

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

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"I am very pleased to have the opportunity to hear the presenter's presentation on the completed ERCP in October 2023, following the presenter's initial presentation on the ERCP in its formative stages at the invitation of the Korean Association of Civil Procedure Law in May 2019. In particular, I am deeply grateful to the presenter for addressing the topic of access to information and evidence, which is a crucial aspect of the ERCP. This is especially significant due to the recent prominence of the introduction of the US discovery system within the Korean legal society. I believe that the presenter's insights will be highly valuable.

1.The Significance of TPCP and ERCP

After the release of ALI/UNIDROIT's Transnational Principles of Civil Procedure, consisting of 35 articles, in 2004, I anticipated the emergence of detailed regulations. However, I believe my expectations were met through the efforts of the ELI and UNIDROIT in the development of the ERCP. The agreement reached in 2004, albeit at a general level, was a significant event in bridging the gap between civil law and common law countries in procedural law. It has been reported that TPCP had a substantial impact on the revision of civil procedural laws in many countries. Therefore, the ERCP, with its more comprehensive information, is expected to serve as a valuable reference for revising civil procedural laws in numerous countries, not just in Europe. I understand that the presenter was directly involved in the ERCP project and has already published a book on the ERCP's collective redress provisions. Additionally, another book covering the entire ERCP is scheduled for publication in November 2023. I express my admiration for the presenter's efforts, and I am also delighted to have the opportunity to attend the valuable presentation in person.

2.Access to Information and Evidence and Questions

(1) The presenter explains the accessibility of information and evidence in product liability litigation from the perspective of various countries, offering insights for the ERCP. This approach is quite intriguing. The level of access to information and evidence in Korean civil

procedural law is akin to that in German civil procedural law. Specifically, the obligation to submit documents, which is the primary means to address the issue of evidence dispersion, is limited to documents cited by the opposing party or documents that can be legally required to be provided to the opposing party (KCCP Article 344, Paragraph 1). In cases where identifying the documents is challenging, a list of documents can be requested (KCCP Article 346), but this provision is narrowly interpreted and seldom employed in practice. The sanctions are also relatively mild. Violation of the obligation to submit documents by a third party results in only a fine.

(2) Given this context, Korea is currently deliberating the adoption of the American pre-trial discovery system. However, there are concerns that the broad access permitted by the American system may not align with the passive and inactive nature of the Korean civil procedural system. In this regard, I am pleased to hear the presenter state, "The ERCP provides a highly flexible system that promotes the exchange of information while mitigating the drawbacks of US pretrial discovery." Notably, the presenter concludes, "Detailed allegations of machine construction deficiencies need not be included in the statement of claim if it can be demonstrated why such details cannot be provided. It is also possible to request an access to evidence court order before initiating legal proceedings, enabling activities such as on-site inspections of the defendant's production site with an expert and requests for disclosure of all relevant documents." Based on this, I would like to pose the following questions.

(3) Firstly, I am curious about the core focus of the ERCP and how it is designed to mitigate the shortcomings of the US pre-trial discovery system while facilitating flexible information exchange. Even highlighting one or two representative examples would greatly benefit the Korean legal society. Secondly, in accordance with ERCP Rule 101(1), any claimant, defendant, or prospective claimant intending to commence proceedings can apply to the court for an order to secure access to relevant and non-privileged evidence held or controlled by other parties or non-parties. I am interested in understanding the differences, if any, in information access rights between potential parties and parties who have initiated a lawsuit. Can all types of evidence be equally investigated? For instance, is it possible to depose witnesses before initiating legal proceedings?"