1. General introduction

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1. EUROPEAN RULES OF CIVIL PROCEDURE

After several years of work by leading academics and practitioners from across Europe, UNIDROIT and the European Law Institute (ELI) adopted the European Rules of Civil Procedure 2020 (ERCP) in Autumn 2020. The project provides model rules for a European civil procedure code. Although followed by observers from the European Commission, the ERCP is not a blueprint for a potential European Directive or Regulation. The target of the project is a little less ambitious – to provide a model for national legislatures to use – because the political landscape in Europe is currently not much in favour of a complete harmonization of civil procedure law and the European legislature lacks the competence for such an advance. Therefore, the ELI/UNIDROIT project aimed mainly to identify converging tendencies in civil procedure across Europe and bring them together in the form of a code, to provide a basis for discussion and a ‘best practice’ template for national legislatures considering procedural reforms.¹

The contributions in this book deal only with a specific part of the ERCP: the rules on parties and on collective redress (and their interplay). The contributions to this book were written based on a late (2019) draft of the ERCP model rules. The rules in Part XI (collective redress) are substantively the same as those finally adopted by the ELI and UNIDROIT. They explain and comment on these rules and provide a comparative context.

Rules on parties – such as joinder of parties, consolidation, representation and so on – are particularly important in the case of complex mass harm events. Policy makers can provide different options for litigants and courts to handle multi-party and collective proceedings. The ‘traditional’ class action

¹ Rolf Stürner, presentation at the German Association of International Procedural Law, March 2018, Hamburg.

model avoids procedural complexity by reducing the litigation to a one-on-one action, albeit with numerous procedural safeguards and modifications.

The implementation of collective redress instruments has been discussed at the European level since the beginning of the 2000s and a considerable number of Member States have enacted reforms of their procedural rules since then. As any set of rules on European civil procedure that did not take account of instruments on collective redress would be incomplete, the ERCP includes a chapter on collective proceedings in Part XI.

The European Commission presented a proposal for reform of EU consumer protection law in April 2018, which included a draft Directive on representative actions for consumers. This proposal draws a line under a controversial debate of many decades but was not foreseen when the ELI/UNIDROIT project started. Like the ERCP, the Directive is expected to be adopted in 2020

2. BACKGROUND TO THE ELI/UNIDROIT PROJECT

In 2004, the American Law Institute (ALI) and UNIDROIT (an intergovernmental agency based in Rome) completed a joint project and presented their Principles of Transnational Civil Procedure – a set of 31 principles – accompanied by some 36 more detailed rules (which were not formally adopted by ALI or UNIDROIT).² Work on the project had started in 1998, driven by the idea that – despite the differences of continental law and common law – it should be possible to draft common principles of civil procedure. The project had a quite limited scope of application and was intended to cover only commercial disputes in an international setting. The principles were meant to provide a valuable pattern for ‘best practice’ dispute resolution procedures.³ The ALI/UNIDROIT principles contained no suggestions on collective redress.

A serious debate on strengthening the private enforcement of EU law in Europe by means of group or class actions had just started in Europe when the principles were adopted. Very few countries in Europe⁴ had implemented rules on the collective enforcement of consumer rights which went beyond traditional representative actions for cease-and-desist (injunction) orders.

² ALI/UNIDROIT, *Principles of Transnational Civil Procedure*, CUP 2006.

³ ALI/UNIDROIT, *Principles of Transnational Civil Procedure*, CUP 2006, Preface, p XXIX.

⁴ Spain (Article 11 of the Civil Procedure Code 2001) and Portugal (Laws 83/95 and 24/96) were the first countries to implement collective actions for the recovery of damages, but the provisions did not gain much importance in practice. In 2002, Sweden was the first Member State to implement a mechanism that clearly followed the role model of the US class action, albeit with an opt-in mechanism.

In 2013/14, the ELI (a non-governmental organization based in Vienna) and UNIDROIT decided to launch a follow-on project, focusing on adapting the 2004 principles to European civil procedure and on regional implementation in Europe. The basic idea behind the new project was not to suggest the drafting of a legislative European code of civil procedure in order to harmonize civil procedure law within the European Union, but rather to provide a consistent set of procedural rules for debate.

The task of drafting the new model rules was given to recognized legal experts in civil procedure from across Europe. In 2016, when some groups had already more or less completed their drafts, the ELI and UNIDROIT decided to establish additional topics in order to cover all parts of civil procedure law. This included a group on ‘parties’.⁵ The remit of this group covered not only traditional rules on parties (eg, joinder, third-party notice), but also a separate chapter on collective redress. At that time, the European Commission had started to evaluate the implementation of Recommendation 396/2013 on collective redress: it eventually published the results of the evaluation in March 2018.⁶

In April 2018 the European Commission published its proposal for a New Deal for Consumers, including the draft Directive on collective redress (representative actions) in consumer law. The ELI/UNIDROIT ‘parties’ group referred to the proposal in the comments of its draft rules. Due to the coming into office of the new European Commission in October 2019, the European legislature was unable to finalize the draft Directive in Summer 2019 as intended. The EU institutional ‘Trilogue’ ended in June 2020 with a common position agreed between the European Council, Parliament and Commission. The new Directive is expected to be adopted by the end of 2020.

3. COLLECTIVE REDRESS IN THE ERCP

Although the ELI/UNIDROIT European Rules of Civil Procedure have the character of model rules only, the chapter on collective redress may gain some practical importance when the European legislature finally passes a binding Directive on consumer collective redress. Member States may consider the ERCP collective redress rules when implementing the Directive in national civil procedure law. The Directive will set out some basic building blocks of a new national collective redress instrument: the details will be for the Member States to design and the ERCP rules could provide a template.

⁵ Emmanuel Jeuland and Astrid Stadler, co-reporters.

The scope of application of the ERCP covers domestic and cross-border civil proceedings; but family law, arbitration and insolvency proceedings are excluded. There are also no rules on jurisdiction, because the Brussels Ibis Regulation⁷ covers questions of jurisdiction.

The ELI/UNIDROIT project has taken the ALI/UNIDROIT principles as a starting point only. It was clear from the outset that the principles would need to be adapted to the European context and traditions, and that the project should also try to present a set of more detailed rules than the earlier ALI/UNIDROIT project. In particular with respect to collective redress, the ALI/UNIDROIT principles were silent and the ‘parties’ group had to start without any guidance from that project.

The ELI/UNIDROIT project looked at the existing EU law relating to civil procedure (*‘acquis communautaire’*), including EU Directives and Regulations, as well as the case law of the Court of Justice of the European Union. Another very important source of inspiration was, of course, national civil procedure law, and substantial comparative research was carried out in this regard. The research was not, however, intended to identify only the lowest common denominator; all groups had in mind to propose ‘best practice’ rules. Therefore, even where EU law existed, it was not taken as ‘carved in stone’, but subject to review and, within accepted limits, improvement.

4. OVERVIEW OF THIS STUDY ON PARTIES AND COLLECTIVE REDRESS

It is the objective of this book to explain the ERCP’s rules on parties and on collective redress, taking into account the comparative context of their origin, and developments at the European level and outside Europe. The text of the rules can be found in the Appendix and the editors would like to express their sincere thanks to ELI and UNIDROIT for their permission to print the relevant rules. The ERCP is also available in full at <https://www.unidroit.org/english/governments/councildocuments/2020session/cd-99-b/cd-99-b-10-rev-e.pdf> (last accessed 4 October 2020).

The official comments on the ERCP had to be brief and could not cover all aspects that might be relevant for the implementation of the rules and their impact on court practice. Therefore, the chapters of this book go beyond the officially available comments and consider the rules on parties and collective redress in their European (and, in Chapter 14, global) context.

The first chapters of this book deal with the general rules on ‘parties’ in the ERCP. These include not only the traditional rules on legal standing, but

⁷ Regulation 1215/2012 [2012] OJEU L351/1.

also the capacity to be a party and litigation capacity. Chapter 2 (Emmanuel Jeuland) also analyses possible procedural ways in future to cope with mass harm situations – for example, in case of environmental disasters. The traditional continental European divide between public law and private law is not always very helpful in this respect and the handling of mass harm events must take both fields of law into consideration.⁸ In the event that public regulators do not enforce environmental rules effectively, private enforcement (in a public interest) must step in to support the rule of law. Chapter 2 therefore explores ways to enforce environmental law, animal rights and so on by providing legal standing to ‘entities’ other than human beings and legal entities, or by legal representation.

Chapter 3 (Vincent Smith) deals with multi-party litigation in a contrast to collective redress actions. The ERCP opens the door to all kinds of ways to handle complex litigation. Joinder of parties, consolidation of proceedings and one-on-one test case litigation are possible ways to handle mass harm events; but the ERCP also provides a whole chapter on collective redress. Chapter 3 analyses the pros and cons of the various options.

Chapter 4 (Emmanuel Jeuland) goes into the detail of procedural settings in which the quite formal approach of defining the parties to litigation (Rule 29 of the ERCP) is not constructive. In order to finally solve a dispute that is pending in court, instruments such as substitution of parties might be necessary. The ERCP has – based on a comparative approach – implemented best practice solutions and not necessarily sought the ‘middle ground’.

Chapters 5 to 12 deal with the most important issues in the context of collective actions and we have provided a separate introduction for this part in Chapter 5. In Chapter 6, Astrid Stadler starts by explaining the structure of collective redress proceedings in the ERCP and the requirements for certification. The chapter also describes the remedies available in collective redress actions and contrasts the ERCP with the European legislature’s draft for a Directive on representative actions in the interest of consumers. The succeeding chapters walk along the course of a collective redress action and explain details on legal standing (Chapter 7, Ianika Tzankova); case management (Chapter 8, Magne Strandberg and Vincent Smith); the taking of evidence (Chapter 9, Fernando Gascón Inchausti); the calculation of damages (Chapter 10, Nils von Hinten Reed); collective settlements (Chapter 11, Astrid Stadler); and costs and funding (Chapter 12, Stefaan Voet). Mass harm events do not honour national

⁸ For a good example, see the project of the Visegrad Fund, ‘Progress in collective redress mechanisms in environmental and consumer mass harm situations’ 2018–19, www.ilaw.cas.cz/en/research-and-projects/research-projects/collectiveredress/info.html (last accessed 21 July 2020).

borders; today, they are mostly cross-border events. Thus, they inevitably raise questions of international jurisdiction and enforcement that are dealt with in Chapter 13 (Michael Stürner).

Our final chapter is a little different. In October 2019, the editors of this book invited leading foreign (non-European) experts in the field of collective redress to discuss Part XI of the ERCP, ‘Collective Proceedings’. Peter Cashman (Barrister and Professor of Law at the University of Sydney Law School), Chongsoo Han (Professor of Law at Hanyang University, Seoul), Richard Marcus (Professor of Law at the University of Hastings, California) and Hermes Zaneti Jr (Federal University of Espírito Santo, Brazil) explained their views on the ERCP collective redress rules from their national perspectives. They provided short summaries of their contributions which became part of the final chapter of this book. The editors are grateful to them for their time and expertise.

From a global perspective, it became evident that the collective redress rules in Part XI of the ERCP are an attempt to establish a ‘European way’ of handling mass harm events through court action. Legal standing, the role of ‘class counsel’ and qualified entities, and costs and funding are just some of the issues on which the traditional class action countries, but also Brazil and South Korea, take different approaches. There is still widespread mistrust in Europe against lawyer-driven litigation and the risk that the economic interests of third parties such as lawyers or third-party funders may prevail over the legitimate interests of the class or group members. We hope, nevertheless, that the comments in Chapter 14 help to demonstrate that the ERCP rules on collective proceedings provide a firm foundation – particularly when viewed in the light of lessons learned outside Europe – for ensuring that European consumers and other victims of mass harm cause by breaches of both national and EU laws can obtain effective redress through proportionately managed court action following European principles.