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

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I gained a better understanding of the ERCP's balanced approach to civil procedure in both Anglo-American and continental legal systems from Prof. Dr. Astrid Stadler's lecture. I am grateful to her for her long and deep research in this field. In the following, I would like to conclude the discussion by asking for additional clarification of the ERCP on access to information and evidence before and during litigation.

In Korea, the remedy for the structural ubiquity of evidence is very inadequate. Article 289(1) of the Korean Civil Procedure Act requires a party to specify the facts to be proved when requesting evidence, which is often impossible for the party to specify. Article 345 requires the plaintiff to specify (1) the name of the document, (2) the purpose of the document, (3) the person in possession of the document, (4) the fact to be proved, and (5) the reason for the duty to produce the document when requesting the submission of a document, which is particularly disadvantageous to the plaintiff in cases where the evidence is structurally ubiquitous. To compensate for these difficulties, Article 346 establishes a system for the submission of a list of documents. Although this provision somewhat reduces the plaintiff's burden of proof by requiring the plaintiff to outline the purpose of the document or the fact to be proved and the defendant to produce the markings and purpose of the document, it is ineffective because there are no sanctions if the defendant does not cooperate.

In addition, there is a system that requires each local bar association to request public institutions to investigate necessary matters and to submit documents in their possession upon request of their members related to cases handled by their members (Article 75-2 of Korean Attorney-at-Law Act), but it is based on voluntary

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submission and has no other means of enforcement.

On the other hand, the Korean Civil Procedure Act provides for an evidence preservation system, which means that if there are circumstances that make it difficult to use the evidence if it is not examined in advance before the hearing procedure is held, the evidence will be examined in advance before the hearing or complaint is filed upon the request of a party (Article 375 et seq.). This is the Korean system that comes closest to the ERCP in terms of pre-action access to information and evidence. However, there is a problem with its current use, which is that it is significantly underutilized. The reason for this is that it is more difficult to demonstrate not only the need for discovery, but also the facts to be proven, which makes it difficult to use the evidence preservation system at a time when the case is not yet mature.

Under these circumstances, the model rules on access to information and evidence before and during litigation proposed by the ERCP are expected to serve as an ideal model for the future revision of evidence laws in Korea. In my view, the concern that these means of access may be abused to pursue the other party's secrets can be resolved by establishing a system that thoroughly protects the other party's secrets such as trade secrets within the litigation process, which is also proposed by the ERCP.

On the other hand, in order to be effective, access to information and evidence during litigation or prior to the commencement of litigation must be accompanied by appropriate sanctions. I would like to know what sanctions the ERCP provides for in the event that the holder of information and/or evidence does not comply with a court's disclosure order, and I would also like to know your view or opinion as to the extent to which such sanctions will be effective in each Member State of the EU, in particular in Germany.