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THE WOOLF REPORT AND GERMAN CIVIL PROCEDURE

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Introduction

New legal projects have traditionally given jurists cause to shift their attention towards other legal systems. They have hoped that this would help them to find a better solution and to avoid the mistakes that other countries have committed in the past. For those countries which are today members of the European Union there is another reason for this traditional glance over the border — namely that their citizens are entitled to settle down and work in every other member state without any significant legal restrictions. Sooner or later this will lead to a growing migration and to an increasing number of individuals living under a foreign jurisdiction. The convergence of the various European legal systems becomes in these circumstances an important factor in its own right, because it is clear that parallel legal solutions will alleviate the situation of those migrants. Hence it is the view of the author that it is in the interest of each member state to participate in what one may term a "competitive re-appraisal" of European legal systems, which should lead not only to better, but necessarily also to convergent laws.

The report "Access to Justice", submitted recently by Lord Woolf, plays its part in this process. On several occasions it reflects on foreign legal rules and practices. Inter alia Lord Woolf refers to the German regulations relating to costs in civil procedure. But apart from costs there are other regulations and aspects of German civil procedure which might be of interest to lawyers about to experience fundamental change as is the case in relation to England and Wales.

In the following paragraphs, a description will be given of German civil procedure, with particular emphasis upon some of those elements which Lord Woolf considered important in his report, taking especially into account the way case management is pursued in Germany. Ordinary adversarial civil procedure will be concentrated on, leaving to one side the special procedures for labour and family law which are in

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part subject to other regulations. The description of German civil practice and procedure which follows will of necessity be influenced by the author's personal experiences. As there are many different local customs in a federal state such as Germany, one could find courts in Germany in which procedural rules are applied in a quite different form.

Principles of Procedure

At the outset I would like to recall the main lines of German civil procedure. In Germany it is the claimant who decides what the claim is that he seeks to pursue and what are the facts which he wishes to present to the court which will decide the case. He alone is responsible for the prosecution of his claim which he is therefore free to withdraw (although after the first oral hearing the consent of the defendant is necessary), or to change (although in general this is possible only with the consent of the defendant or the court). The court is not allowed to award more than is claimed. If the defendant indicates that he does not resist the claim the court will give judgement without reviewing the law. Only the parties can bring evidence before the court. The judge is not allowed to investigate for himself. The court can however in exceptional cases make orders for the calling of a wide variety of evidence. The judge is never entitled to order that a witness be heard. The defendant can absent himself from the trial or he may appear without seeking to defend the claim. In such circumstances the court will deliver a default judgement, provided that the facts relied upon by the claimant justify the claim. If neither party appears, the proceedings must be suspended.

In defended cases it is up to the court alone to decide what facts are relevant for the decision, and if it is therefore necessary to hear witnesses including expert witnesses, to prove original documents etc. From the moment the claim is lodged with the court, it is the responsibility of the judge to push the case forward towards judgement. He must take care that the parties provide the court with information as to the facts they rely on and the evidence they intend to call in support as soon as possible. The judge will then try to clarify the facts in dispute, fix the trial date and summons witnesses etc.

The German judge has not always played such an active role in litigation. When the Zivilprozeßordnung or civil procedure code (ZPO) came into effect in 1877, the speed of litigation was mainly controlled by the parties. They alone were responsible for serving the claim upon