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COOPERAÇÃO INTERNACIONAL

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CAPÍTULO 22

Strengthening civil justice cooperation: the quest for model rules and common minimum standards of Civil Procedure in Europe

Xandra E. Kramer[1]

1. INTRODUCTION

The new Brazilian Code of Civil Procedure, which is the central topic of this book, not only modernises domestic civil procedure but it also invigorates the rules on international judicial cooperation. In Europe, civil procedure is in a constant state of flux as well. While many European countries are reforming their civil procedure rules with the aim of improving efficiency and reducing costs through increased case management, introducing rules on ADR, and modernising procedure by implementing information and communication technology, European law is gradually coming more dominantly into play. Since the extended

1. Professor of Private Law, Erasmus School of Law, Erasmus University Rotterdam, and Professor of Private International Law Faculty of Law, Economics, and Governance, Utrecht University (The Netherlands). This research has received funding from the European Research Council (ERC) under the European Union's Horizon 2020 research and innovation programme (grant agreement No 726032), ERC consolidator project 'Building EU Civil Justice: challenges of procedural innovations – bridging access to justice'; see ‹www.euciviljustice.eu›.

competence of the EU legislator in 1999, civil procedure in the Member States has been increasingly affected and complemented by EU legislation.[2]

The primary aim of EU legislation in the area of civil procedure is to support judicial cooperation in civil matters between the Member States, as is clear from Article 81 of the Treaty on the Functioning of the European Union (TFEU).[3] On the basis of this provision, a series of regulations has been adopted. These are primarily rules that traditionally belong to private international law, including rules on international jurisdiction and on the recognition and enforcement of judgments. In addition, a number of other EU instruments touching upon essential parts of civil procedure are in place. These include three Regulations introducing autonomous European civil procedures, as well as a number of sector-specific instruments focusing primarily on consumer law, and which are based on Article 114 TFEU. These legislative instruments result in the gradual harmonisation of procedural laws. However, the core of civil procedure is still regulated at the national level, and practice diverges significantly in Europe.

The focus of the present EU justice programme – the EU Justice Agenda for 2020 – is on the strengthening of mutual trust, which is considered 'the bedrock' of EU justice policy with the primary purpose of enhancing judicial cooperation.[4] To give body to mutual trust in reality, there has been a shift from adopting new legislation to the proper implementation and application of the existing rules. In recent years, the idea of establishing common minimum standards of civil procedure law to support mutual trust and judicial cooperation has gained ground, as is evident from a number of studies commissioned by the European Commission,[5] and by a Resolution on common minimum standards by the European

2. See *inter alia* Burkhard Hess and Xandra Kramer (eds), *From Common Rules to Best Practices in European Civil Procedure* (Nomos/Hart Publishing 2017); Burkhard Hess, Maria Bergström and Eva Storskrubb (eds), *EU Civil Justice: Current Issues and Future Outlook* (Hart Publishing 2016); Xandra Kramer, *Procedure Matters: Construction and Deconstructivism in European Civil Procedure* (Erasmus Law Lectures 33 (Inaugural Lecture), Eleven International Publishing 2013); Z Vernadaki, 'Civil Procedure Harmonization in the EU: Unravelling the Policy Considerations' (2013) 9 Journal of Contemporary European Research 298-312; M Tulibacka, 'Europeanisation of Civil Procedures: In Search of a Coherent Approach' (2009) 46 Common Market Law Review 1527.
3. See for an overview of civil justice cooperation: XE Kramer, 'Judicial Cooperation in Civil Matters', in: PJ Kuijper, F Amtenbrink, D Curtin, B De Witte, A McDonnell and S Van den Bogaert (eds), *The Law of the European Union* (Kluwer Law International Law 2018) 721-740.
4. European Commission, 'The EU Justice Agenda for 2020 – Strengthening Trust, Mobility and Growth within the Union' COM (2014) 144 final, point 3.
5. European Commission, 'An evaluation study of national procedural laws and practices in terms of their impact on the free circulation of judgments and on the equivalence and effectiveness of the procedural protection of consumers under EU consumer law – Report prepared by a Consortium of European universities led the MPI Luxembourg for Procedural Law' (2017) JUST/2014/RCON/PR/CIVI/0082. These will be published in two volumes in 2018. An earlier study focused on the service of documents: A Simoni and G Pailli (DMI in consortium with the University of Florence and the University of Uppsala), *Final Report: Study*

Parliament adopted in 2017.[6] A major venture that ties in with this is the joint project of the European Law Institute (ELI) and the International Institute for the Unification of Private Law (Unidroit), entitled 'From Transnational Principles to European Rules of Civil Procedure'.[7] This project builds on the 2004 ALI-Unidroit Principles of Transnational Civil Procedure, and its intention is to expand and adjust these for the purpose of the European region, with the aim of creating model rules of European civil procedure. To date, initiatives to expand the ALI-Unidroit rules to other regions as well, including to South America, have not taken off, although there appears to be some interest in such a project.[8] The European framework on judicial cooperation and the envisaged model rules are without doubt more far-reaching than the model rules in South America as established under the auspices of the Ibero-American Institute of Civil Procedure.[9]

This paper will discuss the European Parliament's initiative for establishing common minimum standards and the ELI/Unidroit European Rules of Civil Procedure. The question is to what extent these can contribute to the required coherence in European civil procedure and to improving judicial cooperation in civil matters. A detailed analysis of these comprehensive initiatives is not possible in the context of this paper. Before zooming in on these initiatives, the developments in European harmonisation and the challenges it poses will be discussed, providing the context within which these projects take place.

2. EUROPEANISATION OF CIVIL PROCEDURE: STATE OF AFFAIRS AND SHORTCOMINGS

2.1. The Threefold Harmonisation of Civil Procedure in the EU

Private law has been subject to gradual harmonisation in the European Union since the 1970s. Since then, many directives and regulations have been established, most notably in the areas of consumer law, product liability, competition law, and intellectual property. The ambition to establish a European

on the Service of Documents: *Comparative legal analysis of the relevant laws and practices of the Member States* (JUST/2014/JCOO/PR/CIVI/0049, European Commission 2016).

6. Committee on Legal Affairs (European Parliament), 'Report with recommendations to the Commission on common minimum standards of civil procedure in the EU' 2015/2084(INL)).
7. See the project websites of ELI: ‹www.europeanlawinstitute.eu/projects/current-projects-contd/article/from-transnational-principles-to-europeanrules-of-civil-procedure/?tx_ttnews%5BbackPid%5D=179508&cHash=f55b9b03751e4ae4f928b654d7329d96› and of Unidroit: ‹www.unidroit.org/work-in-progress-studies/current-studies/transnational-civil-procedure›.
8. Governing Council UNIDROIT, 'Draft Triennial Work Programme 2014-2016' (Rome, 8-10 May 2013). See further Section 4.1.
9. The Código Procesal Civil Modelo para Iberoamérica (1988) and the Código Modelo de Procesos Colectivos para Iberoamérica (2004), available at ‹www.iibdp.org/es/codigos-modelo.html›. Information kindly provided by Antonio Gidi.

Civil Code, academically inspired since the 1990s,[10] has been tempered in more recent years. Although it was suggested in 1994 that private international law might 'fade into history' once substantive private law were to 'rule the world',[11] this expectation did not materialise. On the contrary, private international law is an essential and one of the most dynamic areas of law in the EU.[12] The first strand of harmonisation of civil procedure involves the regulations dealing with questions of international litigation, encompassing in particular international jurisdiction, the recognition and enforcement of judgments, the cross-border service of documents, and the taking of evidence. These do not harmonise civil procedure as such, but coordinate and bridge the diverging EU jurisdictions and rules through traditional private international law instruments, as do the Hague Conference on Private International Law conventions at the global level.

The second strand of unification consists of a number of instruments that have introduced pan-EU civil procedures or that aim at harmonising specific topics of civil procedure. These include the Regulations on a European Order for Payment Procedure, a Small Claims Procedure, and an Account Preservation Order[13] as well as the Mediation Directive.[14] What these have in common is that their scope of application is limited to *cross-border cases*. These are generally defined as cases in which at least one of the parties is domiciled or habitually resident in a Member State other than the Member State of the court or tribunal seized for the dispute.[15] This limitation results from Article 81 TFEU, enabling the EU legislator to establish instruments in cases 'having cross-border implications'.

A third category of harmonised EU rules consists of what are termed sectorial or sector-specific rules that introduce harmonised rules for a specific substantive area. These include notably two instruments on Consumer ADR and

10. See in particular AS Hartkamp and others (eds), *Towards a European Civil Code* (4th edn, Kluwer Law International 2010) of which the first edition originates from 1994.
11. TM de Boer, 'Substantive Law and Private International Law' in: AS Hartkamp and others (eds), *Towards a European Civil Code* (1st edn, Ars Aequi Libri/Nijhoff 1994) 53.
12. Many regulations have been established, also more recently in the area of international family law. The European Parliament in particular has made efforts to increase coherence of private international law, and even to possibly establish a European Code of Private International Law. On the state of affairs and this project, see XE Kramer, 'European Private International Law: The Way Forward, In-depth analysis European Parliament (JURI Committee)', in: *Workshop on Upcoming Issues of EU Law. Compilation of In-Depth Analyses.* (European Parliament Brussels 2014) 77-105 ‹http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2502232›.
13. Regulation (EU) 2015/2421 of 16 December 2015 amending Regulation (EC) No. 861/2007 establishing a European Small Claims Procedure and Regulation (EC) No. 1896/2006 creating a European order for payment procedure [2015] OJ L341/1; Regulation (EU) 655/2014 of 15 May 2014 establishing a European Account Preservation Order to facilitate cross-border debt recovery in civil and commercial matters [2014] OJ L189/59.
14. Council Directive 2008/52/EC of 21 May 2008 on certain aspects of mediation in civil and commercial matters [2008] OJ L136/3.
15. See e.g. Article 3 of Council Regulation (EC) 1896/2006 of 12 December 2016 on creating a European Order for Payment Procedure [2006] OJ L399.

Consumer ODR,[16] and a non-binding Recommendation on Collective Redress.[17] A number of other sectorial instruments that regulate largely substantive issues also contain procedural rules on *inter alia* provisional measures, evidence, and seizure. These include a directive on the Enforcement of Intellectual Property Rights[18] and a directive on Damages for Competition Law Claims.[19] In April 2018, as part of a 'New Deal for Consumers', a proposal for representative actions for the protection of the collective interests of consumers was put forward.[20]

2.2. State of the Art and Challenges: Coherence and Implementation

At present, European civil justice is one of the most vital areas of European law. The overriding objective is to invigorate judicial cooperation, based on the principle of mutual trust, with the aim of enhancing access to justice for EU citizens. Apart from creating legislative instruments, the European Commission has invested in practical tools to increase access to information and procedures for practitioners, citizens, and businesses, in particular through the e-Justice portal[21] ('one stop to justice') and in training programmes for judges.[22] The European Network in Civil and Commercial Matters (EJN) plays an important role in strengthening judicial cooperation between the Member States.[23]

Meanwhile, over twenty instruments have been established that focus solely on or include important rules on civil procedure. Nevertheless, civil procedure in the European legal order still relies primarily on a decentralised system

16. Directive 2013/11/EU of 21 May 2013 on alternative dispute resolution for consumer disputes and amending Regulation (EC) No. 2006/2004 and Directive 2009/22/EC (Directive on consumer ADR) [2013] OJ L165/63.
Regulation (EU) 524/2013 of 21 May 2013 on online dispute resolution for consumer disputes and amending Regulation (EC) No. 2006/2004 and Directive 2009/22/EC (Regulation on consumer ODR) [2013] OJ L165/1.
17. Commission Recommendation 2013/396/EU of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law [2013] OJ L201.
18. Council Directive 2004/48/EC of 29 April 2004 on the enforcement of intellectual property rights [2004] OJ 2004 L195/16.
19. Directive 2014/104/EU of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union [2014] OJ L349/1.
20. European Commission, 'The EU Justice Agenda for 2020 – Strengthening Trust, Mobility and Growth within the Union' COM (2014) 144 final, point 3. European Commission, 'Proposal for a directive on representative actions for the protection of the collective interests of consumers, and repealing Directive 2009/22/EC' COM (2018) 184 final.
21. See ‹http://e-justice.europa.eu/home.do› accessed 7 May 2018.
22. See Article 81(2)(g) of the Treaty on the Functioning of the European Union [2012] OJ C326/47; European Commission, 'Communication on judicial training in the European Union' COM (2006) 356; European Commission, 'Building trust in EU-wide justice – a new dimension to European Judicial training' COM (2011) 551 final. Annual reports on the progress are available through the e-Justice Portal, see page on 'European judicial training'.
23. ‹https://e-justice.europa.eu/content_ejn_in_civil_and_commercial_matters-21-en.do›.

of dispute resolution. Even in those areas where EU civil procedure law is in place, these rules are applied by the Member States' national courts, and they function within the domestic legal environment.[24] The principles of subsidiarity and proportionality prohibit legislation that does not have a legitimate aim within the EU legal order (e.g. enforcement of consumer rights, promoting access to justice) or that goes beyond what is necessary to achieve the designated goals of a proposed instrument.[25]

The Member States have generally been hesitant when it comes to legislation on civil procedure.[26] Many instruments in the area of civil justice have been debated intensely in the Council and the European Parliament, and a number of instruments proposed by the European Commission either never made it into law or their scope was severely restricted. For instance, on a number of occasions the Commission has proposed extending the scope of legislation based on Article 81 TFEU to domestic cases, but unsuccessfully so far.[27] In addition, uniform European procedures, including the procedures for a European Order for Payment, Small Claims and Account Preservation Order, are optional. The claimant can choose to initiate either an existing national procedure in the Member States where the claim is brought or the available European procedure.[28] The European procedures thus co-exist, and – to some extent – compete with available domestic civil procedures. An issue that has been debated intensely in the EU is collective redress. Attempts to establish a broad, binding instrument have failed owing to great divergences in the EU, an inability to reach a compromise on the basic concepts, and a fear of the claimed excesses of the US class action system. Thus far, the efforts have resulted only in a non-binding Recommendation,[29] although as mentioned in the previous subsection, in April 2018 a propos-

24. The Court of Justice of the European Union (CJEU) plays an important role in the interpretation of these rules through its preliminary rulings, but the rules are in the first instance applied by the national courts, and function within the domestic legal order.
25. Article 5 of the Treaty on the Functioning of the European Union [2012] OJ C326/47 and Protocol (No 2) on the Application of the Principles of Subsidiarity and Proportionality of the Consolidated version of the Treaty on the Functioning of the European Union [2008] OJ C115.
26. Vernadaki (n 2) 299.
27. XE Kramer, 'European Procedures on Debt Collection: Nothing or Noting? Experiences and Future Prospects' in: B Hess, M Bergström and E Storskrubb (eds), *EU Civil Justice: Current Issues and Future Outlook* (Hart Publishing 2016) 97 at 100-101, 118-119; E Storskrubb, *Civil Procedure and EU Law. A Policy Area Uncovered* (OUP 2008) 41-43.
28. See e.g. Council Regulation (EC) 861/2007 of 11 July 2007 establishing a European Small Claims Procedure [2007] OJ L199, art 1.
29. See for extensive analyses *inter alia* E Lein and others, *Collective Redress in Europe: Why and How?* (BIICL 2015). See also S Voet, 'European Collective Redress: A Status Quaestionis' (2014) 4 International Journal of Procedural Law 97-128; and from a primarily Dutch perspective: XE Kramer, 'Securities Collective Action and Private International Law Issues in Dutch WCAM Settlements: Global Aspirations and Regional Boundaries' (2014) 27(2) Global Business & Development Law Journal 235 at 241-248 ‹http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2480079›.

al for a directive on representative actions for the protection of the collective interests of consumers was put forward.[30]

The specifics of the EU supranational order, the limited competence of the EU legislator, and the reluctance of the Member States have resulted in ad hoc piecemeal legislation. Both legislative technique and scope differ greatly. Some instruments are direct binding regulations, while others are directives – either relying on minimum or maximum harmonisation – that require national implementation, or are non-binding instruments. Some legislative acts apply to most civil and commercial matters (horizontal instruments), while others are limited to a specific type of case (sectorial instrument). Some instruments apply to both domestic and cross-border cases, while others are limited to the latter. In addition, a number of instruments, in particular those introducing uniform civil procedures are only optional. Moreover, a number of Member States are not bound by or only take part on the basis of 'opt in' participation in cross-border civil instruments owing to their special position in relation to judicial cooperation measures (Denmark, the United Kingdom, and Ireland).[31] This mishmash of EU civil procedure legislation can be characterised as a legislative form of unintentional deconstructivism,[32] and – along with application problems in the Member States – has so far only to a limited extent contributed to increasing access to justice and to strengthening the enforcement of EU law.

With a view to evaluating the application of civil procedure instruments in general, and in particular with regard to consumer law, in 2016 and 2017 a large-scale evaluation study commissioned by the European Commission was carried out by an international consortium.[33] The first part of this extensive research report, based on national reports from all the Member States and a large data collection, focuses on mutual trust and on the free circulation of judgments. It studies the application of a series of instruments regarding cross-border litigation along with a number of other procedural law issues, with the aim of evaluating the extent to which differences between the rules and practice in the Member States affect mutual trust and therefore judicial cooperation. The conclusion is that no systemic deficiencies exist, although targeted measures are required to improve the functioning of the European instruments and to

30. See para 2.2 and n 20.
31. It goes without saying that it will no longer be bound at all after the United Kingdom leaves the EU.
32. XE Kramer, *Procedure Matters: Construction and Deconstructivism in European Civil Procedure* (Erasmus Law Lectures 33 (Inaugural Lecture), Eleven International Publishing 2013) 23-26 ‹http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2372713›
33. European Commission, 'An evaluation study of national procedural laws and practices in terms of their impact on the free circulation of judgments and on the equivalence and effectiveness of the procedural protection of consumers under EU consumer law – Report prepared by a Consortium of European universities led the MPI Luxembourg for Procedural Law' (2017) JUST/2014/RCON/PR/CIVI/0082.

enhance the cross-border litigation system as a whole.[34] However, the second part of the study, dedicated to the procedural protection of consumers, concludes that national procedural laws have serious inequalities and shortcomings in applying EU consumer law, and recommends an instrument on procedural consumer protection.[35]

3. THE EUROPEAN PARLIAMENT'S COMMON STANDARDS OF CIVIL PROCEDURE

The European Parliament has been very active in the area of private international law, commissioning a number of studies to increase the coherence of the present framework or even to arrive at a European Code of Private International Law.[36] In more recent years, the European Parliament has shifted its attention to civil procedure in particular.[37] In 2015, its research service department issued a report on the Europeanisation of civil procedure, mapping the current state of affairs, competence issues, and ongoing projects, including the ELI-Unidroit project, and sketching ways forward to achieve common minimum rules of civil procedure.[38] Subsequently, a study was launched to calculate an Added Value 'costs on non-Europe' in relation to the absence of civil procedure rules, as it has done before in other areas, including private international law. These cost studies are always somewhat speculative, however, and this is complicated particularly for the broad area of civil procedure, where EU rules are still largely absent. This study was complemented by a research paper on common minimum standards of civil procedure,[39] and followed by an in-depth analysis.[40]

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34. ibid no. 35.
35. ibid no. 36.
36. See the studies commission by the European Parliament: XE Kramer, M de Rooij, V Lazić, EN Frohn and RJ Blauwhoff, *A European framework for private international law: current gaps and future perspectives* (study, European Parliament 2012); XE Kramer, *Current gaps and future perspectives in European private international law: towards a code on private international law?* (briefing note, European Parliament 2012); XE Kramer, 'European Private International Law: The Way Forward' in: *Workshop on Upcoming Issues of EU Law. Compilation of In-Depth Analyses* (European Parliament 2014) 77-105; J von Hein and G Rühl, 'Towards a European code on private international law?' in: *Cross-border activities in the EU: Making life easier for citizens* (Workshop for the JURI Committee, European Parliament 2015) 8-53.
37. See Robert Bray, 'Common Rules and Best Practices From the Perspective of the European Parliament' in: Burkhard Hess and Xandra Kramer (eds), *From common rules to best practices in European Civil Procedure* (Nomos/Hart 2018) 35. This section is in part based on Burkhard Hess and Xandra Kramer 12-15.
38. European Parliamentary Research Service (Rafał Mańko), *Europeanisation of civil procedure, Towards common minimum standards?* (in-depth analysis, European Parliament 2015) ‹www.europarl.europa.eu/RegData/etudes/IDAN/2015/559499/EPRS_IDA%282015%29559499_EN.pdf›.
39. M Tulibacka, M Sanz and R Blomeyer, *Common minimum standards of civil procedure* (European Added Value Assessment Annex I Research paper, European Parliament 2016).
40. B Hess, *Harmonized Rules and Minimum Standards in the European Law of Civil Procedure* (In-depth analysis, European Parliament 2016). See also Udo Bux, *The European Law Institute/UNIDROIT Civil Procedure Projects as a Soft Law Tool to Resolve Conflicts of Law* (In-Depth Analysis, European Parliament 2016).

After publication of a document on the legal basis of such common rules,[41] a draft was released early in 2017, calling upon the Commission to table a Directive on common minimum standards of civil procedure.[42] The European Parliament adopted this resolution a few months later.[43] The annexed draft Directive consists of 28 provisions containing minimum standards on the commencement, conduct, and conclusion of civil proceedings before Member States' courts and tribunals.[44] According to the Explanatory Statement, these minimum procedural standards aim to 'contribute to the modernisation of national proceedings, to a level playing field for businesses, and to an increased economic growth via effective and efficient judicial systems, while facilitating citizens' access to justice in the EU'.[45] Article 1 of the proposal refers to the approximation of civil procedure objective of ensuring 'full respect for the right to a fair trial as recognised in Article 47 of the Charter and in Article 6 of the ECHR'. In line with a number of other instruments laying down several minimum standards for specific cases, these rules are not intended to replace the national rules of civil procedure, but to serve as minimum rules only that allow for 'more protective and effective national procedural rules'.[46]

What is striking when reading these provisions is that some provide fundamental principles of civil procedure or judicial organisation at a fairly abstract level, reiterating existing sources, including for instance on effective judicial protection, the right to oral hearings, reasoned decisions, public hearings, and judicial independence and impartiality.[47] Other provisions are more detailed, for instance on provisional measures – a rule that is placed at the beginning with some fundamental rules in a section entitled 'fair and effective outcomes' – on service of documents, and the direction of proceedings.[48] It also includes rules on litigation costs, the loser-pays principle, legal aid, and litigation funding,[49] which are either new or only dealt with implicitly in European civil procedure so far, or that are more extensively and differently treated in other instruments, such as in the Legal Aid Directive.[50]

41. Committee on Legal Affairs (Rapporteur: Emil Radev), *Working document on establishing common minimum standards for civil procedure in the European Union – the legal basis* (European Parliament 2015).
42. European Parliament Recommendation 2015/2084(INL) of 10 February 2017 on common minimum standards of civil procedure in the EU [2017].
43. European Parliament Recommendation 2015/2084(INL) of 6 June 2017, on common minimum standards of civil procedure in the EU [2017]. The procedure was closed on 4 July 2017.
44. See ibid Annex to the motion for a resolution: Recommendations for a Directive of the European Parliament and of the Council on common minimum standards of civil procedure in the EU (hereafter: Directive minimum standards).
45. See ibid Explanatory Statement.
46. See ibid Explanatory Statement and European Parliament (n 42) art 2.
47. See ibid arts 4, 5, 8, 22, and 23 (of the proposed Directive minimum standards).
48. See ibid arts 6, 9, and 17 (of the proposed Directive minimum standards).
49. See ibid arts 13- 16 (of the proposed Directive minimum standards).
50. Council Directive 2002/8/EC of 27 Jan. 2003 to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes [2002] OJ L26/41.

From a policy and legislative perspective, this initiative of the European Parliament is the most ambitious one to date in the area of civil procedure. The rules apply to cross-border cases only, but these are widely defined to cover parties domiciled in different countries, the performance of the contract, the place in which the harmful event occurred, or the place of enforcement being in another country, or EU law being applicable.[51] Contrary to earlier, mostly sector-specific instruments containing what can be considered minimum standards of civil procedure,[52] this draft Directive aims at creating a horizontal framework. Moreover, it extends to all civil and commercial matters, including family matters and other specific topics that are excluded from most other regulations in this area. It remains to be seen whether the European Commission will take up this initiative. It does tie in with questions posed in the large-scale evaluation study it had carried out, and it is therefore likely that there will be a follow-up in one way or the other.[53]

4. THE ELI/UNIDROIT EUROPEAN RULES OF CIVIL PROCEDURE

4.1. Regionalisation of the ALI-Unidroit Principles: Europe and Latin America

The ALI-Unidroit Principles of Transnational Civil Procedure consist of a set of 31 Principles covering key topics of civil procedure.[54] They are complemented by rules that provide more details on the implementation, but these were not officially adopted by the institutes. The ALI-Unidroit Principles are geared primarily to transnational commercial disputes aimed at reducing uncertainty and promoting fairness in transnational litigation. The ALI-Unidroit Principles are a considerable achievement in their breadth, eloquence, and conciseness, and in bridging some of the divergences that exist among the different civil justice systems.

However, in terms of being a model for national or supranational legislators, courts, and tribunals, and within academic debates, the influence of these

51. See European Parliament (n 42) arts 1 and 3 (of the proposed Directive minimum standards).
52. See, for instance, Council Regulation (EC) 805/2004 of 21 April 2004 on creating a European Enforcement Order for uncontested claims [2004] OJ L143/15, arts 12-19; Directive 2013/11/EU of 21 May 2013 on alternative dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Directive on consumer ADR) [2013] OJ L165/63.
53. See Hess and Kramer; Hess, Bergström and Storskrubb; Kramer; Vernadaki; Tulibacka (n 1).
54. See ‹www.unidroit.org/instruments/transnational-civil-procedure›. The PTCP drafts and final product have been commented upon extensively, among others in the Uniform Law Review 2001 (4) and 2004 (4). See also ALI/Unidroit, *Principles of Transnational Civil Procedure* (Cambridge University Press 2006), accompanied by Rules and further explanations by the Reporters (Hazard, Taruffo, Stürner and associate reporter, Gidi). A concise analysis is also offered by reporter M Taruffo, 'Harmonisation in a Global Context: the ALI/Unidroit Principles', in: XE Kramer and CH van Rhee, *Civil Litigation in a Globalising World* (Asser Press/Springer 2012) 208-219.

Principles has been limited. The nature of and the limited party autonomy in civil procedure outside the scope of arbitral proceedings are likely indebted to this.[55] To promote the Principles and to implement regional models, Unidroit has sought collaboration with regional organisations[56] – most prominently, with the European Law Institute, leading to the official adoption of the ELI-Unidroit project on European Rules of Civil procedure early in 2014. At the same time, other collaborations were sought, most importantly in the South American region. It is reported that following consultation with the Asociación Americana de Derecho Internacional Privado (ASADIP) that possibilities might exist for future collaboration on a project similar to that of ELI-Unidroit.[57]

4.2. From Transnational Principles to European Rules of Civil Procedure

The ELI-Unidroit project is currently the most comprehensive project in this field aiming at creating model rules of European civil procedure.[58] While it keeps the breadth of the ALI-Unidroit Principles, it is designed to include far more detailed Rules adapted to the European region. The project kicked off with an exploratory workshop in October 2013, during which a range of topics was explored and methodological issues were discussed.[59] In February 2014, the ELI Council approved the project, and the collaboration with Unidroit was formalised. The point of departure was to build upon the ALI/Unidroit Principles with the goal of achieving the regional development of these Principles. During the exploratory workshop, Geoffrey Hazard and Antonio Gidi, representing the American Law Institute, expressed their support of the project, but rightly warned of the complexity, and of the different responses it might provoke.[60] They suggested selecting the most efficient rule with an open mind, and not defining the scope too rigidly from the outset. In the closing remark, Rolf Stürner, one of the other reporters of the ALI-Unidroit working group and closely involved in the work of ELI-Unidroit, argued that the project should not be limited to cross-border cases. In addition, Stürner stressed that reaching comparative compromises is not

55. F Ferrand, 'Les Principes ALI/UNIDROIT de procedure civile pour les litiges transnationaux en matière commerciale/The ALI/UNIDROIT Civil Procedure Principles for transnational disputes in commercial cases' (2006) RDAI/IBLJ 21, 22; SI Strong, 'Limits of Procedural Choice of Law' (2014) 3 Brooklyn Journal of International Law 1028-1121 pleads for increasing procedural choice.
56. See Introduction and Governing Council Unidroit 2013 (n 7); UNIDROIT Governing Council 'Report C.D. (93) 14' (93rd session of the Governing Council of UNIDROIT, Rome, 7-10 May 2014) nos. 72-82.
57. UNIDROIT Governing Council 'Report Unidroit Governing Council 2016 C.D. (93) 15' (95th session of the Governing Council of UNIDROIT, Rome, 18-20 May 2016) 31.
58. The present author was a member and reporter of the working group on Provisional Measures, and, together with Prof. Loic Cadiet, is co-reporter of the horizontal Structure working group.
59. See also the websites of ELI and Unidroit for background information (n 3).
60. Initial report of the ELI-Unidroit 1st Exploratory Workshop (Vienna, 18-19 October 2013) 1 ‹www.europeanlawinstitute.eu/fileadmin/user_upload/p_eli/Projects/ELI-UNIDROIT_Workshop_initial_report.pdf›.

always the best approach, and he underlined the need to involve academics, judges, and other practitioners.[61] Only a few attendants raised any criticism as to the desirability and potential of European rules of civil procedure.

As specified in the initial project report, the rules are intended to promote the effectiveness, efficiency, and reliability of civil procedure.[62] The ALI-Unidroit Principles serve as a starting point, and are to be developed taking into account in particular: (i) the European Convention on Human Rights and the Charter of Fundamental Rights of the European Union; (ii) the wider acquis of binding EU law; (iii) the common traditions in the European countries; (iv) the Storme Commission's work;[63] and (v) other pertinent European sources.

A steering Committee consisting of members of Unidroit and ELI was established, and the first three working groups were set up in the first half of 2014. The three topics that were considered appropriate as pilot projects are (1) *Service and Due Notice of Proceedings*; (2) *Provisional and Protective Measures*; and (3) *Access to Information and Evidence*. These topics largely correspond to Principles 5, 8, and 16 of the ALI-Unidroit Principles. The three working groups were given the task of conducting pilot studies to 'test the viability of the methodological approach and overall project design', while 'the goal remains to cover, as a minimum, the full range of issues addressed in the 2004 ALI-UNIDROIT Principles'.[64] Each working group consists of two reporters, and around four to six other members with different jurisdictional and professional backgrounds.

In the course of 2014, two further working groups were established, on (4) *Obligations of the Parties, Lawyers, and Judges*, and (5) *Res Judicata and Lis Pendens*. These were inspired by Principles 11 and 28 of the ALI/Unidroit Principles. Progress was discussed at two joint meetings, the second of which took place at the European Parliament, which from the outset has shown great interest in the project. In November 2015, these five working groups presented their preliminary drafts during a public conference at the European Law Academy.[65]

At the end of 2015, it was decided to establish three additional working groups, two focusing on content (6) *Costs*, and (7) *Judgments*, and an overarching working group on (8) *Structure*. In the ALI-Unidroit Principles, the primary provisions on costs are included in Principle 25. The enforceability of judgments is regulated by Principle 26, while a number of other Principles are also relevant

61. ibid 2.
62. ibid 2.
63. M Storme (ed), *Rapprochement du Droit Judiciaire de L'Union européenne/Approximation of Judiciary Law in the European Union* (Martinus Nijhoff Publishers 1994).
64. Initial report (n 59) 2.
65. Conference 'Building European Rules of Civil Procedure', Trier, 26-27 November 2015.

for judgments. The topic of costs is particularly sensitive in the EU, as it is closely interwoven with the judicial organisation, which is a national matter. Principle 9 deals with the Structure of the Proceedings, dividing the procedure largely into three stages – a pleading, an interim, and a final phase – and providing a flexible scheme to secure efficient proceedings. The structure of the proceedings was also one of the topics of the first exploratory workshop,[66] but the main purpose of this horizontal working group is to coordinate the drafts and to integrate these into a complete set of model rules, as well as to oversee linguistic issues.[67] Finally, although law and practice diverge fundamentally in Europe, it was decided to also include appellate proceedings in the project, leading to the setting up of a working group on (9) *Appeals* in 2017.

Most of the substantive work will be finalised in 2018. The working groups will have produced their final drafts, and the most important parts of the work will be presented at a public conference at the European Law Academy in Trier in November 2018. But it is only realistic to think that the project will continue well into 2019 before a complete set of model rules of European Rules of Civil Procedure can be finalised.

4.3. Approach and Main Challenges of the European Rules of Civil Procedure

A broad project that covers in principle the full scope of civil procedure, and involving over forty working group members from academia and practice coming from all over Europe (including non-EU Member States), has multiple challenges. This section will address four issues: (i) the scope of the rules; (ii) the methodology and approach; (iii) the internal and external coherence; and (iv) language issues.

(i) The scope of the Rules

At the beginning of the project, the scope of the envisaged European Rules of Civil Procedure was left somewhat open. A key issue was whether it should focus on cross-border cases, as do the ALI-Unidroit Principles, or whether the project should also encompass domestic cases. Discussions soon led to the conclusion that both cross-border and domestic cases should be included.[68] Extending the scope to domestic cases evidently increases the relevance of the rules and better secures coherence of civil procedure as a whole. At the same

66. XE Kramer, 'The Structure of Civil Proceedings and Why It Matters: Exploratory Observations on Future ELI-UNIDROIT European Rules of Civil Procedure' (2014) 2 Uniform Law Review 218-238 ‹http://papers.ssrn.com/sol3/papers.cfm?abstract_id=24800520›.
67. The Structure working group consists of Loic Cadiet (France), Xandra Kramer (the Netherlands) (co-reporters), Rolf Stürner (Germany), and John Sorabji (United Kingdom).
68. See also Section 4.2.

time, it makes the project more challenging, and may affect how the rules are received by the legal community and national legislators in light of the reluctance regarding the European harmonisation of civil procedure. However, for a soft law project this should not be an obstacle. On the contrary, the broad scope is an important asset of the project in comparison to existing EU legislation and the European Parliament's initiative. The project is not limited to EU Member States and the some working group members are from other European countries. The substantive scope has been a point of discussion as well. While the ALI-Unidroit Principles apply to commercial litigation only, this limitation is not evident for the European project, as the EU has been very active outside the area of commercial law as well. The tentative rule formulated by the Structure working group provides that the rules apply to the resolution of domestic and cross-border disputes in civil and commercial matters, whatever the nature of the court. This tentative rule excludes disputes regarding the status or legal capacity of natural persons, family disputes, and insolvency proceedings. This is in part based on the scope of many of the key EU Regulations, most notably the Brussels I-bis Regulation.[69] While there is no objection that some of the rules, for instance those on the service of documents and evidence, also apply to these issues – as the EU Service and Evidence Regulation and the Hague Conventions do – the particularities of these matters make the design and application of the procedural framework more problematic.[70]

(ii) Methodology and approach

To a large extent, the working groups have been given the freedom to decide on the most appropriate working method. The composition and size of the working groups differ somewhat, but each group secures good jurisdictional coverage and a mix of professional backgrounds (academics and practitioners). Some groups have had frequent meetings involving all group members in the actual drafting, while other groups have relied mostly on the reporters' drafting. The working groups have proceeded on a collaborative basis allowing for intensive discussions and an exchange of ideas.

The approach taken by the working groups diverges somewhat, and did so particularly in the first half of the project when the Structure working group had not yet been established. While it was clear from the outset that the ALI-Unidroit Principles serve as the starting point, some working groups have drawn more from these principles than others. This can in part be explained by the fact that

69. Regulation (EU) 1215/2012 of 12 December 2012 on jurisdiction and the recognition and enforcement of judgements in civil and commercial matters (recast) [2012] OJ L351/1.
70. For instance, as regards provisional measures, the protection of children requires a specific regulatory framework.

for some of the topics these Principles are a valuable basis, whereas for others – and this especially goes for some of the later working groups – the Principles offer little guidance. The working groups have taken into account EU legislation and other important European and international sources, including for instance on arbitration. Most working groups have done extensive comparative research, and in any case the different backgrounds of the members ensure that diverse national approaches have been considered. Some working groups have stayed close to the existing binding EU instruments – either by incorporating or referring to them – while others have been more ambitious in adding to or amending the instruments where they considered that to be an improvement.

During the project, two joint ELI-Unidroit meetings per year were held, and the Steering Committee, reporters, members, and external observers discussed drafts in a collaborative way and, as far as possible, coordinated the work. These and other meetings have resulted in a gradual convergence of the approaches, and in a constant revision and improvement of the drafts. In the second half of the project, the Structure working group has played a role in unifying the drafting of the rules by providing a format for the structuring of the rules, of the sources, and of the comments to the rules.

(iii) Internal and external coherence of the Rules

The primary task of the horizontal Structure working group is to secure the internal coherence of the Rules drafted by the eight other working groups. There is some overlap between the working groups, and the drafting style has to be brought into line. In mid-2017, the work commenced to draft an overall structure of the work, and to integrate the final drafts of the first three working groups into this structure, followed by those of the later working groups in 2018. From these drafts, it emerged that some recurring rules on the cooperation between the parties and the courts, on proportionality, and on settlement endeavours are best placed at the beginning, serving as general principles. In addition, some of the working group rules have to be laid out in different sections of the overall structure. Apart from resolving disparities and restructuring the rules, achieving uniformity in the drafting of the rules is an important and challenging task. The groups' drafting techniques diverge somewhat, and to avoid too much detail in the rules, some text is merged into the comments. To ensure that the future model rules are as complete as possible, several rules including fundamental rights of civil procedure – based to a large extent on European and international sources and the rules of the working groups – will be included.

Furthermore, it is essential that the model rules take proper account of the EU acquis and other pan-European or international sources of law. However, the EU acquis should not restrain the drafters from taking a different approach where appropriate. The ELI-Unidroit Rules should also contribute to

the modernisation of civil procedure, and thereby reflect new developments and best law-making and practices. Of particular importance in this regard are securing the efficiency of civil proceedings by means of case management, supporting out-of-court and in-court settlement of disputes, and facilitating information and communication technology.

From the outset, ELI and Unidroit have involved external institutional observers, including the European Commission and the Hague Conference on Private International Law. These have played an important rules-related role in pointing to the interaction with the EU legislation and global private international law conventions. Where appropriate and instructed by the Structure working group, the working groups have included a separate section for cross-border cases, distinguishing between those governed by EU law and those involving third countries. The involvement of external observers and institutions is also important to further the acceptance of the Rules by the European and global legal community.

(iv) Language issues

The rules are drafted in English and in French. Most working groups have to a large degree worked in these two languages simultaneously, even though the group discussions and first drafts were in English. This guarantees that terms used are appropriate in both languages, and in some cases a translation into French has resulted in adapting the English language version. While it is the primary responsibility of the individual working groups to provide the two language versions, the Structure working group has also been charged with the overseeing of linguistic issues and ensuring a consistent use of concepts and terms throughout the work. For this purpose, it is envisaged that including a list of definitions will be useful, although any attempt to define concepts has its inherent flaws.

5. JUDICIAL COOPERATION, EUROPEANISATION, AND GLOBALISATION OF CIVIL JUSTICE

The legislative activities in the area of civil justice in Europe over the past twenty years have resulted in an impressive number of instruments aimed at improving access to justice and judicial cooperation. The mix of horizontal approaches and sector-specific instruments, the connection with substantive EU law in certain areas, the limitation to cross-border cases of many instruments, and the optional nature of some of the instruments have resulted in a patchwork of rules regarding European civil procedure. To support judicial cooperation in civil matters, to enhance mutual trust, and to offer a more systemic approach to European civil procedure, the activities by the European Parliament

in the past few years and the soft law project of ELI/Unidroit are of importance. The European instruments and even the autonomous European civil procedures to a great extent rely on domestic civil procedure rules, and on the functioning of national systems. Both initiatives provide a horizontal framework embedding fundamental principles of civil procedure in combination with more detailed provisions on key issues of procedure that rely on insights of best laws and practices in Europe.

The initiative of the European Parliament for a directive on Minimum Standards is explicitly placed in the context of enhancing judicial cooperation and mutual trust in the European Judicial Area.[71] The free movement of judicial decisions and other forms of judicial cooperation between the Member States, including the service of documents and the taking of evidence, requires a certain level of trust between the authorities and the legal systems involved. This directive is intended as a first step towards the convergence of civil procedure and establishing a balance between fundamental procedural rights of parties.[72] At the same time, it aims to secure a minimum level of quality of civil proceedings, to increase efficiency, and to aid the modernisation of national proceedings. As for earlier instruments initiated by the European Commission, the desire to contribute to a level playing field for businesses and to increase economic growth are also mentioned.[73] Though there is some support for the assumption that better civil procedures support economic growth,[74] it should be stressed that civil justice and the protection of fundamental rights should be considered primarily as an end in itself.[75] The strong focus on fundamental rights that are addressed in a more concrete way than Article 6 ECHR and Article 47 of the EU Charter, and that are in part 'operationalised' by further provisions, is to be welcomed in this regard. As discussed earlier, the draft also has its flaws.[76] The regulatory concept underlying the proposed Directive and the meaning of 'common minimum

71. Committee on Legal Affairs (European Parliament) (n 5) 4-7.
72. ibid 7.
73. ibid 5.
74. Bernd Hayo and Stefan Voight, 'The Relevance of Judicial Procedure for Economic Growth' (2014) CESifo Economic Studies 490-524 (including data of 67 countries and using 10 indicators for a good legal procedure). See, e.g. for the Netherlands: BCJ van Velthoven, *The value of the judicial infrastructure for the Dutch economy* (Research Memorandum Council for the Judiciary 2005) 18; Frans van Dijk and Horatius Dumbrava, 'Judiciary in Times of Scarcity: Retrenchment and Reform' (2013) International Journal for Court Administration 16; Frans van Dijk, 'Improved Performance of The Netherlands Judiciary: Assessment Of The Gains For Society' (2014) International Journal For Court Administration 83-99. See on this Xandra Kramer and Shusuke Kakiuchi, 'Relief in Small and Simple Matters in an Age of Austerity' in: H Pekcanitez, N Bolayir and C Simil (eds), *XVth International Association of Procedural Law World Congress* (Oniki Levha Yayıncılık 2016) 221, 121.
75. Hess and Kramer (n 1) 24.
76. See Section 3.

standards' are unclear.[77] In part, fundamental rights are reiterated from the sources mentioned, and these provisions are mixed with detailed rules on a number of selected topics. It remains to be seen whether this initiative will be taken up by the European Commission; in any event, however, it is to be hoped that the framework will be improved.

In a number of ways, the envisaged ELI-Unidroit European Rules of Civil Procedure go further than the European Parliaments' initiative. They cover not only cross-border but also domestic cases, and they address a wide array of important issues of civil procedure in much greater detail and in a more systematic way. The size and ambition of the project, and their reliance on a huge variety of European, international, and national sources, also pose challenges. As for any soft law instrument, but considering in particular the intrinsic national orientation of civil procedure and limited party autonomy, the question remains as to what the legislative and practical impact will be. To a great extent, these rules are intended to serve as guidelines or models for better law-making and good practice, and, as such, they can inspire national legislators. Should these rules be adopted as a model for legislation at the pan-European level, the question is to what degree would they influence law and, in particular, practice at the grass-roots level. Civil procedure and litigation behaviour are largely embedded in national legal culture and practice, and European legislative instruments addressing civil procedure have thus far had limited influence on the actual practice in the Member States. Consequently, the contribution to improving cross-border judicial cooperation would be limited as well.

Nevertheless, the need to connect the dots of civil procedure in Europe, to enforce EU law effectively, and to increase the efficiency and quality of civil litigation in European countries gives rise to the hope that these rules will receive wide recognition. The involvement of many academics, practitioners, and European and international institutions will also contribute to the acceptance by the legal community. In addition, the European project draws particular attention to the valuable work being done by the ALI-Unidroit working group. The project can also serve as a model for similar endeavours in other regions of the world, including South America. It is absolutely certain that the collaborative work resulting in an extensive set of rules on European civil procedure has enriched international procedural law scholarship, and will inspire the global civil justice community.

77. See also Hess and Kramer (1) 26.