (1997) (discussing some commentary from federal judges on the proposed expansion of federal civil juries to twelve members).

10. *See* ALLAN C. HUTCHINSON, IT'S ALL IN THE GAME: A NONFOUNDATIONALIST ACCOUNT OF LAW AND ADJUDICATION 288-319 (2000); *see generally* Wayne D. Brazil, *The Adversary Character of Civil Discovery: A Critique and Proposals for Change*, 31 VAND. L.

between the two allegedly most important law systems are stressed, and that, in this perspective, these differences seem substantial and, as such, virtually unbridgeable. In other words, the basic assumption is that the systems can be defined only by way of contrast, rather than by way of similarities. This assumption is in fact commonplace in the traditional comparative study of law, especially procedure, and is still perpetuated nowadays.[11]

II. Roles of the Advocate and Judge: A Functional Analysis

It must be said, however, that in commercial litigation, this traditional contrast seems at least misleading, especially considering that the parties are generally sophisticated in business affairs, have real disputes about substantial and material matters, and tend to employ experienced advocates to represent them. Of course, the problems of procedure and justice in other areas, such as family law litigation, in which the parties may be of unequal competence, the disputes arise out of personal relationships, or one or both parties lack competent counsel, are different.

A. Advocates

In both civil and common law systems, the advocates in modern commercial litigation have a primary role in defining the disputes, as well as the legal and factual bases under which they are adjudicated. However, in both common law and civil law systems, the judge maintains a pivotal role in managing the development of the case and the sequence of addressing and resolving issues, as well as a general managerial role in setting each single hearing. Regardless, the best metaphor for the roles of judge and advocates in modern commercial litigation in both civil and common law systems is that of a committee in which there are representatives for each different interest (the advocates) and a chairperson (the judge) responsible for the orderly exploration and resolution of the controversy. Further, in modern litigation, there are often more than two parties involved—at times several parties—and consequently the resolution frequently becomes a combination of adjudication, mediation and negotiation. Thus, some typical elements of the advocate's role in modern commercial litigation must further be considered.

1. Selection of the Forum

In this context, the initiative is clearly with the parties. Usually, the injured party selects the forum, barring an enforceable forum selection clause in the contract between the parties. As all realistic analysts of civil

REV. 1295 (1978) (providing a classic account of some of the problems with an adversarial system during discovery).

11. *See, e.g.*, David S. Clark, *Comparing the Work and Organization of Lawyers Worldwide: The Persistence of Legal Traditions*, *in* LAWYERS' PRACTICE & IDEALS: A COMPARATIVE VIEW 9, 35-69 (John J. Barceló III & Roger C. Cramton eds., 1999) (outlining the differences in the roles of lawyers worldwide).

procedural realize, this choice is fraught with consequences and affects the resolution of a legal controversy. However, the judge takes no part in the initial choice of forum, despite its importance to the ultimate resolution of the dispute. Traditionally, the judge has only the negative authority to refuse jurisdiction whenever the initiating party has chosen an improper or inappropriate forum.

2. *Formulation of Claims and Defenses*

A rule generally found in most legal systems is that the advocate for the plaintiff formulates the claims to be considered, while the respondent's counsel bears a corresponding responsibility to formulate the defenses and counterclaims, if applicable. These tasks must be accomplished in the context of the pleadings or, as in the American system, in the pretrial order that follows the pleadings. Similar chances to formulate or change the claims or defenses after the pleadings exist also in some European systems, for instance the Italian legal system. In the Italian system, the defendant's advocate can actually delay the formulation of the response well after the initial phase, triggering either mutual options to respond on the side of his opponent lawyer for the plaintiff, and a virtually endless postponement of the actual framing of the case in view of its definition by the judge.[12]

On the other hand, the parties' advocates have almost as much room for this kind of strategic choices in most of the other European legal systems, although with a lesser scope of inherent powers on the side of lawyers. This is also the case in France, and to an even greater degree in Germany. The provisions on this subject in the French *Nouveau Code de Procédure Civile* provide the advocate—within the boundaries of basic *fondement sérieux* of each pleading or request[13]—with an extremely wide range of strategic choices and professional undertakings. The lawyer's role is of fundamental value in the stages of *mise en oeuvre de l'action* and *déroulement de l'instance*, although the lawyer acts with constant judicial supervision aimed at fully carrying out principles "*de la contradiction*" and "*de la cooperation*" between the parties' advocates.[14] Likewise, the German *ZPO* (the German code of civil procedure) grants the lawyer a similar range of options through the written complaint (the *Klage*), which controls the "procedural initiative" in order to properly shape the complaint at the outset of

12. *Cf.* Angelo Dondi, *Abuse of Procedural Rights: Regional Report for Italy and France*, *in* ABUSE OF PROCEDURAL RIGHTS: COMPARATIVE STANDARDS OF PROCEDURAL FAIRNESS 109, 109-12 (Michele Taruffo ed., 1998) (discussing the lack of a defined concept of "abuse of procedural rights" in Italian civil procedure).

13. *See* SERGE GUINCHARD ET AL., DROIT PROCESSUEL: DROIT COMMUN DU PROCÈS 520 (2001) (discussing the recent shuffle in French civil procedure rules); *see also* Mélina Douchy, *Le décret n. 98-1231 du décembre 1998 modifiant le code de l'organisation judiciare et le nouveau code de procédure civile: l'adoption partielle des propositions du rapport de J.-M. Coulon*, *reprinted in* 2001 GAZETTE DU PALAIS [GAZ. PAL.], Doctrine II 831 (1999).

14. NOUVEAU CODE DE PROCÉDURE CIVILE [N.C.P.C.] arts. 1-8, 16, 53-59 (96th ed. Dalloz 2004) (Fr.); *see also* DROIT JUDICIAIRE PRIVÉ 376 (4th ed. Cadiet & Jeuland eds., 2004); PROCÉDURE CIVILE 437 (Cornu & Foyer eds., 1996).

the litigation though the judge, called the *Hinweispflicht*.[15]

In a different cultural context, the recent Spanish procedural reform embodied in the so-called "LEC 2000" or "LEY 1/2000" adopted a similar interaction between the advocates and judicial power in the initial stage of a civil litigation. The great number of chances to frame pleadings by the lawyers of each party is fully balanced—as provided by the *Articulo 401* of the new LEY—against the very strong powers of the judge, whose control is aimed at avoiding abusive strategies by the advocate in the very beginning of a civil case.[16]

B. Judges

In both civil and common law systems, the courts have authority to permit amendments to the initial pleadings. Despite this trend, it remains the exception in civil law procedure, where the general philosophy still favors limiting the occasions for the judge to intervene and allow amendments.[17] Though such an authority is by no means more frequent in the common law procedure, it is structurally more liberal in this respect. The much broader power to frame the case conferred to the parties must be considered, as it allows them to intellectually shape the basis of a legal controversy.[18] Hence, in practice most common law judges do not interfere with parties' formulation of the issues, particularly where experienced advocates are involved.[19] However, the fact seems to be that in all legal systems the advocates actually frame the legal basis of a case. The ability to

15. *See* PETER L. MURRAY & ROLF STÜRNER, GERMAN CIVIL JUSTICE 12-13, 166 (2004); Peter Gottwald, *Civil Justice Reform: Access, Cost, and Expedition. The German Perspective, in* ZUCKERMAN, *supra* note 4, at 207 *passim*.

16. *See* JUAN MONTERO AROCA ET AL., EL NUEVO PROCESO CIVIL - LEY 1/2000, at 246-47, 445 (2000); Juan Damián Moreno, *Título II: Del Juicio Ordinario, in* 2 COMENTARIOS A LA NUEVA LEY DE ENJUICIAMIENTO CIVIL 2081-2193 (Antonio María Lorca Navarrete ed., 2000); Joan Picò i Junoy, *I principi del nuovo processo civile spagnolo*, 2003 RIVISTA DI DIRITTO PROCESSUALE [RIV. DIR. PROC.] 65 (It.). *But see* Juan Montero Aroca, *Il processo civile "sociale" come strumento di giustizia autoritaria*, 2004 RIV. DIR. PROC. 553 (taking a critical approach to the new rules).

17. *See, e.g.*, MURRAY & STÜRNER, *supra* note 15, at 237-39 (stating that the German *ZPO* "represents a legislative narrowing of [the] traditional liberality" of allowing late submissions of factual or legal materials and that "new claims for relief . . . which change the subject matter of the proceedings . . . may be added only under limited conditions").

18. For some fairly recent discussions of the problem, see Edward Cavanagh, *Pleading Rules in Antitrust Cases: A Return to Fact Pleading?*, 22 REV. LITIG. 1 (2002); Christopher M. Fairman, *Heightened Pleading*, 81 TEX. L. REV. 551 (2002); Jeffrey A. Parness et al., *The Substantive Elements in the New Special Pleadings Laws*, 78 NEB. L. REV. 412 (1999).

19. *See* A.L.I.-A.B.A., LATEST DEVELOPMENTS IN COMPLEX CIVIL LITIGATION: AN ANALYSIS OF THE FEDERAL JUDICIAL CENTER'S NEW MANUAL FOR COMPLEX LITIGATION 108 (2003); Barbara Comninos Kruzansky, Note, *Sanctions for Nonfrivolous Complaints?* Sussman v. Bank of Israel *and Implications for the Improper Purpose Prong of Rule 11*, 61 ALB. L. REV. 1359 (1998); Richard L. Marcus, *The Puzzling Persistence of Pleading Practice*, 76 TEX. L. REV. 1749 (1998); *see also* PATRICK M. GARRY, A NATION OF ADVERSARIES: HOW THE LITIGATION EXPLOSION IS RESHAPING AMERICA 139 (1997); WALTER K. OLSON, THE RULE OF LAWYERS: HOW THE NEW LITIGATION ELITE THREATENS AMERICA'S RULE OF LAW 73 (2003); Stephen N. Subrin & Thomas O. Main, *Honoring David Shapiro: The Integration of Law*

frame the legal basis of a case has some consequences of fundamental importance, particularly that the formulation of the legal basis of the case determines what evidence can be relevant. In other words, the relevance of evidence is derived from the issues to be determined, and again those issues are more or less directly derived from the contentions formulated by the advocates.[20] And in both civil law and common law systems it is within these boundaries, initially established by the advocates for the parties, that the authority of the judge is exercised. Returning to the abovementioned metaphor of the priest, it might be true that the priest-like judge gives the sermon, but the believer-like lawyers have already determined from which part of the Bible the lesson for the day will be taken.

1. *Identification of Evidence*

Broadly speaking, the conventional understanding of relevant evidence is as follows: The issues determine the relevance, while the law determines the issues. The formal correctness of this contention is not in question here. However, what we would like to focus on is the actual process through which this relevance determination takes place, and especially by whom it may be initiated. In practice, without exception, the sequence of analysis building up this determination begins with the advocates, particularly the claimant's advocate.[21] Commencement of civil litigation implies a basic "feasibility evaluation" by the plaintiff's lawyer has occurred; the advocate will not commence litigation unless he believes there is a legally arguable case.[22] In determining whether there is a legally arguable case, an advocate will have to make a preliminary determination as to whether there is evidence to support the claim. Therefore, he will have provisionally determined that there is relevant evidence prior to the case being commenced.[23]

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and Fact in an Unchartered Parallel Procedural Universe, 79 NOTRE DAME L. REV. 1981, 2016 (2004).

20. *See* sources cited *supra* note 16; *see also* Shelly Brinker, Comment, *Opening the Door to the Indeterminate Plaintiff: An Analysis of the Causation Barriers Facing Environmental Toxic Tort Plaintiffs*, 46 UCLA L. REV. 1289 (1999); Patricia J. Meyer, Note, *What Congress Said About the Heightened Pleading Standard: A Proposed Solution to the Securities Fraud Pleading Confusion*, 66 FORDHAM L. REV. 2517 (1998).

21. *See* FLEMING JAMES ET AL., CIVIL PROCEDURE 215 (5th ed. 2001); *see also* Ann Morales Olazabal, *The Search for "Middle Ground": Towards a Harmonized Interpretation of the Private Securities Litigation Reform Act's New Pleading Standard*, 6 STAN. J.L. BUS. & FIN. 153 (2001); Parness et al., *supra* note 18, at 412.

22. *See, e.g.*, FED. R. CIV. P. 11 (providing for sanctions against attorneys whose filings to the court are not "warranted by existing law," do not present a valid argument for modification of existing law, or contain facts which lack an evidentiary basis); THE REFORMS OF CIVIL PROCEDURE IN COMPARATIVE PERSPECTIVE: AN INTERNATIONAL CONFERENCE DEDICATED TO MAURO CAPPELLETTI, FLORENCE, 12-13 DECEMBER, 2003 *passim* (Nicolò Trocker & Vicenzo Varano eds., 2005).

23. These features are considered in the Italian model of civil litigation in MICHELE TARUFFO, LA PROVA DEI FATTI GIURIDICI: NOZIONI GENERALI (1992); Michele Taruffo, *Funzione della prova: la funzione dimostrativa*, 1997 RIVISTA TRIMESTRALE DI DIRITTO E PROCEDURA CIVILE [RIV. TRIM. DIR. PROC. CIV.] 558; *see also* LUIGI LOMBARDO, LA PROVA GIUDIZIALE: CONTRIBUTO ALLA TEORIA DEL GIUDIZIO DI FATTO NEL PROCESSO (2000).

In other words, from a functional perspective, the initial task of determining what relevant evidence exists is a task for the lawyer, not the judge. Further, though the judge determines the relevant evidence on the basis of the pleadings as they appear to him after the case is filed, it is the advocate who initially determines the pleadings based on what he considers the relevant evidence to be, as it appears to him before the case is even filed.[24] This pattern is widespread and commonly accepted as unquestionable in all legal systems—both civil and common law families.[25]

Of course, the judge retains a nevertheless fundamental role in the above-mentioned sequence of analysis, which shapes the core of a legal lawsuit, framing it for a decision. First of all, and somewhat unavoidably, it is up to the judge to arrange an orderly sequence for receiving the evidence.[26] In doing so, the judge must necessarily give thought to the issues involved in the case before him and provide direction for their resolution. Stated differently, the judge must give the case further intellectual treatment, after the initial treatment performed by the advocate before the case is filed.[27]

Generally, the judge framing the case in such a contest will first check the initial writings produced by the advocates on behalf of their clients.[28] The range and quality of these initial controls have a great impact on whether a procedural system is efficient and effectively aimed at just results. To reach these goals of justice and efficiency, the judge should not limit his task to checking the formal package of the claim, though that is certainly an essential and unavoidable part of the process.[29] However, he should also plunge into the very intellectual and strategic foundation of

24. On this problem, see HAZARD & DONDI, *supra* note 5, at 63; T.P. Gallanis, *The Rise of Modern Evidence Law*, 84 IOWA L. REV. 499 (1999) (suggesting that both lawyers' power over evidence and the exclusionary approach to evidence derived from criminal trials and spread gradually to civil trials); Stephen C. Yeazell, *The Misunderstood Consequences of Modern Civil Process*, 1994 WIS. L. REV. 631 (1994); *cf.* MIRJAN R. DAMASKA, EVIDENCE LAW ADRIFT 74-124 (1997) (discussing the individual party's control over determinations of factual parameters in common law litigations).

25. For an Italian perspective, see Taruffo, *supra* note 2. Some further treatment of this topic can be found in HOWARD ABADINSKY, LAW AND JUSTICE: AN INTRODUCTION TO THE AMERICAN LEGAL SYSTEM 292 *passim* (1995).

26. *See* Langbein, *The German Advantage in Civil Procedure*, *supra* note 6, at 826-33.

27. For an overview of the evolution of discovery in the United States, see generally EDWARD J. IMWINKELRIED & THEODORE BLUMOFF, PRETRIAL DISCOVERY: STRATEGY AND TACTICS 120 (Rev. ed. 1999); THOMAS A. MAUET, PRETRIAL 339 (4th ed. 1999); Kevin Brady, *Pretrial Scheduling and Management*, *in* FEDERAL CIVIL PROCEDURE BEFORE TRIAL (Robert Cindrich ed., 1996); Geoffrey C. Hazard, Jr., *From Whom No Secrets Are Hid*, 76 TEX. L. REV. 1665 (1998); Richard Marcus, *Only Yesterday: Reflections on Rulemaking Responses to E-Discovery*, 73 FORDHAM L. REV. 1 (2004); Stephen N. Subrin, *Fishing Expeditions Allowed: The Historical Background of the 1938 Federal Discovery Rules*, 39 B.C. L. REV. 691 (1998); Stephen N. Subrin, *Discovery in Global Perspective: Are We Nuts?*, 52 DEPAUL L. REV. 299 (2002).

28. *See* Langbein, *The German Advantage in Civil Procedure*, *supra* note 6, at 827-29.

29. *See* JAMES ROBERT FORCIER, JUDICIAL EXCESS: THE POLITICAL ECONOMY OF THE AMERICAN LEGAL SYSTEM 91-93 (1994); Wayne D. Brazil, *Improving Judicial Controls over the Pretrial Development of Civil Actions: Model Rules for Case Management and Sanctions*, 1981 AM. B. FOUND. RES. J. 875, 890-915 (1981); Resnik, *supra* note 9, at 158-65; *cf.* ROBERT J. NIEMIC ET AL., GUIDE TO JUDICIAL MANAGEMENT OF CASES IN ADR 11-13 (2001)

these contentions.[30]

In order to move the case toward a just resolution, the judge ought to focus his attention on reaching the core of its conflict. This often involves ridding the case of many of the useless complexities raised in the initial writings of the advocates for tactical reasons, and figuring out a precise and determined path towards resolution.[31] To do this, the judge must have effective and formalized management power and a full understanding of his duties. However, directing the process in this manner implies a vital measure of judicial activism, which is functionally required and institutionally sanctioned in all procedural systems, whether civil or common law.[32]

The 1999 English "Civil Procedure Rules" were recently reformed to create a greater managerial role for judges.[33] The reform was grounded on the philosophy that wide case management power should be granted to the judge, especially in the preliminary stage of a civil proceeding.[34] In this respect, the result of the English reform seems in many ways laudable and almost amazing for most of the goals it attains. The cornerstone of this reform is that the judge is now able to evaluate the probable complexity of a case when it is initiated, in order to set it in the most appropriate of the three planned procedural tracks, or to determine an ad hoc procedural framework.[35]

What seems even more noteworthy here is the very nature and range of these organizational powers. These powers are not at all static, and provide a far-reaching range of intervention; they actually outline the practical essence of the traditional notion of managerial judges.[36]

In its modern English version, the notion of the managerial judge might be seen as consisting of various judicial powers, distributed through practically each successive articulation of a civil lawsuit; they are not limited to the commencement of action stage. Provisions such as those conferring upon the judge the "ultimate responsibility for the control of

(discussing the judge's considerations in determining whether to use alternative dispute resolution).

30. *See generally* Hazard, *supra* note 27 (comparing the discovery system in the United States with that in other countries). For a European perspective, see 1 ANGELO DONDI, INTRODUZIONE DELLA CAUSA E STRATEGIE DI DIFESA (1991) (discussing the United States), and more recently Angelo Dondi, *Questioni di efficienza della fase preparatoria nel processo civile statunitense (e prospettive italiane di riforma)*, 2003 RIV. TRIM. DIR. PROC. CIV. 161.

31. *See* NEIL ANDREWS, ENGLISH CIVIL PROCEDURE: FUNDAMENTALS OF THE NEW CIVIL JUSTICE SYSTEM 36-37 (2003); AN EVALUATION OF JUDICIAL CASE MANAGEMENT UNDER THE CIVIL JUSTICE REFORM ACT 35 (James S. Kakalik et al. eds., 1996); JUST, SPEEDY AND INEXPENSIVE? AN EVALUATION OF JUDICIAL CASE MANAGEMENT UNDER THE CIVIL JUSTICE REFORM ACT 12-21 (James S. Kakalik et al. eds., 1996); Paul Michalik, *Justice in Crisis: England and Wales*, *in* ZUCKERMAN, *supra* note 4, at 117, 128; Dondi, *supra* note 30, at 161.

32. *See* ANDREWS, *supra* note 31, at 41-45, 60, 69.

33. *See id.* at 36, 38, 41-45, 68-71.

34. *See id.* at 41-45, 60, 69.

35. *Id.* at 337-42; JOHN O'HARE & KEVIN BROWNE, CIVIL LITIGATION 257, 377-84 (10th ed. 2001); Subrin, *Discovery in Global Perspective: Are We Nuts?*, *supra* note 27, at 305.

36. *See* ANDREWS, *supra* note 31, at 41-45, 60, 69.

litigation," in Lord Woolf's words, in fact permeate the later stages of litigation in the new English rules. For instance, those rules concerning the so-called disclosure or the selection of evidence demonstrate this responsibility.[37] In both these stages, the English judge has been empowered with tools in order to dispose of the case, curtailing the ability of the advocates for the parties to perform any sort of procedural abuse.[38]

Such an active approach to case management, clearly designed to encourage a hands-on approach by judges, gives at least a hint of the revolutionary trend by now pervading the philosophy of civil proceedings in the common law systems. This philosophy seems somewhat unexpected given the similarity to the paradigm of the "judge-centered" civil law systems—often considered completely incongruous.

III. Convergence of Modern Procedural Systems

In the context of the managerial role of the judge in civil litigation, a noteworthy convergence of the two systems has taken place. This convergence is, of course, more noticeable in some areas of the civil practice, such as that of the modern commercial disputes.

These disputes most often involve complicated issues that involve multiple and interdependent questions of law and fact.[39] Further, they tend to involve highly technical issues, sometimes of physical or medical science, finance, or business or professional judgment that may require the use of expert testimony, such as scientific tests, accounting analyses, or problems of foreign law and language.[40]

When issues of this kind are involved, the advocates have an inevitable advantage over the judges at the outset of the litigation. This, of course, is not because they are more intelligent or better informed in such matters than the judges, but rather because in these circumstances clients seek out

37. *See, e.g.*, Subrin, *Discovery in Global Perspective: Are We Nuts?*, *supra* note 27, at 305.

38. For a European perspective, see generally Angelo Dondi, *Complessità e adeguatezza nella riforma del processo societario - Spunti minimi di raffronto comparato,* 2004 RIV. TRIM. DIR. PROC. CIV. 137. For the American view, see generally RICHARD L. MARCUS & EDWARD F. SHERMAN, COMPLEX LITIGATION: CASES AND MATERIALS ON ADVANCED CIVIL PROCEDURE (2d ed. 1992) (explaining the role of judges in federal proceedings); Elizabeth J. Cabraser, *Life After* Amchem*: The Class Struggle Continues*, 31 LOY. L.A. L. REV. 373 (1998) (noting the role of judges in class action cases); Linda S. Mullenix, *Practical Wisdom and Third-Generation Mass Tort Litigation*, 31 LOY. L.A. L. REV. 551 (1998) (discussing the role of judges in mass tort litigation).

39. *See* Bert Black et al., *Science and the Law in the Wake of* Daubert*: A New Search for Scientific Knowledge,* 72 TEX. L. REV. 715, 787-90 (1994). *See generally* JOANNA PAGE, JOANNA DAY & LOUISE LE GAT, EXPERT EVIDENCE UNDER THE CPR: A COMPENDIUM OF CASES FROM APRIL 1999 TO APRIL 2001 (2001); DAVID L. FAIGMAN ET AL., MODERN SCIENTIFIC EVIDENCE: THE LAW AND SCIENCE OF EXPERT TESTIMONY (2d ed. 2002); H.H. Kaufman, *The Expert Witness. Neither* Frye *nor* Daubert *Solved the Problem: What Can be Done?*, 41 SCI. & JUST. 7 (2001).

40. *See* JAY TIDMARSH & ROGER H. TRANSGRUD, COMPLEX LITIGATION AND THE ADVERSARY SYSTEM 1170 (1998). *See generally* MARCUS & SHERMAN, *supra* note 38 (federal courts); Cabraser, *supra* note 38 (class actions); Mullenix, *supra* note 38 (mass tort). For a European perspective, see Dondi, *supra* note 38.

advocates who are especially adept in handling cases involving such complexities. In any event, when the underlying dispute is complicated, the judges will necessarily be more dependent on the advocates than when the court is dealing with a familiar and routine type of dispute.

More and more, commercial litigation tends to involve complexities of the kind mentioned above. Routine disputes may more readily be settled, so modern commercial litigation plays a greater part in shaping the role of the advocates because they have more interaction with the judges, whatever the legal system in which these disputes are adjudicated. Thus, the very subject matter with which modern procedural systems must most frequently contend seems to influence the way in which the professional participants function.

Since every procedural system faces similar problems when dealing with modern commercial litigation, the convergence of the procedures between common law and civil law systems has become an unquestionable and steady reality. Consequently, the actual conduct of litigation in modern systems looks more and more similar, whatever the tradition from which they derive. In fact, these cases require active and creative initiatives by the advocates, as well as active, attentive, and flexible engagement on the part of the judges.[41]

Of course this does not mean that the differences between the systems are fully erased. Though the general trend shows the systems are growing together, there are still areas in which civil and common law procedures continue to diverge. A noteworthy example is represented by a recent Italian procedural reform enacted in January 2004, concerning the alternative dispute resolution in the adjudication of commercial cases.[42]

Surprisingly enough, the whole philosophy of the new Italian rules is founded on an ideal of a sharp restriction of the judicial powers, in view of bringing them back to their allegedly original and inner feature of "sheer decisional function."[43] In order to attain this goal, the judge's role has been restricted to a mere late appearance past the stages of such importance as the commencement of the action and the pretrial process (with all the possible discovery activities included). The judge is involved only at the trial hearing; the remaining function left to the judge is conceived as limited to adjudicating the case, while the preparation of the factual and legal terms of adjudication are exclusively performed by the lawyers of the parties.[44]

With no hint of earlier judicial intervention in the proceeding whatsoever, the model conceived by the Italian legislators seems more apt to revi-

41. *See* Dondi, *supra* note 38, at 138; Romano Vaccarella, *La riforma del processo societario: risposta ad un editoriale*, *in* 2 CORRIERE GIURIDICO [CORR. GUIR.] 262 (2003).

42. For a discussion of this reform, see Cecilia Carrara, *Critical Analysis of the New Italian Rules on Arbitration in Corporate Matters*, 7 INT'L ARB. L. REV. 8 (2004).

43. *See* Vaccarella, *supra* note 41, at 262.

44. For some critical remarks, see Dondi, *supra* note 38, at 139. *See also* Angelo Dondi, *Impostazione ideologica e funzionalità nella riforma italiana recente del processo civile*, 35 POLITICA DEL DIRITTO 251 (2004).

talize ancient conceptions about the mutual apportionment of powers between professional participants such as judges and advocates, adopting the approach of the nineteenth century, rather than facing the complex reality of modern civil cases. This seems even worse because it is conceived to regulate commercial litigation. However, the philosophy of the Italian new procedural rules for commercial cases is an exceptional and, to the best of our knowledge, isolated event in the perspective of solving the many problems connected to the management of controversies of this kind.

The above-mentioned similarities in terms of the complex questions of fact and law that these disputes involve, short of the legal system in which the single case is to be adjudicated, seem to move powerfully toward an approximation or a convergence of procedural law. A basic feature of this progression is an awareness that these cases, while requiring active and creative initiatives by the advocates, are in absolute need of an even more powerful engagement and pushing of initiatives by judges.