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CJC DL 2014/04  
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The Emergence of a Model of Cooperative Justice in  
Europe: Horizontal Dimensions

Loïc Cadet





European University Institute  
**Centre for Judicial Cooperation**  
Distinguished Lecture

## **The Emergence of a Model of Cooperative Justice in Europe: Horizontal Dimensions**

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Florence, Italy  
5 December 2013  
CJC Distinguished Lecture 2014/04

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ISSN 2362-9673

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Printed in Italy  
European University Institute  
Badia Fiesolana  
I – 50014 San Domenico di Fiesole (FI)  
Italy  
[www.eui.eu](http://www.eui.eu)  
[cadmus.eui.eu](http://cadmus.eui.eu)

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## **Abstract**

The lecture deals with the horizontal dimensions of the model of cooperative justice emerging in Europe. This cooperation is largely considered: a) in the European space, through the new forms of direct cooperation between the different national legal systems, especially the court-to-court cooperation, instead of the traditional pattern of coordination, mainly diplomatic and indirect; b) in domestic systems, with the development of a cooperative model of procedure, transcending the distinction of accusatorial and inquisitorial types, parties and judges having the duty to cooperate in order to reach a fair and rapid solution of the case.

## **Keywords**

Coherence – Cooperative justice – Course of proceedings – Effects of judgement. - EU judicial system



## Introduction

I would first of all like to offer my thanks to Prof. Azoulai and the EUI for kindly extending to me an invitation to attend today's seminar on *The Structure of the Legal European Instrument*.

I find the subjects that are to be discussed during the course of this seminar fascinating, in particular European Union as a "special type of relationship between States", the transformation of rules into rights, the ongoing rise of a European executive power, and the alleged indifference of EU law to Ethics and Morality.

I must state at the outset that I am not an expert in European Law, nor am I an expert in Public Law. My training is in the field of Private Law and I have further specialised in Procedural Law. My main research interests at this point in time are civil procedure, Alternative Dispute Resolution ADR, comparative procedural law, and general theory of litigation.

Nobody is perfect.

However, perhaps this failing is not so important. I see that the next session will deal with the public/private distinction. Added to this is the fact that we must consider the evolution of the European project from a vertical to a horizontal perspective. Let me be clear, I do not say that the time of European law has gone, not at all; I would argue that a new dimension of the European project is growing with horizontal techniques of direct coordination between the actors of the Justice system - courts, judges, prosecutors, advocates, bailiffs, policemen/women and so on. This evolution goes further and enhances what Pierre Pescatore described as the "Emergence d'un pouvoir judiciaire européen" on the basis of the preliminary ruling in the last chapter of his book *Le droit de l'intégration*<sup>1</sup>. My horizontal perspective must also be distinguished from the category called "horizontal judicial dialogue" as outlined by Allan Rosas in his paper "The European Court of Justice in context: forms and patterns of judicial dialogue"<sup>2</sup>. My concern is not to look at what other judges are doing or to cite their judgments or to exchange views and experiences about the interpretation of law. Instead I deal with procedural duties governing conflict/case resolution and with coordination of different foreign courts in the fulfilment of these procedural duties. The development of new forms of horizontal coordination between national courts in Europe is one expression of the rise of a cooperative model of dispute resolution, which can also be observed in the national judicial systems. I will make the argument here that the proceedings in question are neither the property of the parties (accusatorial system), nor are they the property of the

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<sup>1</sup> P. Pescatore, *Le droit de l'intégration - Emergence d'un phénomène nouveau dans les relations internationales selon l'expérience des Communautés européennes*, Bruylant, 2005, pp. 73-95.

<sup>2</sup> A. Rosas, "The European Court of Justice in context: forms and patterns of judicial dialogue", *European Journal of Legal Studies*, 2007, Vol. 1, No. 2, pp. 13-14. But comp. with G. de Vergottini, *Au delà du dialogue entre les cours - Juges, droit étranger, comparaison*, Dalloz, 2013.

Judge. The proceedings depend both on the parties and on the Judge and this community leads them to cooperate in order to reach a fair and efficient settlement of the case.

I will focus mainly on civil procedure. Not all civil procedure is covered by the European Regulations, only certain aspects are covered.<sup>3</sup> I am sorry for listing them but it is useful that you have an idea of the regulation ambit. Thus the aspects of civil procedure that are covered by the EU law are: jurisdiction, recognition and enforcement of judgments in civil or commercial matters<sup>4</sup>, jurisdiction, recognition and enforcement of judgments in matrimonial matters and of parental responsibility<sup>5</sup>, service of judicial and extrajudicial documents in civil or commercial matters<sup>6</sup>, cooperation between courts in the taking of evidence<sup>7</sup>, insolvency proceedings<sup>8</sup>, enforcement order for uncontested claims<sup>9</sup>, order for payment procedure<sup>10</sup>, small claims procedure<sup>11</sup>, jurisdiction, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations<sup>12</sup>, jurisdiction, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession<sup>13</sup>.

A comparable set of common rules regarding jurisdiction in criminal matters does not exist. The explanation for this is that criminal procedure is traditionally closely connected to State territoriality and sovereignty. However, the same phenomenon as in civil matters is emerging and growing in the criminal field. Illustrative of this evolution is the Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States,<sup>14</sup>

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<sup>3</sup> That is a problem. See L. Cadiet, E. Jeuland et S. Amarani Mekki, *Droit processuel civil de l'Union européenne*, Paris, LexisNexis, 2011, n° 4. - A.-M. Leroyer et E. Jeuland (dir.), *Quelle cohérence pour l'espace judiciaire européen ?* Dalloz, 2004.

<sup>4</sup> (EC) Regulation n° 44/2001, 22 December 2000 on jurisdiction, recognition and enforcement of civil and commercial judgements, replaced by (EU) Regulation n° 1215/2012, 12 December 2012 on jurisdiction, recognition and enforcement of civil and commercial judgements

<sup>5</sup> (EC) Regulation n° 2201/2003, 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility

<sup>6</sup> (EC) Regulation n° 1393/2007, 13 November 2007 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (service of documents)

<sup>7</sup> (EC) Regulation n° 1206/2001, 28 May 2001 on cooperation between the courts of member States in the matter of evidence in civil and commercial cases

<sup>8</sup> (EC) Regulation n° 1346/2000, 29 May 2000, on insolvency proceedings.

<sup>9</sup> (EC) Regulation n° 805/2004, 21 April 2004 on creation of a European enforcement order for uncontested claims

<sup>10</sup> (EC) Regulation n° 1896/2006, 12 December 2006 creating a European order for payment procedure

<sup>11</sup> (EC) Regulation n° 861/2007, 11 July 2007 establishing a European small claims procedure.

<sup>12</sup> (EU) Regulation n° 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations

<sup>13</sup> (EU) Regulation n° 650/2012, 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession

<sup>14</sup> Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, OJ L 190, 18.7.2002; amended by Council Framework Decision 2009/299/JHA of 26 February 2009 amending Framework Decisions 2002/584/JHA, 2005/214/JHA, 2006/783/JHA, 2008/909/JHA and 2008/947/JHA, thereby enhancing the procedural rights of persons and fostering the application of the principle of mutual recognition to decisions rendered in the absence of the

likewise the Council Framework Decision of 18 December 2008 on the European evidence warrant for the purpose of obtaining objects, documents and data for use in proceedings in criminal matters<sup>15</sup>. These Framework decisions are another step after the creation of Eurojust and before the creation of a European public prosecutor's office<sup>16</sup>.

The most interesting aspect in the evolution towards greater judicial cooperation in the EU is the numerous ways in which the crucial actors of the European Justice System have come to cooperate. But I also think that this aspect is closely connected with a new conception, in the domestic framework of the procedure and of the role of the actors of the national justice system: this domestic cooperation between actors of the national Justice system(s) will be my second point.

## I. – INTERNATIONAL COOPERATION BETWEEN ACTORS WITHIN THE EUROPEAN JUSTICE SYSTEM

Traditionally, with the exception of arbitration, international litigation depends on the *lex fori* because justice is a matter falling under the State's prerogatives. On this understanding, justice is one of the main attributes of the State power, just like monetary matters or military matters. This does not prevent any coordination between States, but traditional coordination is limited to jurisdiction, effects of judgments, maybe service of documents or taking of evidence<sup>17</sup>. Furthermore this coordination requires a Treaty of Mutual Assistance, *traité d'entraide judiciaire*, which can be bilateral or multilateral like The Hague Conventions for example<sup>18</sup>. This mutual assistance is traditionally organized on a diplomatic basis and is approached on a State-to-State basis. Inter-State cooperation and assistance is therefore limited to the power of the executive branch of the States, and the Courts have no direct powers except the ability to request the executive to request such assistance. It is a subject for private international law, especially the part of private

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person concerned at the trial, OJ L 81, 27.3.2009. The European arrest warrant is a judicial decision issued by a Member State with a view to the arrest and surrender by another Member State of a requested person, for the purposes of conducting a criminal prosecution or executing a custodial sentence or detention order. The important thing is that Member States shall execute any European arrest warrant on the basis of the principle of mutual recognition and, of course, in accordance with the provisions of this Framework Decision.

<sup>15</sup> Council Framework Decision 2008/978/JHA of 18 December 2008 on the European evidence warrant for the purpose of obtaining objects, documents and data for use in proceedings in criminal matters, OJ L 350 of 30.12.2008.

<sup>16</sup> See I. Patrone, "Conflicts of jurisdiction and judicial cooperation instruments : Eurojust's role", *ERA Forum*, 2013, vol. 14, Issue 2, pp. 215-225. – M. Berger, « Le droit de l'Union européenne et la coopération en matière pénale », *ERA Forum*, 2013, vol. 14, Issue 2, pp. 263-275.

<sup>17</sup> See P. Mayer, « La notion de coordination et le conflit de juridictions », in E. Pataut, S. Bollée, L. Cadiet et E. Jeuland (dir.), *Les nouvelles formes de coordination des justices étatiques*, Paris, IRJS Editions, 2013, pp. 3-10.

<sup>18</sup> V. p. ex Convention du 15 novembre 1965 relative à la signification et à la notification à l'étranger des actes judiciaires et extrajudiciaires en matière civile (*service of documents*). - Convention du 18 mars 1970 sur l'obtention des preuves à l'étranger en matière civile ou commerciale (*taking of evidence*).

international law called “Conflict of jurisdictions”; this issue is not really a question for civil procedure.

On the contrary, the interesting aspect of the contemporary evolution of EU law is the new forms of coordination between State’s justice systems and how they have made questioned the traditional lines due to a rising osmosis between the internal and the external dimensions, the domestic and the international levels. This osmosis was already observed in the global field of *conflict of laws* where the rise in power of private interests competes with the traditional primacy of state sovereignties<sup>19</sup>; it forces itself more on the regional level with the development in Europe of an integrated community in favour of which the national constitutions agree a growing delegation of sovereignty from state members to the European Union. Thus appears a European procedural law that can be presented, in a synthetic formula and from a private law point of view, like both the result of the proceduralization of private international law and of the internationalization of private procedural law. To catch a sense of this evolution, it is necessary to begin with presenting some new forms of coordination of state justices (A) before outlining some general remarks on this evolution of the notion of coordination (B).

#### **A. - Some examples of new forms of coordination**

The new forms of coordination are many and they develop with regard to the action -a problematic word for expressing the *action en justice*- as well as in the proceeding (*l’instance* in French). I will focus on the proceeding<sup>20</sup> and I will limit my presentation by giving you three specific examples. We may observe this shift through the course of the proceeding (1°) as well as about the court’s duty (2°) and the effects of (national) judgment (3°).

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<sup>19</sup> Starting point: Friedrich-Carl von Savigny, *Traité de droit romain*, 1849, t. VIII, esp. § 348-361. See esp. H. Muir Watt, *La fonction de la règle de conflit de lois*, thèse Paris II, 1985. Comp. B. Hess, « Nouvelles techniques de la coopération judiciaire transfrontière en Europe », *Rev. crit. DIP* 2003, pp. 215 *sq.*, spec. II, 1°.

<sup>20</sup> As to the action, the new forms of coordination do not have much to show with classical international *lis pendens* or *exequatur* proceedings: see M.-L. Niboyet et Y.-M. Serinet, “L’action en justice: comparaison entre le contentieux international et le contentieux interne”, in E. Pataut, S. Bollée, L. Cadiet et E. Jeuland (dir.), *Les nouvelles formes de coordination des justices étatiques*, Paris, IRJS Editions, 2013, pp. 87-114. For example, in a *Flash Airlines* case (Paris 6 March 2008, *JCP* 2008, II, 10115, note Bruneau ; *D.* 2008, 1452, note Courbe ; *Gaz. Pal.* 20-21 Feb. 2009, 48, obs. Niboyet) and a *West Caribbean* case (Cass. 1<sup>re</sup> civ., 7 Dec. 2011, *JCP* 2012, 241, note D’Avout ; *D.* 2012, 254, note Delebecque ; *Rev. crit. DIP* 2012, 138, rapp. Maitrepierre), a party asked the French courts to declare themselves incompetent to decide the cases pending before US courts, or, in a *Vivendi* case (Paris, pôle 2, ch. 2, 28 Apr. 2010, *JCP* 2010, 1191, n° 25, obs. Jeuland ; *Procédures* 2010, repère 7, obs. Nourissat ; *D.* 2010, 2323, obs. Bollée. Also see M. Audit and M.-L. Niboyet, « L’affaire Vivendi Universal SA ou comment une class action diligentée aux États-Unis renouvelle le droit du contentieux international en France », *Gaz. Pal.* 28-29 May 2010, 11), a claimant asked a French *juge des référés* to decide by anticipation the non-invocability of a foreign judgment that has not yet been ruled (See TGI Paris, ord. réf., 27 August 2009, *Gaz. Pal.* 28-29 May 2010, 11, obs. Audit and Niboyet. - Paris, pôle 2, ch. 2, 28 Apr. 2010, n° 10/01643, *JCP* 2010, 1191, n° 25, obs. Jeuland ; *D.* 2010, obs. Bollée ; *Gaz. Pal.* 28-29 mai 2010, 11, obs. Audit and Niboyet). Action becomes the vector for dialogue between foreign judges, for transnational judicial cooperation, which focuses precisely on avoiding *forum shopping* and organizing an efficient coordination of state justices.

1°) Firstly, in the *course* of proceeding (*le déroulement de l'instance*), foreign national procedural rules may be applied and not just supranational ones. We may observe the progressive integration “of national procedures inside a supranational procedure,” in passing “from independent national proceedings (...) to an international proceedings composed of interdependent national segments.”<sup>21</sup> The case law for the European Court of Human Rights also follows this new conception. In the *Dinu c. Roumanie et France* case, the court ruled that a transnational process has to be considered like a unique procedure in spite of the multiplicity of national proceedings implemented in a single case<sup>22</sup>. This is indeed a *renewed* vision of the proceedings and not a simple stacking up of technical rules justified only by their sector-based necessity. *Lex fori* is no longer the only applicable law to the proceedings. This renewed approach brings about “active facts of co-operation of a national court to the course of proceedings in another State”<sup>23</sup>. In other words, a national court delegates the implementation of certain aspects of the proceedings to another European court, including in the forms foreseen in the law of foreseen in the law of the requesting court.

Two particularly clear examples can be given here, that illustrate two modes of this new co-operative procedural work.

The first one lies in EU Regulation of 2001 on the taking of evidence<sup>24</sup>. Under this regulation, on the ground of Art. 10, French judges may be directly asked by a court in another EU country to execute an order to investigate in accordance with a special procedure provided for by the law of its Member State (Art. 10, 3°), and representatives of the referring court may even be present when for example the French court implements the measure of investigation (Art. 12, 1°). Therefore a French judge may be led to order disclosure or cross-examination at the request of an English court, may be in the presence of an English judge, even though these tools do not exist at all in French civil procedure.

The second example is provided by the Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of

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<sup>21</sup> L. D'Avout, “De l'entraide judiciaire internationale au contentieux civil intégré”, in E. Pataut, S. Bollée, L. Cadiet et E. Jeuland (dir.), *op. cit.*, pp. 117-140, spec. n° 1.

<sup>22</sup> Ex. CEDH 4 Nov. 2008, n° 6152/02, *Dinu c. Roumanie et France*, *Procédures* 2008, n° 333, obs. Fricero ; *Gaz. Pal.* 20-21 févr. 2009, 50, obs. Sinopoli (avec CEDH, 29 Apr. et 18 Dec. 2008). See also CEDH 4 mai 2010, n° 56588/07, *Robert Stapleton c. Irlande* (criminal matter, but application inadmissible). – CEDH [GC], 21 janv. 2011, n° 30696/09, *M.S.S. c. Belgique et Grèce* (administrative matter). – CEDH [GC], 26 nov. 2013, n° 27853/09, *X c. Lettonie* (civil matter).

<sup>23</sup> L. D'Avout, *op. cit.* p. 118.

<sup>24</sup> Council Regulation (EC) No 1206/2001 of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters.

judgments in matrimonial matters and the matters of parental responsibility<sup>25</sup>. I specially draw your attention to Art. 15, entitled: “Transfer to a court better placed to hear the case”. This provision states : “By way of exception, the courts of a Member State having jurisdiction as to the substance of the matter may, if they consider that a court of another Member State, with which the child has a particular connection, would be better placed to hear the case, or a specific part thereof, and where this is in the best interests of the child: (a) stay the case or the part thereof in question and invite the parties to introduce a request before the court of that other Member State in accordance with paragraph 4; or [and that’s more interesting] (b) request a court of another Member State to assume jurisdiction in accordance with paragraph 5”. It is remarkable that this provision shall apply, not only, “(a) upon application from a party”, but also “(b) of the court's own motion; or (c) upon application from a court of another Member State with which the child has a particular connection, in accordance with paragraph 3”. The courts involved have expressly the duty to “cooperate” for the purposes of this Article.

These new forms of coordination of state justices can be observed not only in the course of the proceedings; they also impact upon the court’s duty as well as the effects of judgments.

2°) The contemporary evolution for international dispute resolution modifies the *court’s duty* beyond the traditional issue of the application of foreign law according to *lex fori*. The new forms of coordination of state justices express an obvious reinforcement and a diversification of judge’s powers: it is the judge who decides, it is the judge who manages, the judge must be active and is obliged to apply the appropriate rules<sup>26</sup>. The evolution is notable since it may be considered as a limitation of the principle of procedural autonomy of States, especially in the field of consumer protection against unfair abusive clauses where the national court has seen its judicial powers limited by the CJEU interpreting the applicable EU Directives. Even if the parties are the ones commonly establishing the parameters of civil proceedings, the jurisprudence of the CJEU interpreting Directive 93/13/EC changed to a certain extent this logic in the sense that it thus spelled out the domestic courts’ power first<sup>27</sup> and later the obligation<sup>28</sup> to examine whether a given term of contract is unfair. If the national court considers a contractual term unfair, it shall not apply irrespective of whether the “unfairness” was raised or not by one of the parties in

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<sup>25</sup> Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility.

<sup>26</sup> See S. Clavel, « Les mutations de l’office du juge à l’aune du développement des règles de droit international privé supranationales », in E. Pataut, S. Bollée, L. Cadiet et E. Jeuland (dir.), *op. cit.*, pp. 57-71.

<sup>27</sup> Joined Cases 240/98 to 244/98 *Oceano*, cit.

<sup>28</sup> Case C-168/05 *Elisa Maria Mostaza Claro v Centro Movil Milenium SL* [2006] ECR I-10421. Case C-243/08 *Pannon GSM Zrt. V. Erzsébet Sustikne Gyofri* [2009] ECR I-04713.

first or second instance proceedings<sup>29</sup>, unless the consumer insists on its application.<sup>30</sup>

In the filigree of positive European law, this evolution tends to give the national judge a large power aimed at the effective realization of material law of the Union, under the control of the European Union Court of Justice.

3°) The *effects of judgments* are also the object of an important renewal. With regard to recognition and enforcement of foreign judgments, one may say that, inside the European Union, foreign judgments are less and less foreign and more and more domestic because of the abolition of exequatur<sup>31</sup>. The foreign judgment is somehow naturalized, which expresses the trend already observed in the “privatization” of the coordination between State justice systems<sup>32</sup>. The procedure for exequatur was presented as a form of coordination between state justices; therefore, one may well question whether its abolition means, not a new form of coordination, but a backward movement<sup>33</sup>? In my opinion, it is not a backward step.

Rather than a step backward, the abolition of exequatur is simply a moving of the coordination in question. It is first the result of a homogenization of national procedural systems. Secondly, the apparent step backwards which the abolition of exequatur may bring is compensated by a possible recourse against the judgment (strictly speaking an “*application for refusal of enforcement*”) on the ground of public policy in the member State addressed<sup>34</sup>. The abolition thus represents a moving of the coordination to a later stage of the implementation of the recognition or of the enforcement.

This brings us to a point whereby certain additional general comments may be made as to these new forms of coordination.

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<sup>29</sup> Case C 488/11, *Dirk Frederik Asbeek Brusse, Katarina de Man Garabito v Jahani BV*, judgment 30 May 2013.

<sup>30</sup> See, Case C-243/08 *Pannon*, *op. cit.*

<sup>31</sup> (EU) Regulation n° 1215/2012, 12 December 2012 on jurisdiction, recognition and enforcement of civil and commercial judgements, Art. 39-44, spec. Art. 39: “*A judgment given in a Member State which is enforceable in that Member State shall be enforceable in the other Member States without any declaration of enforceability being required*”. See S. Bollée, “*Les effets des jugements étrangers*”, in E. Pataut, S. Bollée, L. Cadiet et E. Jeuland (dir.), *op. cit.*, pp. 157-169.

<sup>32</sup> See *supra* I, *in limine*, p. 4 and *infra*, p. 9, b).

<sup>33</sup> See P. Mayer and E. Jeuland, *op. cit.*

<sup>34</sup> (EU) Regulation n° 1215/2012, 12 December 2012 on jurisdiction, recognition and enforcement of civil and commercial judgements, Art. 45-51, spec. Art. 45: “*1. On the application of any interested party, the recognition of a judgment shall be refused: a) if such recognition is manifestly contrary to public policy (ordre public) in the Member State addressed*”.

## B. – General remarks on new forms of coordination

The observation of the new forms of coordination allows me to sketch three general remarks.

a) The first one refers to the *structure of proceedings*.

What happens with these new forms of coordination between the judicial systems in different States?

I would say that they draw an “*informal model for integrated international proceedings*”<sup>35</sup> that would favour a form of relocation (*délocalisation*) of the proceedings brought before a given national court. This relocation may be managed according to two modes: either by association with a foreign court, for example in the taking of evidence; or by transmission, which can be reversed, of the case to a more appropriate foreign judge, like in family matters.

The first mode illustrates a “*geographically diffused procedure, but ranked globally*” under the management of a “*guiding judge*”; the second one illustrates a “*geographically concentrated but turning procedure*”<sup>36</sup>. The choice between these two formulas depends largely on the nature of the claim; it is clear that maintenance disputes are not similar to evidence issues. However, in all these hypothesis, it is a sort of what Peter Schlosser qualifies as a “*joint transborder case management*” of the proceedings that is performed<sup>37</sup>, depending on an institutionalized dialogue of judges which might go in some cases as far as a decision ruled in cooperation by the judges of different States. This co-operation could be reinforced in the future thanks to the development of new information and communication technology which would allow the organization of joint hearings before courts located in different countries.

These occurrences merit attention; they may be of considerable pedagogical value for the judges involved, since they give them experience in foreign procedural techniques. So to speak, these techniques are adopted in foreign systems and this leads to gradual harmonization of court practices, by mutual adaptation<sup>38</sup>. This

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<sup>35</sup> L. D’Avout, *op. cit.*, p. 132.

<sup>36</sup> L. D’Avout, *op. cit.*, n° 23.

<sup>37</sup> See P. Schlosser, “Jurisdiction and international judicial and administrative cooperation”, *RCDAl* 2000, t. 284, pp. 396 *sq.*

<sup>38</sup> A similar phenomenon occurs in criminal procedure with the *Joint Investigation Teams* (JITS) created by the Framework Decision of 13 June 2002 on the European arrest warrant, hosted in French law by the Code of Criminal Procedure (art. 695-2 and 695-3). A *Joint Investigation Team* (JIT) is an investigation team set up for a fixed period, based on an agreement between two or more EU Member States and/or competent authorities,

procedural assimilation (*acculturation*) is furthermore favored by the institution of different co-operative networks, specially the *European Judicial Network in criminal<sup>39</sup>, civil and commercial matters<sup>40</sup>*, and the *European Judicial Training Network<sup>41</sup>*. The transnational disputes are testing grounds for international exchanges of court practices, and thus to the integration of new procedures, and ultimately, this cultural adaptation will gradually favour the harmonization of national procedural rules themselves. This is why the Commission wants to strengthen the European Judicial Network (EJN) so that communication between courts becomes a reality in day-to-day judicial life.

b) The second remark is about the *patterns of coordination*.

The contemporary evolution in European law proposes a categorization of coordination mechanisms by grading them: a lower grade is illustrated by the abstention of a national court to handle the case to the benefit of a foreign court and the higher grade is the direct co-operation of foreign judges in the settlement of the same international case<sup>42</sup>. With regard to the scale of coordination, the forms have gone from the diplomatic channels to jurisdictional cooperation passing through administrative intervention, from indirect collaboration to direct cooperation passing through semi-direct cooperation, from the passive choice of abstention to the active duty of cooperation. Nowadays the goal is not only to remedying the complex diversity of legal systems in order to avoid a denial of justice but to improving efficiency of procedures in order to reach a fair and prompt solution of the case. This evolution translates a tendency for a kind of “privatization” of the judicial mutual assistance rules<sup>43</sup>. The regulation of this cooperation is displaced from the general terrain of the law of conflicts applicable at the form for acts of procedure to the enactment of specific provisions for procedural issues by means of European material rules. The proceedings have to be simplified and faster. The fundamental objective of mutual assistance between European jurisdictions is not to preserve national sovereignty, or public interest, but to assure the effectiveness of procedures and private interest. This is subject to the necessary individual procedural protection of the parties, especially of the defendant<sup>44</sup>.

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for a specific purpose. Non EU Member States may participate in a JIT with the agreement of all other parties. The aim of a JIT is per definition to investigate specific cases, it is not possible to establish a generically competent task force for a certain type of crime, nor is it possible to set up a permanent operational team by using the JIT setup and concept.

<sup>39</sup> [https://e-justice.europa.eu/content\\_ejn\\_in\\_criminal\\_matters-22-en.do](https://e-justice.europa.eu/content_ejn_in_criminal_matters-22-en.do)

<sup>40</sup> [https://e-justice.europa.eu/content\\_ejn\\_in\\_civil\\_and\\_commercial\\_matters-21-en.do](https://e-justice.europa.eu/content_ejn_in_civil_and_commercial_matters-21-en.do)

<sup>41</sup> <http://www.ejtn.eu>

<sup>42</sup> See P. Schlosser, *op. cit.*, spec. pp. 29 *sq.*

<sup>43</sup> See *supra* I, *in limine*, p. 4 and p. 7, 3°).

<sup>44</sup> See L. D'Avout, *op. cit.*, n° 11.

c) The third and final remark is more epistemological; the issue is the *approximation of categories of international private law and judicial private law*.

Traditionally the points of view of proceduralists and internationalists are rather different: the proceduralist is concerned with the *internal coherence* of the domestic Justice while the internationalist is interested in the *systemic coordination* of national laws<sup>45</sup>. This difference makes sense in a world segmented by the phenomena of borders, inherited essentially from the 19<sup>th</sup> century; it makes sense in reference to the existence of State Justices separated by their respective national sovereignty.

However the new forms of coordination between State Justices show that the objective for coordination of private international law and the objective for coherence of private procedural law are not incompatible. On the one hand, coherence is not unknown to private international law while on the other hand, coordination is not unfamiliar to private procedural law<sup>46</sup>.

As to *coordination*, the State justice systems do not always appear themselves under the form of homogenous and closed systems. Legal systems of the federal type are confronted with these questions of internal coordination which are sometimes very complex, above all in the absence of a federal procedural law. But these questions of internal coordination are not unknown to legal systems of the unitary type, such as in France. Many illustrations are available: for example, the unilateral and passive coordination like that which occurs with *lis pendens* and related cases<sup>47</sup>; more active co-operation with many techniques of referral of the case from one court to another<sup>48</sup>; the collaborative process implemented by the rogatory commission<sup>49</sup>; the settlement of conflicts between different jurisdictional orders, in particular between the judicial jurisdiction and the administrative jurisdiction by the *Tribunal des conflits*<sup>50</sup>, or between criminal and civil suits<sup>51</sup>.

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<sup>45</sup> Confer P. Mayer, *op. cit.*, and E. Jeuland, "Les internationalistes et les processualistes ont-ils une vision commune de la notion même de coordination des justices étatiques ? Etude de canardologie », in E. Pataut, S. Bollée, L. Cadet et E. Jeuland (dir.), *op. cit.*, pp. 11-21.

<sup>46</sup> See L. Cadet, « Conclusion d'un processualiste », in E. Pataut, S. Bollée, L. Cadet et E. Jeuland (dir.), *op. cit.*, pp. 209-229.

<sup>47</sup> Art. 100-106 CPC.

<sup>48</sup> Ex. art. 47, 97, 107 CPC.

<sup>49</sup> Art. 730-732 CPC.

<sup>50</sup> The *Tribunal des conflits* was instituted by article 89 of the Constitution of 1848 to settle conflicts of attribution between the administrative and judicial authorities. Eliminated with the onset of the Second Empire, it was re-established by the law of 24 May 1872 regarding the reorganization of the Conseil d'État. These attributions were reinforced by the law of 20 April 1932 and the decree of 25 July 1960. See P. Gonod & L. Cadet (dir.), *Le Tribunal des conflits*, Paris, Dalloz, 2009. It is going to be reformed : see Projet de loi relatif à la modernisation et à la simplification du droit et des procédures dans les domaines de la justice et des affaires intérieures, Sénat, n° 175, 27 Nov. 2013, spec. Art. 7.

<sup>51</sup> Art. 1<sup>er</sup>-10 CPP ; art. 826-1 et 852-1 CPC.

Inversely, *coherence* is not unknown to private international law. Particularly, the principles for a fair trial<sup>52</sup>, which are part of the public order, favours an approximation of foreign systems which contributes, in its sphere, to mutual trust and to make possible the free circulation of judgments in the international space just like in the domestic sphere.

The approximation contributes, in its sphere, to mutual trust and to make possible the free circulation of judgments in the European space.

Thus the European procedural system, combining coordination and coherence, illustrates what I would call a methodical jurisdictional pluralism which is not so far from the thesis of the “*pluralisme ordonné*” proposed by Mireille Delmas-Marty<sup>53</sup>. The Kelsenian metaphor of the *pyramid* is replaced by the metaphor of *network*, or maybe *clouds*,<sup>54</sup> and by the emergence of unedited forms of *contractualization* of the settlement of international litigation, which perfectly echoes contemporary *contractualization* of litigation, proceedings and judicial administration in State Justice systems<sup>55</sup>. This phenomenon can be illustrated with transnational insolvency procedures for which the practice, I mean legal firms, administrators and liquidators, has imagined and drafted protocols for coordination of national procedures, on the basis of standard-contracts, eventually sanctioned by the relevant courts, aimed to optimizing the course of the different parallel procedures<sup>56</sup>. This goes further than the duty to cooperate and communicate information currently ruled by the EU Regulation on insolvency proceedings<sup>57</sup>. I think that the European legislator could contribute more to the spontaneous coordination of State Justices in giving to the national courts, together with their foreign counterparts, the power to

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<sup>52</sup> According to the European convention for human rights, which are part of the public order clause in the EU regulation : CJCE, 28 March 2000, *Krombach*, JCP 2001, II, 10607, note Nourissat ; *Europe* 2000, n° 157, obs. Idot ; *Gaz. Pal.* 1<sup>er</sup>-3 oct. 2000, 30, obs. Niboyet ; *Rev. crit. DIP* 2000, 481, note Muir Watt. – See M.-L. Niboyet, « La confirmation par la Cour de justice des Communautés européennes de l'intégration des droits fondamentaux au système de la Convention de Bruxelles du 27 septembre 1968 », *Gaz. Pal.* 1<sup>er</sup>-3 oct. 2000, 21.

<sup>53</sup> M. Delmas-Marty, *Les forces imaginantes du droit (II)- Le pluralisme ordonné*, Paris, Seuil, 2006.

<sup>54</sup> See L. Cadet, “La légalité procédurale en matière civile”, *Bulletin d'information de la Cour de cassation*, n° 636, 15 March 2006, pp. 3-19.

<sup>55</sup> See *infra* II, B.

<sup>56</sup> See L. D'Avout, *op. cit.*, n° 29.

<sup>57</sup> (EC) Regulation n° 1346/2000, 29 May 2000, on insolvency proceedings, spec. Art. 31. *Duty to cooperate and communicate information*: “1. Subject to the rules restricting the communication of information, the liquidator in the main proceedings and the liquidators in the secondary proceedings shall be duty bound to communicate information to each other. They shall immediately communicate any information which may be relevant to the other proceedings, in particular the progress made in lodging and verifying claims and all measures aimed at terminating the proceedings. 2. Subject to the rules applicable to each of the proceedings, the liquidator in the main proceedings and the liquidators in the secondary proceedings shall be duty bound to cooperate with each other. 3. The liquidator in the secondary proceedings shall give the liquidator in the main proceedings an early opportunity of submitting proposals on the liquidation or use of the assets in the secondary proceedings”.

adapt domestic procedural rules to the specific difficulties of international litigation brought before them.

This shift is not only noticeable at the European level. It is the same inside the national system: the same evolution towards dialogue between courts, the same evolution towards professional networks, the same evolution towards collaborative tools in proceedings and judicial administration. This internal evolution refers to the emergence of a cooperative model of procedure. The second part of my presentation will consider this internal evolution.

## II. – INTERNAL COOPERATION BETWEEN ACTORS OF THE NATIONAL JUSTICE SYSTEM

The distinction between civil law and common law no longer conforms to legal reality. It seems to me outdated in the macro-comparative view of judicial systems where the genealogical distinction between civil law and common law has lost its historical sense in favour of a geographic reorganization of national systems, clearly illustrated by the development of European law<sup>58</sup>. In the same way, in a micro-comparative view of dispute resolution, the distinction between inquisitorial and accusatorial models of procedure does not take the contemporary procedural realities into account to a sufficient degree. Still, it is necessary to be precise about what substitutes for the traditional distinction between inquisitorial, or investigative, and accusatorial, or adversarial, models of procedure. It seems to me that the appropriate way to describe the contemporary evolution is the emergence of a model of cooperative procedure in a plural system of justice. There are two issues here: why (A) and what (B)?

### A. – Why ?

The main *reasons* that push us to progressively transcend the traditional distinctions are of a technical and economic order and all refer to globalization. I don't have time to emphasize them here. The conferences of the *International Association of Procedural Law*, during these ten past years, have often dealt with these issues.

Maybe we have not sufficiently considered how scientific and technical progress, which knows no borders, can shape judicial procedures and makes them

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<sup>58</sup> See L. Cadiet, "Avenir des catégories, catégories de l'avenir: perspectives. Rapport de clôture," in J. Walker and O.G. Chase (eds), *Common Law – Civil Law and the Future of Categories*, Toronto, LexisNexis, 2009, pp. 635-655.

move toward an international process that will leave less room to national singularities. Whether or not this evolution receives approval, I think it is a revolution of a paradigmatic type which is taking place, leading to a rejection of rites (*déritualisation*), even a delocalization of justice whereas traditional rites expressed the significance of local legal cultures. For instance, the desk judge, I mean the judge of a computerized procedure<sup>59</sup>, does not need a court house, which puts into question the fundamental principles of democratic justice, to begin with the publicity of justice. The technical norm models the legal rule. Giuseppe Tarzia observed ten years ago that “*the technical evolution imposes the fixation of common rules for the admissibility of the new means of proof, especially the electronic evidence. One is in the technical sector where the diversity of historical traditions cannot block the formation of a common law*”<sup>60</sup>. The computerization also puts into question the traditional distinction of oral and written proceedings to which the new technology cannot be reduced. It favours the cooperation of the judge and the lawyers, in the measure where it supposes the definition and the implementation of data exchange protocols<sup>61</sup>.

Thus the computerization appears as an important tool of judicial management, which translates itself into the emergence of a new economic culture of procedure. In some way, economy meets up with science from which it shares the same quantitative culture, what Pierre Legendre called the “*Techno-Science-Economie*”, referred to in the “*Industrial State*” (“*Etat industriel*”)<sup>62</sup>. One may say that justice and procedure are captured by technology and by economy that may subject them to their own categories. It is clear that procedural efficiency has become a major challenge for legislative reforms and a main principle for trial or for saying it in the English manner, an “*overriding objective*”<sup>63</sup>. This objective is not absent from French procedural law. For instance, since the start of the 1970’s, French Civil Procedure Code (CPC) limits the judge in his case management “*to what is sufficient to resolve the case, in choosing measures that are the most simple and least onerous*” (Art. 147 CPC)<sup>64</sup>. In this wake, an academic proposal to reform the Italian CPC, presented by Professor

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<sup>59</sup> See J. Resnik, “Managerial Judges, Jeremy Bentham and the Privatization of Adjudication”, in J. Walker and OS G. Chase (eds), *Common Law, Civil Law and the Future of Categories*, Toronto, LexisNexis, 2010, pp. 205-224.

<sup>60</sup> G. Tarzia, « Harmonisation ou unification transnationale de la procédure civile », *Rivista di diritto internazionale privato e processuale*, 2001-4, pp. 869-884.

<sup>61</sup> See L. Cadiet, « Le procès civil à l’épreuve des nouvelles technologies », *Procédures* 2010, Dossier, art. 8. – S. Sontag – Koenig, *Les droits de la défense face aux technologies de l’information et de la communication*, thèse Poitiers, 2013.

<sup>62</sup> P. Legendre, *Argumenta & Dogmatica – Le Fiduciaire*, suivi de *Le silence des mots*, Paris, Edition Mille et une nuits, 2012, p. 105 et 115.

<sup>63</sup> Civil Rules Procedure, Part. 1: “(1) *These Rules are a new procedural code with the overriding objective of enabling the court to deal with cases justly. (2) Dealing with a case justly includes, so far as is practicable : (a) ensuring that the parties are on an equal footing; (b) saving expense; (c) dealing with the case in ways which are proportionate : (i) to the amount of money involved; (ii) to the importance of the case; (iii) to the complexity of the issues; and (iv) to the financial position of each party; (d) ensuring that it is dealt with expeditiously and fairly; and (e) allotting to it an appropriate share of the court’s resources, while taking into account the need to allot resources to other cases*”. This goal is not limited to civil procedure. See also Criminal Procedure Rules, Part 1.

<sup>64</sup> See in a larger view L. Cadiet, « Case management judiciaire et déformalisation de la procédure », *RF adm. publ.* 2008, pp. 134-150.

Andrea Proto Pisani, also contains, in its preliminary provisions, some “*Principi fondamentali dei processi giuridizionali*”, and especially an Article 0.8, entitled “*Efficienza del processo civile*”, that states: «*E assicurato un impiego proporzionato delle risorse giudiziali rispetto allo scopo della giusta composizione della controversia entro un termine ragionevole, tenendo conto della necessità di riservare risorse agli altri processi*»<sup>65</sup>. Therefore, this tendency is certain.

But it is also certain and important to underline that neither science nor economy are not an end in themselves. The only goal of procedure is a just solution of the case and before observing justice in the sentence itself, fairness must first characterize the procedure which drives to it. If a fair procedure does not protect necessarily against unjust sentences, there is little chance that an unfair procedure will make sentences fairer. In other words, procedural efficiency cannot be achieved to the detriment of fair trial. A justice of quality is a justice which succeeds in combining these two logics. This quest is at the heart of the mission to evaluate judicial systems confined in Europe to the *European Commission for efficiency of justice* (CEPEJ)<sup>66</sup>. It is also the spirit of the *EU Justice Scoreboard* presented by the EU Justice Commission itself as a “*cooperative mechanism*” which aims to assist the EU and the member States in achieving more effective justice by providing objective, reliable and comparable data on independence, quality and efficiency of justice systems in all EU member States<sup>67</sup>. The idea is that efficient justice systems are key to economic growth.

Still it is necessary to define exactly *what is going to substitute the traditional distinction of adversarial model and inquisitorial model* of procedure. The second question is what?

## B. – What ?

My answer is that the main evolution is the emergence of a cooperative model of procedure (1°) within a plural justice system (2°).

1°) The *cooperative model of procedure* expresses the idea that the proceedings neither belong to the parties nor to the judge only, but both belong to the parties and to the judge because the parties and the judge are necessarily led to

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<sup>65</sup> A. Proto Pisani, *Per un nuovo codice di procedura civile*, Il Foro italiano, gennaio 2009, V, 1 (estratto).

<sup>66</sup> Whose aims are clearly defined by the Resolution that institutes it : “*to improve the efficiency and the functioning of the justice system of member states, with a view to ensuring that everyone within their jurisdiction can enforce their legal rights effectively, thereby generating increased confidence of the citizens in the justice system and (b) to enable a better implementation of the international legal instruments of the Council of Europe concerning efficiency and fairness of justice*”, Resolution Res(2002)12 establishing the European Commission for the efficiency of justice (CEPEJ), Statute of the CEPEJ, art. 1.

<sup>67</sup> [http://ec.europa.eu/justice/effective-justice/files/justice\\_scoreboard\\_communication\\_en.pdf](http://ec.europa.eu/justice/effective-justice/files/justice_scoreboard_communication_en.pdf)

cooperate in order to reach, in a reasonable time, the fair and efficient resolution of the dispute. The contemporary notion of case management takes this idea in account i.e. that it translates into a rise in powers of the judge in the respect of rights of the parties who must cooperate in the resolution of their case. The case management must not be conceived as the expression of an all-powerful judge, but as an efficient cooperation of all the actors in the process, compatible with a democratic society. Litigation is certainly and mainly a matter of private interests. The courts decide in the respect of the law and in order to assure social peace, thanks to a equal treatment of citizens which refers to Franz Klein's doctrine of social function of procedure<sup>68</sup>. Moreover the recourse to the judge implies a public institution whose functioning is financed by the national revenue service. So it cannot only depend on private initiative and control. The budget of justice is not indefinitely extendable and justice must not only be delivered in the particular case at stake but also in the totality of cases that are submitted to the judge. This means that the resources of public justice have to be equitably divided<sup>69</sup>.

This cooperative model of procedure is at the base of the guiding principles for trial consecrated by the French new CPC in 1975<sup>70</sup>. It also inspires the reform of English procedural rules in 1998 following the *Woolf* report<sup>71</sup>. I especially draw your attention on Articles 1.3 and 1.4 of the Civil Procedure Rules<sup>72</sup>. This cooperative

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<sup>68</sup> F. Klein, *Pro futuro*, Betrachtungen über probleme der Civilproceßreform in Osterreich, Leipzig, Franz Deuticke, 1891, pp. 108 sq. See L. Cadiet, "Judicial case management in France, tradition into Modernity - About some Aspects of Contemporary Tendencies in French civil procedure", in L. Chan & C.H. van Rhee, *Towards a Chinese Civil Code - Comparative and Historical Perspectives*, Leiden, Martinus Nijhoff Publishers, 2012, pp. 541-562.

<sup>69</sup> See L. Cadiet, « La justice face aux défis du nombre et de la complexité », *Les Cahiers de la Justice*, 2010/1, ENM et Dalloz, pp. 13-35.

<sup>70</sup> See L. Cadiet and E. Jeuland, *Droit judiciaire privé*, Paris, LexisNexis, 8ème éd., 2013, nos. 524-551.

<sup>71</sup> See J. Bell, "L'Angleterre: à l'aube d'une réforme radicale de la procédure civile," *Revue générale des procédures*, 1999, pp. 307-139.

<sup>72</sup> Part. 1. - 1.3. **Duty of the parties:** "The parties are required to help the court to further the overriding objective". - 1.4. **Court's duty to manage cases:** "(1) The court must further the overriding objective by actively managing cases. (2) Active case management includes - (a) encouraging the parties to co-operate with each other in the conduct of the proceedings; (b) identifying the issues at an early stage; (c) deciding promptly which issues need full investigation and trial and accordingly disposing summarily of the others; (d) deciding the order in which issues are to be resolved; (e) encouraging the parties to use an alternative dispute resolution procedure if the court considers that appropriate and facilitating the use of such procedure; (f) helping the parties to settle the whole or part of the case; (g) fixing timetables or otherwise controlling the progress of the case; (h) considering whether the likely benefits of taking a particular step justify the cost of taking it; (i) dealing with as many aspects of the case as it can on the same occasion; (j) dealing with the case without the parties needing to attend at court; (k) making use of technology; and (l) giving directions to ensure that the trial of a case proceeds quickly and efficiently". This provision identifies all the ingredients of court case management : - economy of justice (saving expense, allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases, considering whether the likely benefits of taking a particular step justify the cost of taking it) ; control of proceedings time limits (ensuring that it is dealt with expeditiously, identifying the issues at an early stage, deciding promptly which issues need full investigation and trial and accordingly disposing summarily of the others, fixing timetables or otherwise controlling the progress of the case, giving directions to ensure that the trial of a case proceeds quickly and efficiently) ; increased powers of the court (The court must seek to give effect to the overriding objective, The court must further the overriding objective by actively managing cases) ; cooperation of the parties (The parties are required to help the court to further the overriding objective, encouraging the parties to co-operate with each other in the conduct of the proceedings) ; adjustment of the proceedings to the real case (dealing with the case in ways which are proportionate : (i) to the amount of money involved; (ii) to the importance

model is approved by the European Courts<sup>73</sup>. Finally, it has been promoted by the UNIDROIT Principles of transnational civil procedure, especially in Article 11.2 which states that “*The parties share with the court the responsibility to promote a fair, efficient, and reasonably speedy resolution of the proceeding*”<sup>74</sup>. A lot is said in this remarkable provision.

I just want to add that this cooperative model is intended to be deployed through procedural agreements concluded between the parties, and even between the judge and parties, be it in the framework of each particular case, under the form of individual agreements, be it in the framework of general protocols, concluded between the courts and their habitual interlocutors, especially the Bar. A lot of illustrations of this growing contractualization of procedure and of justice could be given but I would need time to do it that I do not have<sup>75</sup>. Just one very recent example: a protocol on the implementation of electronic communication of procedural documents (*Télérecours*) has been concluded on 27 November between the Paris Bar, the Administrative court and the Administrative court of appeal of Paris<sup>76</sup>. The phenomenon is not only French; it is wider. The English system is not so far from France since the *Woolf* reform has introduced pre-action protocols for some type of litigation<sup>77</sup>. Some years ago the Italian *Revista trimestrale* dedicated a special issue to *Accordi di parte e processo*<sup>78</sup>. Of course the concept of contractualization is not reducible to the utilization of contracts in the sense of dogmatic law; rather, it rests on a metaphoric use of the concept of contract referring to consultation, participation

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of the case; (iii) to the complexity of the issues; and (iv) to the financial position of each party) ; incentives to ADR (encouraging the parties to use an alternative dispute resolution procedure if the court considers that appropriate and facilitating the use of such procedure, helping the parties to settle the whole or part of the case); and use of ICT (making use of technology), which allows, for instance, to prevent the appearance of parties (dealing with the case without the parties needing to attend at court).

<sup>73</sup> See for example : ECHR, 3 Feb. 2009, no 44807/06, *Poelmans v. Belgique*, JCP G 2009, II, 10070 ; *Procédures* 2009, n° 81 ; *Rev. huissiers* 2010, 11, note and obs. Fricero : “*Even when a procedure is governed by the principle of parties autonomy, the members States have the duty to organize their judicial systems in such a way that their courts can guarantee everyone the right to a final decision within a reasonable time*”. – EU General Court, 11 July. 2002, *Hyper Srl c. Commission*, aff. T-205/99, Europe 2002, no 326, ruling that “*while the principle of the rights of the defense imposes a number of procedural obligations on the national and Community authorities, it also implies a certain amount of diligence on the part of the party concerned*” (administrative procedure).

<sup>74</sup> ALI/UNIDROIT, *Principles of Transnational Civil Procedure*, Cambridge, Cambridge University Press, 2006.

<sup>75</sup> See L. Cadiet, « Les pouvoirs du juge dans le cours de la procédure civile et de la procédure pénale », *Les cahiers de la justice*, 2013/3, pp. 61-72.

<sup>76</sup> <http://www.annoncesdelaseine.fr/index.php/2013/12/09/signature-de-la-convention-%C2%AB-telerecours-%C2%BB-4>

<sup>77</sup> <http://www.justice.gov.uk/courts/procedure-rules/civil/protocol>. Pre-action protocols are defined as statements of best practice about pre-action conduct which have been approved by the Head of Civil Justice and are listed in Practice Direction (Pre-Action Conduct). See A. Binet-Grosclaude, C. Foulquier, L. Cadiet, J.-P. Jean et H. Pauliat *Mieux administrer la justice en interne et dans les pays du Conseil de l'Europe pour mieux juger*, Rapport pour l'Agence nationale de la recherche, Limoges-Paris-Poitiers, juin 2012, 580 p.

<sup>78</sup> F. Carpi et alii, *Accordi di parte e processo*, in *Quaderni della Rivista trimestrale di diritto e procedura civile*, t. 11, Giuffrè editore, 2008.

and maybe agreements of the parties involved in the procedure and aiming to legitimise the judgment and to facilitate its acceptance by the parties<sup>79</sup>.

2°) This cooperative dimension of contemporary procedure registers secondly in a *plural system of justice*. What I mean by this is that dispute resolution is not limited to the solution of disputes by a court instituted by the law to do so. The recourse to the judge must not be conceived as a *first* recourse but as a *final* recourse, which must be used only when it is not possible to settle the dispute in another way. It is necessary to have exhausted all the possible avenues of dialogue before collecting the good word of this third party independent who is the judge. It is a civic duty and a social responsibility for citizens. All forms of dispute resolution as alternatives to judgment must thus be developed before the judge during the proceedings.

Speak of a plural justice system aims to express the idea that to each case must be offered the mode of resolution which is the most appropriate to it and that the law must facilitate the passage of a mode to another provided that these methods present the same guarantees of good justice (*bonne justice*). For instance, the right to a fair conciliation must respond to the right for a fair trial. In all the registers of plural justice, the contemporary evolution invites us to consider that procedure cannot be thought of as “ready-to-wear” (*prêt-à-porter*) but in that of “made-to-measure” (*sur-mesure*). Diversity, flexibility, reactivity are a good response to the complexity of contemporary societies. The traditional conception of a static and standard procedure, based on a rigid division of work between the judge and the parties, regulated by the legislation, is replaced by a dynamic and diversified conception of procedure, resting on a constant cooperation of the judge and parties who may have recourse if needed to agreements already evoked as a tool of procedural management<sup>80</sup>. Consultation, negotiation, agreement, convention and even contract are the keywords of the destiny of the new European civil procedure as tools of a democratic justice based on the cooperation of citizens and States, which brings me to the conclusion.

## **Conclusion**

To draw a conclusion to this too long presentation, let me say that the development of the horizontal model of cooperative justice and of cooperative

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<sup>79</sup> See L. Cadiet, « Faire lien, propos introductifs », in S. Chassagnard-Pinet et D. Hiez (dir.), *La contractualisation de la production normative*, Dalloz, 2008, pp. 169-184.

<sup>80</sup> See L. Cadiet, “Le procès civil à l’épreuve de la complexité,” in *Mélanges Bruno Oppetit*, Paris, Litec, 2010, pp. 73-94.

procedure in Europe is not a fashion but a structural change in the way of thinking and implementing dispute settlements. Two recent European initiatives confirm the rooting of this evolution.

The main initiative is a European Commission one, especially the EU Justice Commissioner Viviane Reding, who organized in Brussels, on 21-22 past November, the *Assises de la justice*, dedicated to shaping justice policies in Europe for the years to come after the Stockholm Programme<sup>81</sup>. This brain storming was preparing the Communication on future initiatives in the field of Justice and home affairs policies that the EU Commission will present in spring 2014 and which will be discussed at the European Council in June 2014. The question addressed was: what will EU justice policy look like in 2020? A package of five discussion papers were presented covering European civil, criminal, administrative law, as well as the rule of law and fundamental rights in the EU. As to procedural aspects, beyond what has been achieved, I must stress that a common aim is to enhance co-operation between actors of the judicial systems: co-operation and mutual trust are closely and dialectically connected. As to administrative matters, one of the challenges is to enhance co-operation between administrative authorities at national and EU level. In this field, the forms of cooperation are complex and need to be closely monitored. In criminal matters, the challenge is to consolidate, simplify and standardize the methods of judicial cooperation at each stage of the criminal proceeding because practitioners need to work together, exchange information in a fast and secure way, and obtain direct assistance from their colleagues through efficient collaborative tools. In civil matters, the service of documents is a crucial element whose good functioning supposes a fair cooperation between courts and parties. The current state of play is not satisfactory due to divergences between member States on important issues such as the circumstances under which documents are to be served, by whom such service should or could take place, to whom documents may be served and so on.

Therefore it is not a surprise that this issue is also addressed by the second initiative I wish to highlight. This initiative has been taken by the European Law Institute which, in October of last year, launched the drafting of European principles of civil procedure on the basis of the UNIDROIT principles of transnational civil procedure<sup>82</sup>. I proposed this perspective some years ago<sup>83</sup> and I am happy to observe that it has been adopted. It is true that time has not yet come for an European Model Code. But, in a first stage, three subjects have been identified to be chosen for drafting European principles and these subjects are, I think, the main subjects where

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<sup>81</sup> See [http://ec.europa.eu/justice/events/assises-justice-2013/index\\_en.htm](http://ec.europa.eu/justice/events/assises-justice-2013/index_en.htm)

<sup>82</sup> See [http://www.europeanlawinstitute.eu/news-events/news-contd/article/eli-unidroit-workshop-on-civil-procedure-held-in-vienna/?tx\\_ttnews%5BbackPid%5D=132848&cHash=930285a737821cd28ad974bba61e4226](http://www.europeanlawinstitute.eu/news-events/news-contd/article/eli-unidroit-workshop-on-civil-procedure-held-in-vienna/?tx_ttnews%5BbackPid%5D=132848&cHash=930285a737821cd28ad974bba61e4226)

<sup>83</sup> See in Ph. Fouchard (dir.), *Vers un procès civil universel ? Les règles transnationales de procédure civile et l'American Law Institute*, Paris, Editions Panthéon-Assa, 2011, spec. n° 155-163, 176-177, 180. *Adde* L. Cadiet, « La preuve », in F. Ferrand (dir.), *La procédure civile mondiale modélisée*, Paris, EJT, 2004, pp. 119-138, spec. n° 354.

further cooperation between all actors of justice is most needed. These subjects are: service of documents, provisional measures and taking of evidence. So let us wait and see. The path is fraught with pitfalls, but the journey is quite fascinating<sup>84</sup>.

I finally observe a strange shift of the paradigm described by Pierre Pescatore in his masterpiece. In order to singularize the European law, which he qualifies as a *droit de l'intégration*, compared to the international law, he wrote : "*Si le droit international est un droit relationnel, au mieux coopératif, le droit de l'intégration est un droit fusionnel et unitaire*"<sup>85</sup>. However European law is becoming cooperative but in a sense which is not the traditional sense adopted in international law; it is an integrative cooperation, not a forced cooperation, imposed by State sovereignties but a deliberate cooperation inherent to the emerging European sovereignty. I know that things are not so simple in practice and that we have to face scepticism, reluctance, unwillingness and so on. Mutual trust cannot be imposed "*par décret*". But when we look backward and when we compare the European situation between 1910/1945 and 1945 up to now, we cannot have any hesitation. Europe is a challenge, a lot has been done and there remains much still to do.

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<sup>84</sup> See also the project for *Model Rules on EU Administrative Procedural Law*: <http://www.reneual.eu>

<sup>85</sup> P. Pescatore, *op. cit.*, Préface, p. 5.



