Model European Rules of Civil Procedure 2020 - the ELI/UNIDROIT Project on harmonization of civil procedure rules

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I. Introduction[1]

1. Starting point: ALI/UNIDROIT Transnational Principles of Civil Procedure

The ELI/UNIDROIT Model European Rules of Civil Procedure (ERCP) are a set of Model rules adopted by the European Law Institute and UNIDROIT in 2020.[2] The idea of developing rules for a harmonized civil procedure in Europe was not completely new. It dates back to the 1980s when a privately organised group of academics, the so-called *Storme* Commission, started a project on unified or at least harmonized civil procedural rules in Europe.[3] It triggered a controversial debate in Germany and in the Member States and stimulated further projects on European procedural harmonization. In 2004, a joint project of UNIDROIT and the American Law Institute (ALI) which had started a couple of years earlier, was concluded. It attempted to identify fundamental common principles for civil proceedings in civil and commercial matters in a transatlantic setting.[4] Its primary goal was to bridge the gap between European and US civil procedure and suggest a common frame. A set of 35 'Transnational Principles of Civil Procedure' were adopted by both institutions.[5]

The ALI/UNIDROIT project was ambitious undertaking because the gap between European and US civil procedure was considerable and not easy to bridge. In many respects, US civil procedural rules take a very different approach from what is familiar in Continental Europe and even from what was established in England and Wales with the *Woolf* reform and its Civil Procedure Rules of 1999. I will mention only some of the key issues here. Despite a certain tendency since the 1990s to promote case management by US judges, US civil procedure is still dominated by a very strong adversarial system which puts the parties at their lawyer's mercy and tends to be rather expensive. Modern English civil procedure, by contrast, emphasizes the principle of proportionality and many Continental procedural systems require the court to help the parties if their factual allegations or offer of evidence are insufficient. Case management powers of the civill court have been extended in Continental Europe as well as in England over the years and have led to a completely different system compared to the adversarial proceedings in the US, where the judge is more or less only an umpire taking care that the lawyers abide by the rules. Pretrial discovery, jury trials and the American rule of costs as typical features of US civil procedure have a great influence on the parties' strategy and are, by trend, very

[1] This introduction is summary of the Introdcutory chapter by *A Stadler/V Smith/F Gascon Inchausti*, in A Stadler/V Smith/F Gascon Inchausti, European Rules of Civil Procedure, A commentary on the ELI/UNIDROIT Model Rules, (forthcoming autumn 2022, Edward Elgar). The text of the ERCP with official comments is available at: https://www.unidroit.org/english/principles/civilprocedure/eli-unidroit-rules/200925-eli-unidroit-rules-e.pdf.

[2] For a detailed description and analysis of the history, methodology and objectives of the ELI/UNIDROIT project *Rolf Stürner*, 'The ELI/UNIDROIT Model European Rules of Civil Procedure, An Introduction to Their Basic Conceptions' [2022] Rabels Zeitschrift für ausländisches und internationales Privatrecht 421; see *also* European Law Institute and International Institute for the Unification of Private Law (eds), *ELI/UNIDROIT Model European Rules of Civil Procedure* (1st edn, OUP 2021) Preamble.

[3] Formally mandated by the EU Commission in 1990, the Storme Commission published a draft in 1993/94.

[4] The project was prepared by a feasibility study for the UNIDROIT General Council written by Rolf Stürner (Freiburg).

[5] Its history, background and essential features are described by *Rolf Stürner*, 'The Principles of Transnational Civil Procedure: An Introduction to Their Basic Conceptions' [2005] Rabels Zeitschrift für ausländisches und internationales Privatrecht 201.

plaintiff-friendly, which is one of the reasons why US courts are so attractive for foreign plaintiffs in cross-border litigation.

Despite these differences, the ALI/UNIDROIT project was successful in balancing different legal families and received mostly benevolent reviews. The 2004 Principles inspired an academic debate and reflected developments which were considered later in EU directives and the drafting of procedural rules for the Unified European Patent Court.[6] Encouraged by the fact that even for such considerably different procedural systems converging trends could be identified, a similiar academic project for European civil procedure law based on the ALI/UNIDROIT principles seemed promising.

2. European background of the project

UNIDROIT's partner institution in the new project was the European Law Institute, which had been founded in 2011 as an independent institution following the role model of the ALI. The European Law Institute with its seat in Vienna was the reaction to considerable dissatisfaction in the Member States with EU regulations and a failed attempt to harmonize civil law. In 2004, a private Study Group of European academics funded by the EU Commission had started to work on a so-called Draft Common Frame of Reference (DCFR). The EU Commission wanted to have a tool-box of common prinicples of civil law generated on a comparative basis by the Study Group in order to improve the basis for European legislation. Instead the Study Group came up with an almost complete proposal for a European Civil Code (except family law, inheritance law and real property law). The proposal immediately raised a lot of criticism in the Member States and many authors challenged the legitimation of the small Study Group to speak for whole Europe. It also triggered the fear that the European legislature might actually take the DCFR as a first step to a European Civil Code – an idea probably not far from what the Study group had in mind. Due to the political pressure imposed by the Member States, the EU Commission reduced the project to a draft for a 'Common European Sales Law'[7] which was also not met with enthusiasm across Europe and which was finally abandoned by the Commission in favor of two directives on distance selling (2015) and contracts for the supply of digital content and digital services (2019). The DCFR tiger ended up as a bedside rug! So the lessons learned from this failure were importnant: The European Community needed a European Law Institute in order have a broad and independant basis of academic and practical input for legislative processes at the European level. And: far reaching projects aiming at a harmonization of vast areas of civil law and civil procedure law are politically highly sensitive.

Against this background, the idea of developing model rules on European civil procedure, by taking the ALI/UNIDROIT principles as an starting point and a framework, therefore began with rather heterogeneous ideas about the content and purpose of the project.[8] Having in mind the failure of the

[6] *Rolf Stürner*, The ELI/UNIDROIT Model European Rules of Civil Procedure, An Introduction to Their Basic Conceptions (n 2) 421, 427–28; *Rolf Stürner*, 'The ALI/UNIDROIT Principles of Transnational Civil Procedure and Their Influence on Future Private Enforcement of European Competition Law' in Janet Walker and Oscar Chase (eds), *Common Law, Civil Law and the Future of Categories* (LexisNexis Canada 2010) 421, 425, 428.

[7] Proposal for a Regulation on a Common European Sales Law [2011] COM/2011/0635 final.

[8] The ideas were discussed during a kick-off workshop in Vienna in 2013. The presentations held at the workshop on the project in general and on particular aspects of civil procedure are published in [2014] 19 Uniform Law Review; for example *Diana Wallis*, 'Introductory Remarks on the ELI/UNIDROIT project' [2014] 19 Uniform Law Review, 173; *Geoffrey C Hazard*, 'Some Preliminary Observations on the Proposed ELI/UNIDROIT Civil Procedure Project in the Light of the Experience of the ALI/UNIDROIT project' (2014) 19 Uniform Law Review 176.

DCFR, the aim of the procjet never was to prepare a blueprint for a binding EU instrument such as a Directive or Regulation. Moreover, the EU legislature currently does not have the legislative power to harmonize civil procedural rules for domestic cases. European treaties provide only a basis for the judicial cooperation of the Member States in cross-border cases.

3. Organisation of the project

The organisational structure of the project reflected the dual leadership by UNIDROIT and the ELI. Plenary meetings were held alternately in Rome and Vienna. The Steering Committee consisted of the Secretary General of UNIDROIT, its deputy Anna Veneziano, the then President of the ELI, Diana Wallis, three proceduralists from England (John Sorabji), Italy (Remo Caponi) and Germany (Rolf Stürner, who had already worked in the ALI/UNIDROIT project as a co-reporter. Step by step nine Working Groups were established, each consisting of two co-reporters and 6-8 members from international academia and practice. All in all, the groups included more than 40 practitioners and academics from 25 jurisdictions. The EU Commission and the Hague Conference[9] obtained the status of observers and their representatives were invited to the plenary meetings.

The Working Groups addressed the following topics (in the chronological order of their formation in the course of the project): access to justice and information, provisional and protective measures, service of documents and due notice of proceedings, lis pendens and res judicata, obligations of the parties and the lawyers, judgments, parties and collective redress, costs, appeals.[10] They were expected to prepare draft rules in English and French and supporting comments. The drafts were presented and discussed during annual Plenary Meetings. In order to ensure the coordination of the Working Groups, a Structure Group prepared, presided and organized the plenary meetings. A Final Drafting Team, established in a final stage of the project, completed the drafts by filling remaining gaps, e.g. on general principles, consolidated the drafts and ensured coherence of the entire set of rules.[11] Although working language in all Working Groups was English, most Working Groups also presented the rules in French. At the end of the project, a French Task Force took care of the French version of the ERCP. By now, translations of the ERCP into Spanish, Italian, German and Chinese are on the way. All in all, the project took seven years and the last drafts were not completed before 2019/2020, which did not leave much time for the Structure Group and the Final Drafting Team to finalize the Rules and Comments before they were presented for adoption to the ELI Council, ELI Membership, and UNIDROIT's Governing Council in summer 2020.

II. Scope of Application and Objectives of the ERCP

1. Scope of application (Rule 1 ERCP)

The set of rules finally approved and published in 2020 cover all substantive parts of regular civil proceedings. Rule 1 para 2 of the ERCP lists the same exceptions from the scope of application as Art.

[9] For a complete list of Observers see European Law Institute and International Institute for the Unification of Private Law (eds), *ELI/UNIDROIT Model European Rules of Civil Procedure* p. XII.

[10] Co-reporters and members of the Working Groups are listed in the official publication of the ERCP: ELI/UNIDROIT Model European Rules of Civil Procedure European Law Institute and International Institute for the Unification of Private Law (eds), *ELI/UNIDROIT Model European Rules of Civil Procedure* Participants in the project.

[11] For details *Rolf Stürner,* The ELI/UNIDROIT Model European Rules of Civil Procedure, An Introduction to Their Basic Conceptions (n 2) 430–431.

1 para 1 of the Brussels Ibis Regulation does. In sum, family and heritage proceedings, social security, insolvency proceedings and arbitrations have been excluded from the project due to their particularities. Due to their complexity and heterogeneity across Europe enforcement proceedings are also not part of the ERCP, but they are subject of a follow-up project of UNIDROIT. The ERCP, however, includes rules on provisional and protective measures (Part X) and on collective proceedings (Part XI). Including collective redress into the project had been a rather controversial issue. One reason was its complexity which would have justified a project of its own, another argument raised particularly by the representatives of th European Commission was that a Directive on representative actions in the collective interest of consumers was on its way and the EU Commission was apparently not in favour of a parallel project on this topic. However, quite on the contrary it made sense to offer a set of complete rules on collective redress which Member States could use as a template when implementing the forthcoming directive. In this respect, the Working Group was in the position to take into account extensive material on the development of collective redress instruments in the Member States over the years. By contrast, the ALI/UNIDROIT Principles of 2004 did not include any regulations on collective redress – this was far too controversial a topic at that time. The US class action mechanism was considered to be alien to European traditions although a debate on private enforcement and group or class actions had started at the European level since the early 2000s. A harmonized mechanism was not adopted before 2018 and it is still restricted to consumer law.[12]

It was also clear from the outset of the project that the ERCP should cover domestic and cross-border cases. Nevertheless, the ERCP does not provide rules on venue and jurisdiction simply due to the fact that the Brussels I bis Regulation and the Lugano Convention are well-accepted in cross-border settings and make additional model rules unnecessary.[13] This did not mean, however, that existing EU legislation was set in stone for the project. Some of the Working Groups came to the conclusion that existing EU regulations did not provide an optimal standard and their drafts deviated from the European acquis. Several parts of the ERCP now conclude with a separate section on cross-border issues which either provides new rules to be applied in the European Union and/or outside the European Union or simply explain the interplay between the ERCP and EU legislation or international conventions.

3. Harmonization of civil procedure law – to what extent?

Civil procedure law is a field where national law is still very dominant. A real European Code of Civil Procedure in the sense of binding and uniform set of rules is not a realistic option. It will not be politically accepted in the Member States. Despite the EU Commission's credo of an equivalence of the judicial systems within the EU, the situation has not improved in recent years. Contrary to the widespread, almost global acceptance of the rule of law and of fundamental procedural rights, some Member States such as Poland and Hungary underwent a political development to the contrary and not even the independence of the judiciary is guaranteed there.

[12] Directive 2020/1828 on representative actions in the collective interest of consumers.

[13] *Stürner*, The ELI/UNIDROIT Model European Rules of Civil Procedure, An Introduction to Their Basic Conceptions (n 2) 433; European Law Institute and International Institute for the Unification of Private Law (eds), *ELI/UNIDROIT Model European Rules of Civil Procedure* Preamble, III. Project Methodology, p. 3.

The ERCP, contrary to a project for unification, benefit exactly from the fact that they are non-binding. The acceptance of the ERCP depends exclusively on the persuasiveness and attractiveness of the rules, not on political power or political trade-offs. This offered the Working Groups the freedom of focussing completely on the content of the rule, on consistency and best practices. Another advantage became clear soon after the project had started: 'Brexit', which was on the horizon and then actually took place during the course of the project, did not hold up the project. Despite the uncertain future status of the United Kingdom, the input of the English colleagues in the Working Groups was extremely valuable and important against the background of numerous common elements of English and Continental civil procedure.

The ERCP are not even a Model Code, but 'only Model Rules'. National legislatures are completely free to set their own priorities and may chose only selected chapters.[14] Parts of the ERCP can be adopted separately and this is a good option for national legislators which may still consider that their own solution - different from the ERCP - works better, at least in their 'internal procedural ecosystem'. But this potential partial and fragmentary use of the ERCP cannot tarnish their systematic character and internal coherence.

Indeed, the ERCP represent a complete model of civil procedure, whose parts are interrelated and designed to function as a whole: the pleading and evidentiary system is designed to function in a procedural dynamic such as the one described overall in the ERCP. It assumes the reciprocal roles and powers of judges and parties, the active management of the procedure and a prevalence of the principle of party disposition tempered by the principle of cooperation (ERCP Rules 2 to 8). The different provisions, therefore, can only be properly understood within this system, applied in the light of the general principles set out in the first Rules of the ERCP.

Contrary to the ALI/UNIDROIT Principles the ERCP are much more detailed through all parts, although in some parts such as Part IX on means of review and Part XII on Costs the rules are not designed down to every details because of the diverging national frameworks in the Member States with respect to the organisation of the judiciary as well as professional standards and regulations for lawyers.

III. The model of civil procedure proposed by the ERCP

The ERCP provide a flexible model of civil procedure, based on the over-arching principles of cooperation, proportionality and active case management. Starting from a civil procedure governed by the principle of party disposition (e.g. ERCP Rules 21, 23, 24, 56), which reflect the principle of party autonomy, they are committed to promoting a cooperative approach, especially in terms of procedural management and the search for consensual solutions to the dispute. It is particularly symbolic that the first three rules - once the scope of action of the ERCP has been established - are devoted to embodying the principle of cooperation.

The procedural structure as designed is not excessively detailed. It is an unsurprising structure, which responds to the ordinary logic that best serves the objective of placing the court in the best position to deliver the best possible judgment. The proceedings begin with written pleadings by the parties,

[14] European Law Institute and International Institute for the Unification of Private Law (eds), *ELI/UNIDROIT Model European Rules of Civil Procedure*, Preamble, p. 5.

followed by preparatory activity for the trial (including taking of evidence and provisional measures if needed), leading to the holding of the trial (main hearing) which includes the taking of evidence.

IV. Methodology of the Project

Taking into account the international composition of the Working Groups and the great diversity of represented legal traditions it was necessary to adopt a common working methodology across the groups. It was not a uniform methodology in a strict sense, but a common approach that was based on three pillars: taking the ALI/UNIDROIT Principles as a starting point, making an assessment of the *acquis communautaire* including common European fundamental procedural rights as a pre-set framework, and doing a comparative study of national law (to the extent possible within the Working Group's expertise) in order to identify converging trends.[15] *Rolf Stürner*[16] has explained very impressively that there are parts of civil procedure with a clear tendency towards convergence in Europe such as the structure of proceedings, case management by judges and some questions of allocation of procedural risks and taking of evidence. On the other side, there are also areas where only a certain trend could be identified. In this respect the Working Groups had to make legal policy decisions that were sometimes very controversial in the group itself and not always shared in the plenary meetings. The whole project did, however, benefit enormously from these meetings and comments from observers[17]. In many respects, compromises were needed, but also innovative steps. In the end, the Structure Group faced the challenge of consolidating the drafts which had sometimes produced overlapping rules and had been designed based on differing assumptions on overarching principles.

V. Differences between the ALI/UNIDROIT Principles and the ERCP

As mentioned earlier the ALI/UNIDROIT Principles include only 35 very general principles whereas the ERCP provide 245 Rules in a structure as it can be expected from a "real" civil procedure code. Two examples may illustrate the different approaches.

With respect to appeals against a court judgment the ALI/UNIDROIT principles provide only three principles (27.1-27.3) that very generally state that an appeal should be available and concluded expeditiously. The appeal should ordinarily be limited to claims and defences addressed in the first-instance proceedings and new facts and evidence be allowed only "in the interest of justice". By contrast, the ERCP provide in Part IX altogether 30 rules on the issue of appeals. There are some general rules, followed by detailled rules on a first and a second appeal. The ERCP thus made a clear decision in favour of three instances - a decision which was not explicitedly made in the Principles.

Another example are case management rules. In the ALI/UNIDROIT Principles there are only 3 rules on case management. Principle 14.1. states that "as early as possible, the court should actively manage the proceedings". For US courts, case management is mainly to be found during the pretrial

[15] *Rolf Stürner*, The ELI/UNIDROIT Model European Rules of Civil Procedure, An Introduction to Their Basic Conceptions (n 2) 436–438; European Law Institute and International Institute for the Unification of Private Law (eds), *ELI/UNIDROIT Model European Rules of Civil Procedure*, Preamble, p 2–3.

[16] *Rolf Stürner*, The ELI/UNIDROIT Model European Rules of Civil Procedure, An Introduction to Their Basic Conceptions (n 2) 438–471.

[17] For a complete list of Advisory Committee Members see European Law Institute and International Institute for the Unification of Private Law (eds), *ELI/UNIDROIT Model European Rules of Civil Procedure*, p. XIII–XIV.

discovery phase, but it had not been very distinctive until the 1980s and 1990s. Rule 16 Federal Rules of Civil Procedure has been amendend over the years[18] and pretrial conferences and scheduling orders are today widely used by US courts, but Principle 14.1. as a general rule was nevertheless breaking new ground. Compared to only 3 provisions in the Principles, the ERCP reflect a long tradition of case management powers in Continental European civil procedure. There is a separate part on general case management including Rules 47-50, supplemented by more rules on case management in the part on access to information and evidence (Rules 92, 100-110) and in the collective redress part (Part XI, Rules 218-220). They all emphasize that courts are responsible for a speedy and efficient procedure and courts must help the parties to clarify facts and to submit evidence where necessary.

VI. Case Study to illustrate the comparative challenges of the ERCP

1. Access to information in product liability cases

In order to illustrate the differences between national systems in Europe and the ERCP I have selected a theoretical case having a focus on access to information and evidence. In this respect we can still observe very different approaches taken in national law. The ERCP provide a very flexible system that favours the exchange of information, but avoids the downsides of US pretrial discovery at the same time.

Let's take the following, very simplyfied product liability case. The owner of a small enterprise bought an machine for manufacturing his products. Shortly after putting the machine into operation, the engine catches fire during use. Let's assume that the owern himself is injured and part of his manufacturing hall gets damaged. As the seller of the machine is insolvent, the owner considers to sue the producer of the machine based on the principles of product liability. He has heard that other users of the machine had similar problems and therefore he concludes that the machine has a construcitonal defect, but, of course, he cannot be sure about this. Let's further assume that under the applicable tort law, the owner of the machine carries the burden of proof that the machine was defective when put on the market and that the producer is liable for the defect (although very often a strict liability regime applies[19]). Preparation of a product liability case can be very challenging for claimants as they will normally have no reliable information and details about the manufacturing process and often can only guess what the cause of damage was. In legal systems where the loser pays principle applies to litigation costs claimants must be able to assess their chances before filing an action.

In a lawsuit between the owner and the producer the following questions will probably come up:

1) How much details must the claimant provide in his statement of claim? Is he expected to provide detailled information on the construction of the machine or a possible defect of the machine?

[18] For details *Richey*, Rule 16 Revised, and Related Rules: Analysis of Recent Developments for the Benefit of Bench and Bar, 157 F.R.D. 69 (1994*); Schuh*, Curbing Judicial Discretion in Pretrial Conferences, 2016 Lewis & Clark Review (Vol. 20) 648; for the roots of pretrial conferences see *Pickering*, The Pre-Trial Conference, 1958 Hastings Law Journal (Vol. 9), 117.

[19] See for example EU Directive 85/374/EEC on liability for defective products. Even in cases where strict liability standards appy, the claimant must prove that the product was defective in order to succeed in his claim.

2) Is the claimant entitled to get access to the defendant's production facility, the documents relating to the production of the machine at issue? Does he have access before he filed the claim against the producer or at least during the proceedings?

2. Solutions available in the US and European procedural law

a) Federal Rules of Civil procedure (US)

It is common knowledge among proceduralists that US civil procedure law is very claimant friendly and plaintiffs does not have to provide details of the allegation he is making against the defendant. Although the Supreme Court has restricted the system of "notice pleading"[20] in favour of a more detailled "fact pleading" in some cases,[21] it sufficient to state facts in a general way and claimants need not seek for detailled information of their case before starting an action.[22] The claimant will have access to information and evidence in the defendant's possession during the pretrial discovery phase of the proceedings which allow for requests for the production of documents, access to the production site, as well as party and witness depositions.[23] The scope of facts to be proven is very broadly defined and not restricted to directly relevant facts of the claimant's case. The owner of the machine would therefore have a good chance of getting hold of the relevant evidence in an US civil proceeding.

b) England and Wales

Should our owner sue the producer in England, the situation with respect to access to information is also quite comfortable for the claimant. Since the Civil Procedure Rules of 1999 (CPR) have come into force, before proceedings are commenced, litigants are generally expected to participate in pre-action exchanges of correspondence. This may include the exchange of evidence according to prescribed procedures (pre-action protocols). According to the pre-action protocol for personal injury claims[24] litigants are held to disclose documents that contain "relevant information to help in clarifying or resolving issues in dispute".[25] The protocol also suggests and encourages the joint selection of, and access to experts.[26] Parties who fail to comply with the protocol may face sanctions by the court, the court can also take the failure to comply into consideratin when awarding costs, and the court may stay proceedings entirely until there is pre-action compliance. Based on the information obtained, the claimant is in the position to assess the prospects of his case and to make rather detailled allegations in the statement of claim. Once the litigation has started, Rule 31.6 CPR on standard disclosure requirs a party to disclose: a) documents on which he relies, documents which adversely affect his own case

[20] Rules 7-10 Federal Rules of Civil Procedure.
[21] The US Supreme Court cautiously modified the notice-based concept of Rule 8 Federal Rules of Civil Procedure towards a fact-based model, see *Bell Atlantic v. Twombley*, 550 U.S. 544 (2007); *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). For its implications see *Richard Marcus*, 'Misgivings about American Exceptionalism' in *Alan Uzelac and Cornelis Hendrik van Rhee* (eds), Revisiting Fundamental Human Rights (Intersentia 2017) 53. Later decisions like *Matrixx Initiatives, Inc. v. Siracusano*, 563 U.S. 27 (2011) are sometimes interpreted as adhering to a notice-pleading standard.
[22] For details *Scott Dodson*, Comparative convergences in pleading standards, 158 University of Pennsylvania L. Rev. (2010), 441-472; *Adam Steinman*, Notice Pleading in Exile, 41 Cardozo L. Rev. 1057 (2019-20).
[23] Rules 26-37 Federal Rules of Civil Procedure (as amended 2022).
[24] https://www.justice.gov.uk/courts/procedure-rules/civil/protocol/prot_pic.
[25] Pre-action protocol for personal injury claims no. 7 ("disclosure").
[26] For details 7.2-7.11 Pre-action protocol for personal injury claims.

or support another party's case, and the documents which he is required to disclose by a relevant practice direction.

c) France

In the French system, by contrast, there is no pre-action exchange of information and evidence, but claimants must nevertheless plead substantial facts (Article 6 Code de Procedure). Once proceedings have started access to information is quite easy, because based on Article 10 Code de Procedure French courts may order the production of any kind of documents. If the parties do not comply with such an order sanctions are available including daily fines to be paid for non-compliance ("astreinte").

d) Germany

If we finally have a look at German law, the situation for the claimant becomes even more difficult as in France. The principle of strictly substantiated fact pleading applies[27] that is a challenge for claimants who do not have the necessary information to allege for example that the product was defectively designed or manufactured. There is also no pre-action exchange of information or evidence available, except for some type of case (like IP law) where EU Regulations apply and give the plaintiff a better position.[28] German courts have, however, reduced the plaintiff's burden of substantiation in situations in which he is not in the position to provide details because the relevant facts and evidence are in the opponent's sphere. The so-called principle of secondary burden of presentation applies according to settled case law.[29] It requires that (i) a party who is carrying the burden of proof has presented sufficient indication for the relevant facts to be proven, and (ii) such party has no knowledge of the relevant circumstances and no access to information to clarify the facts, whereas (iii) the opponent either knows the facts or can easily provide more details. If in such a situation the opponent does not come up with details regarding the relevant facts, the allegations of the party having the burden of proof can be regarded as conceded by the opponent (§ 138 German CPC). In our product liability case the plaintiff may fulfill the requirements of a general, but plausible case against the defendant as he can present facts that other purchases of the machine have also suffered damage under similar circumstances which also a prima facie conclusion against the producer of the machine. Nevertheless, the plaintiff is under German civil procedure law in a difficult position to comply with his burden of proof. The German Civil Procedure Code provides very limited access to documents in the possession of the opponent and documents must be described in detail in order to obtain an evidence order from the court.[30] The opponent is obliged to produce documents only if he has himself referred to the documents[31] or if the plaintiff is under substantive law entitled to get access to documents[32]. Both

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[27] In general *Rosenberg/Schwab/Gottwald*, Zivilprozessrecht, 18th ed. 2018, § 95 n. 15 ff.; T*homas/Putzo/Seiler*, Zivilprozessordnung, 44th ed. 2023, Preliminary remarks § 253 n. 40.

[28] Articles 6, 7 Directive 2004/48/EC.

[29] BGH NJW 2022, 321; BeckRS 2021, 34798 n. 17 ff; BeckRS 2021, 1283 n. 15 ff; BeckRS 2021, 12218; BeckRS 2021, 15393; BeckRS 2021, 15705 (all decisions made in the VW Dieselgate case); furthermore BeckRS 2015, 06013; BGHZ 200, 76 = NJW 2014, 2360; NZG 2006, 429 (430); NJW 1990, 3151 (3152); BGHZ 100, 190 (195 f.) = NJW 1987, 2008. For a general description of the principle *Musielak/Voit/Stadler*, Zivilprozessordnung, 23rd ed. 2023, § 138 n. 10a.

[30] § 424 no. 1 German CPC; this requirement also applies to a court order for the production of documents unter § 142 German CPC: BGH (I ZR 205/15) BeckRS 2017, 122068 Rn. 30; BGH NJW 2014, 3312; NJW-RR 2007, 1393; *Zöller/Greger*, Zivilprozessordnung, 34. ed., § 142 n. 6; *Stein/Jonas/Althammer*, Zivilprozessordnung, Vol 2, 23rd ed. 2016, § 142 Rn. 11; for a more liberal approach and less strict substantiation standards see *Musielak/Voit/Stadler*, Zivilprozessordnung, 20th ed, 2023, § 142 n. 4a; *Wagner* JZ 2007, 706, 713 f.,

[31] § 423 German CPC.

[32] § 422 German CPC.

requirements are normally not fulfilled in a product liability case. Although a reform of 2002 allows the court to order the production of documents from any party irrespective of a claim under substantive law or a reference to the documents during the proceedings,[33] courts are very reluctant to do so. The Federal Supreme Court still upholds the principle that a party to litigation is not required to deliver weapons into the hands of ist opponent (*nemo contra se edere tenetur*) nor to contribute to an opponent's victory.[34]

e) Comparative summary

In sum, there are today no uniform rules on access to information in European legal systems, but there is some tendendcy to grant access once the claimant has asserted certain facts. By contrast to US civil litigation, access to information and evidence requires statement of facts to some degree. European legal systems do not allow "allegations out of the blue" or fishing expeditions.[35] One can also state there is no general obligation of the parties to the litigation in Europe to co-operate, but some tendency to establish such an obligation. The *nemo contra se edere tenetur* principle is applied very rarely in modern civil litigation – Germany is an exception to that and has a standard of access to evidence that is not in line with international standards.[36]

3. Solutions provided by the ERCP

a) Party co-operation and principle of fact-pleading

The Model Rules are characterized by the fact that they incorporate general trends in European civil procedural law and make trade-offs where necessary and where European jurisdictions still differ considerably. EU law sometimes also provide some guidance. EU directives have established by now a set of harmonized rules on the obligation of parties and non-parties to provide access to relevant evidence subject to the protection of confidential information in the fields of enforcement of

[33] § 142 German CPC.

[34] Bundesgerichthof, 11.6.1990, II ZR 159/89, [1990] Neue juristische Wochenschrift 1404 (referring to a decision in [1958] Neue juristische Wochenschrift 1491): "The principle remains that neither party is obliged to provide the opponent with the material for his trial victory which he does not already have at his disposal'. The decision was described by *Peter Schlosser* as 'The long German journey into procedural modernity', [1990] Juristenzeitung 599, but parts of legal doctrine still support this principle, eg by one of the leading commentators on the German CPC, *Hanns Prütting*, in Münchner Kommentar ZPO (6th edn, C. H. Beck 2020) s 284 n 111, who emphasizes that it is an essential part of adversarial civil proceedings that no party is obliged to help the opponent win his case.

[35] For Germany see BGH (VI ZR 163/17) BeckRS 2019, 7939; BGH NZG 2016, 658; BGH NJW-RR 2004, 337; *Musielak/Voit/Stadler*, Zivilprozessordnung 23rd ed 2023, § 138 n. 6 with further references.

[36] *R. Stürner*, 'The ELI/UNIDROIT Model European Rules of Civil Procedure – An Introduction to Their Basic Conceptions' (n 2) 421, 447 with reference to the Case of the European Court of Justice, C-60/92 *Otto v. Postbank* [1993] ECLI:EU:C:1993:242. A broad access to documents and things is provided in many Member States and the Nordic countries, see e.g. Austria CPC § 303, 369; Norwegian CCP § 21-4, 21-5, 26-5 and 26-6; Swedish CCP s 38:2, CPC § 39:5; Danish CCP § 298–300.

intellectual property rights[37] and cartel damages[38], and in case of representative actions in the collective interest of consumers[39].

One of the main guiding principles to be found throughout the ERCP is the principle of party co-operation (Rules 2, 3, 9 ERCP)[40] which also shapes the law of access to information and evidence.

Regarding the claimants obligation to provide facts ERCP Rule 53 tries to strike a balance differentiating between minimum necessary and optional contents of the statement of claim. Rule 53(1) says that the statement of claim must at least specify the essential requirements such as the court seized, the parties' identity, the relief sought and its factual grounds. Para 2 of Rule 53 reads as follows:

> *(2) The statement of claim should:*
> *(a) state the relevant facts on which the claimis based in reasonable detail as to time, place, participants and events;*
> *(b) describe with sufficient specification the available means of evidence to be offered in support of factual allegations;*
> *(c) refer to the legal grounds that support the claim, including foreign law, in a way that is sufficient to permit the court to determine the claim's legal validity;*
> *(d) state the detailed remedy requested, including the monetary amount or the specified terms of any other remedy sought;*
> *(e) allege compliance with any applicable condition precedent, according to applicable national law, to bringing the claim, such as parties having to engage in pre-commencement conciliation or mediation, or having to issue a formal demand concerning the subject matter of the dispute.*
> *(3) If a claimant does not fully comply with the requirements of Rule 53(2), the court must invite the claimant to amend the statement of claim. If a claimant shows good cause why it is not possible to provide details of relevant facts or specify the means of evidence in their statement of claim but the statement of claim nevertheless demonstrates that there is plausible dispute on the merits, the court should give due regard to the possibility that relevant detailed facts will develop later in the course of the taking of evidence.*

The Model Rules opted for a model that does not establish a too high threshold for claimants to bring an action. Facts must be presented in reasonable detail, but that is not an absolute requirement. Rule 53 para 3 allows later amendments by the claimant if he can show good cause why he is not able to submit details of relevant facts in his statement of claim. This may help claimants considerably in cases where they were not able to investigate details prior to the filing of the action.

b) Access to information and evidence

The principle of party co-operation is also mirrored by Rule 25 (based on ALI/UNIDROIT Principle 16.1, 16.2):

> *Rule 25. Evidence*

[37] Council and European Parliament Directive 2004/48/EC of 29 April 2004 on enforcement of intellectual property rights [2004] OJ L 157/45, Art 6.

[38] Council and European Parliament Directive 2014/104/EC of 26 November 2014 on certain rules governing actions for damages under national law for infringements of competition law provisions of the Member States and of the European Union [2014] OJ L 349/1, Art 5.

[39] Council and European Parliament Directive (EU) 2020/1828 of 25 November 2020 on representative actions for the protection of the collective interests of consumers and repealing Directive 2009/22/EC, Art 18.

[40] For a detailed description of the pinciple and its historical and comparativ background see *Loic Cadiet/Soraya Amrani-Mekki*, Ch. 2, marginal no. 2.015-2.023 in: A Stadler/V Smith/F Gascon Inchausti, European Rules of Civil Procedure, A commentary on the ELI/UNIDROIT Model Rules, (forthcoming autumn 2022, Edward Elgar).

(1) Each party is required to prove all the relevant facts supporting its case. Parties must offer evidence supporting their factual contentions. Substantive law determines the burden of proof.
(2) Each party has, in principle, a right to access all forms of relevant, non-privileged and reasonably identified evidence. In so far as appropriate, parties and non-parties must contribute to disclosure and production of evidence. It is not a basis of objection to such disclosure by a party that disclosure may favour the opponent or other parties.
(3) In so far as appropriate the court may invite the parties to supplement their offers of evidence. Exceptionally, it may take evidence on its own motion.

The ERCP grants access to information in line with modern civil procedure and explicitly rejects the German system that no party must disclose evidence that may favour the opponent or other parties (Rule 25 para 2 sentence 3 ERCP). There are very detailed rules on access to evidence in Part VII ERCP, Rules 88-110) including a broad scope of sanctions which the court may impose in case of non-compliance.[41] The evidence part of the ERCP is not based on one particular tradition from one legal family. While the rules on access to evidence orders are inspired by English rules on disclosure, the standard of evidence follows more the continental tradition, and the rules on co-operation and active management are found in many European countries. Rule 102 ERCP, e.g., tries to strike a balance between the parties interests and ensures that court orders are only made when they are both necessary and adequately supported.[42] According to Rule 102 para 4 the court may not grant any application for evidence which involves a vague, speculative, or unjustifiably wide-ranging search for information. US pretrial discovery was clearly not a role model for the ERCP. The official comment to Rule 100 ERCP emphasises that 'evidence' should be interpreted in a broad sense, including information and data 'that can later be transformed into real or documentary evidence'.[43] This does not mean, however, that fishing expeditions are allowed. On the contrary, as in most European jurisdictions, parties must allege relevant facts to be proven in reasonable detail in order to enter the fact-finding stage of proceedings.[44]

Again, the ERCP rightly reject the very strict requirements under German law according to which evidence sought must always be descripted very clearly and in detail. As a basic rule, parties must identify evidence sought as precisely as possible.[45] Rule 102 para 1 (a) states, however, that it is sufficient to identify "categories of evidence by reference to their nature, content, or date". In a case like our example of a product liability action, the claimant must therefore not have an knowledge what documents the defendant possesses, how they are labelled and what their exact content is.

Rule 102. Relevant Criteria where an application for access to evidence is made
(1) A party or prospective party applying for an order for access to evidence must

[41] For a detailed review of these rules and comparative references see *A Stadler/M Strandberg*, Ch. 12 in: A Stadler/V Smith/F Gascon Inchausti, European Rules of Civil Procedure, A commentary on the ELI/UNIDROIT Model Rules, (forthcoming autumn 2022, Edward Elgar).
[42] Official Comment to Rule 103 n. 1.
[43] Rule 100 Comment 3.
[44] Austria, CPC ss 177, 178, 226, 239; France CPC art 6 ('faits pertinents' must not be directly relevant for the success of the claim or defence; they include circumstantial evidence), art 222 ('preciser les faits dont elle entend rapporter la preuve'); Germany CPC ss 253(4), 130 no 3, 331, 371(1), 373, 424 no 2; Italy CPC arts 163(3) no 4; 183(4), (6) & (7); 184; 187(1–2); Spain CPC arts 399, 400, 281 no 1, 283 no 3; Denmark CCP sections 348 and 349; Norway CCP sections 9-2 and 9-3; Sweden CCP ch 42 sections 3–7. For England and Wales: CPR r 16.4, 16.5.
[45] Rules 25 (2), 100 (2), 102 (1) and (4). The same applies to the relevancy of the evidence: Rules 25 (2), 92 (1), 100 (1), 102 (2)(a) and (3).

(a) identify, as accurately as possible in the light of the circumstances of the case, the specific sources of evidence to which access is sought, or alternatively
(b) identify closely defined categories of evidence by reference to their nature, content, or date.
(2) An application must satisfy the court of the plausibility of the merits of the applicant's claim or defence by demonstrating that
(a) the requested evidence is necessary for the proof or proposed proof of issues in dispute in proceedings or in contemplated proceedings;
(b) the applicant cannot otherwise gain access to this evidence without the court's assistance; and
(c) the nature and amount of evidence subject to the application is reasonable and proportionate. For this purpose the court will take into account the legitimate interests of all parties and all interested non-parties.

The principle of proportionality that is also one of the over-arching principles of the ERCP also applies with respect to the taking of evidence. Courts must consider the "nature and amount of evidence" and put it in relation to the strength of the applicant's case. Applications can be dismissed if the taking of evidence is too costly or would cause excessive delay of the proceedings.[46] Where, however, the claimant has demonstrated a strong prima facie case of an infringement of his substantive rights and where no other rele-vant evidence is available, even expensive expert evidence or the production of a huge amount of documents by the defendant can be justified.

c) Pre-action access to information and evidence

Finally, in product liability cases or other situations in which the claimant is typicially not aware of details in the sphere of the defendant and has neither access to relevant facts nor evidence, the ERCP are very claimant friendly and provide pre-action access to information and evidence. This helps the claimant to assess the prospects of his claim and to decide whether to file an action or not. As the ERCP have basically adopted the loser pays principle of costs this is a very important tool to assess the litigation risk. Rule 101 allows applications for access to evidence for "any prospective claimant who intends to commence proceedings"[47] and a respective court order may secure access to relevant and non-privileged evidence held or controlled by other parties or non-parties". Rule 102 para 3 specifies the requirements for such an application:

Rule 103 (3) If an application for access to evidence is made prior to the commencement of proceedings, the applicant must indicate with sufficient precision all elements necessary to enable the court to identify the claim for relief which the applicant intends to make.

Rules 101, 103 were drafted based on Article 7 of the Directive 2004/48 /EC on the enforcement of intellectual property rights:

Measures for preserving evidence
1. Member States shall ensure that, even before the commencement of proceedings on the merits of the case, the competent judicial authorities may, on application by a party who has presented reasonably available evidence to support his claims that his intellectual property right has been infringed or is about to be infringed, order prompt and effective provisional measures to preserve relevant evidence in respect of the alleged infringement, subject to the protection of confidential information. …Those measures shall be taken, if necessary without the other party having been heard, in particular where any delay is

[46] *Gascón Inchausti/ M Stürner*, 'Access to Information and Evidence in the ELI/UNIDROIT European Rules on Civil Procedure: Some Fundamental Aspects' (2019) 24 Uniform L Rev 14, 18; *A Stadler/M Strandberg*, Ch. 12 n. in: A Stadler/V Smith/F Gascon Inchausti, European Rules of Civil Procedure, A commentary on the ELI/UNIDROIT Model Rules, (forthcoming autumn 2022, Edward Elgar)

[47] See also Rule 106 (Time of application): (1) Applications for access to evidence may be made prior to the initiation of proceedings, in a statement of claim, or in pending proceedings.

likely to cause irreparable harm to the rightholder or where there is a demonstrable risk of evidence being destroyed.

In order to prevent misuse of pre-action access to evidence Rule 106 para 2 states that the successful applicant of such an evidence order may be required to initiate proceedings within a specified, reasonable, period of time. If he fails to comply, the court may set aside the evidence order and direct the return of any evidence obtained so far.

Let us have a final look at our product liability case: The plaintiff would be in a much better position under the ERCP than in a number of European countries. He must not allege in detail deficiencies of the construction of the machine in the statement of claim, because he can show good cause why it is not possible to provid details. He may also apply for an access to evidence court order before filing an action an can, e.g. inspect the defendant's production site with an expert, ask for disclosure of all relevant documents etc. The rather plaintiff-friendly system of the ERCP does, however, also take into account that the defendant may fear that his trade secrets (technical details of how he manufactures his products) may be violated it the claimant and his lawyer gets free access to them. Rule 103 obliges the court to have regard to all relevant rules concerning the protection of confidential information. Rule 103 para 2 provides a non-exhaustive list of protective measures such as redacting relevant sensitive parts in documents, conduct hearings in camera, restrict the persons allowed to gain access, write a non-confidential version of the judgment in which passages containing confidential data are deleted or limit access to evidence to the representatives and lawyers of a party or to an expert.[48] The ERCP thus offer a well-balanced and much better protection of trade secrets than many jurisdictions in the EU.

VII. Conclusions

The ERCP Model Rules are an academic attempt to identifying best practices in handling civil proceedings. In some cases, the ERCP also lead to significant improvements compared to national law. One may not expect them become binding law as a whole or in part in the near future. Their aim is to inspire national legislatures in Europe (and elsewhere) to adopt modern rules that seem to be acceptable not only in domestic cases but also in cross-border settings. The ERCP may thus trigger a bottom-up process of harmonization instead of the top-down approaches preferred by the European legislature.

[48] For details see *A Stadler/M Strandberg*, Ch. 12 n. 12.086-12.091 in: A Stadler/V Smith/F Gascon Inchausti, European Rules of Civil Procedure, A commentary on the ELI/UNIDROIT Model Rules, (forthcoming autumn 2022, Edward Elgar)