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Burkhard Hess and Xandra E. Kramer (eds.)

From common rules to best practices in European Civil Procedure

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From Common Rules to Best Practices in European Civil Procedure: An Introduction

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(A) A New Era for Civil Procedure in the EU

Twenty years after the adoption of the extended competence in the area of judicial cooperation under the Amsterdam Treaty of 1997, numerous instruments on European civil procedure have been developed and enacted by the EU legislature, and applied by national courts. There is no doubt that these instruments have built a genuine Judicial Area where citizens and businesses can rely on operating justice systems and functioning cross-border cooperation, notwithstanding that there are still deficiencies in many individual cases.[1] While it remains important to study these legislative instruments and, where necessary, to establish new instruments, civil procedure in the EU has entered a new era in which the development of common standards and best practices in the Member States and at the EU level are of the essence.

(1) Policy and Legislative Perspectives

European civil procedure has developed rapidly since the Amsterdam Treaty entered into force in 1999. The Tampere Conclusions and the justice programmes that followed breathed the ambitions to enact new instru-

1 F. Gascon Inchausti & M. Requejo Isidro, in: Hess et al. (ed.), EU Procedural Law Study, 2017, JUST/2014/RCON/PR/CIVI/0082 available at: https://publications.europa.eu/en/publication-detail/-/publication/531ef49a-9768-11e7-b92d-01aa75ed71a1/language-en.

ments, ranging from "traditional" private international law instruments to coordinate cross-border litigation to harmonized rules on certain procedural aspects and fully-fledged, uniform European civil procedures. While the EU legislature and academics initially focused on establishing and discussing new legislation, the focus has shifted to evaluating the national implementation in practice, the relation between the different instruments and the interaction with national law. The flood of new instruments concerning civil procedure and the multidimensional character of regulation have also raised concerns about the coherence of the European law of civil procedure.[2]

Compared to the previous policy programmes of the European Commission, the current programme, called the EU Justice Agenda for 2020,[3] is less ambitious in proposing new legislation. The main challenges pointed out in the 2020 Agenda are the strengthening of mutual trust ("the bedrock upon which EU justice policy should be built"), the mobility of citizens (freedom of movement), and economic recovery and growth.[4] While previous programmes have highlighted overarching new concepts, most prominently that of mutual trust,[5] the present Justice Agenda proposes to tackle the challenges by the further consolidation, codification, and completion of EU legislation.[6] In relation to the completion of EU legislation, no particular initiatives are mentioned, but the need to adjust to the dynamics of the mobility of citizens and businesses is addressed. The Jus-

2 See among others M. Tulibacka, "Europeanization of Civil Procedures: In Search of a Coherent Approach", 46 CMLRev (2009) 5, 1527 at 1549-1565; S. Huber, "Koordinierung europäischer Zivilprozessrechtsinstrumente" in Geimer and Schütze (eds.), Recht ohne Grenzen Festschrift für Athanassios Kaissis zum 65. Geburtstag (Sellier, 2012), 413-429; X.E. Kramer, *Procedure Matters: Construction and deconstructivism in European civil procedure* (Erasmus Law Lectures 33), Eleven International Publishing, 2013, at 23-24; B. Hess, "The State of Civil Justice Union", in B. Hess, M. Bergström and E. Storskrubb (eds.), EU Civil Justice. Current issues and Future Outlook, Hart Publishing, 2016, at 1-5.

3 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee of the Regions, The EU Justice Agenda for 2020 – Strengthening Trust, Mobility and Growth within the Union, COM (2014) 144 final.

4 EU Justice Agenda for 2020, cited n. 3, Section 3.

5 This principle of mutual recognition was introduced as the "cornerstone of judicial co-operation" in the Tampere European Council Conclusions, No. 33, of 15-16 October 1999.

6 EU Justice Agenda for 2020, cited n. 3, Section 4.

tice Agenda emphasizes that mutual trust requires justice systems to be independent, of a high standard, and efficient, ensuring the parties' procedural rights.

The call for coherence, a recurring theme since the establishment of the Hague Programme of 2004[7], is also addressed in the present Justice programme by stressing the need, in particular, for consolidation.[8] That is to say, it is emphasized as a priority that the progress made in the area of EU justice should be consolidated "ensuring that fundamental rights are upheld and that rights granted by EU legislation become a reality". Judicial cooperation needs to be strengthened for this purpose and communication technologies need to be further developed to make justice more effective. These are also two of the central themes in this book. It is recognized that the implementation and functioning within the national system of European civil procedural rules should be a priority.[9]

Many EU procedural law instruments rely on some form of implementation into national legal systems, and, in any case, they operate within the national procedural and institutional systems. Until recently, the interaction with national civil procedure remained under-researched, notwithstanding that the actual implementation and application of EU rules in the domestic legal order is evidently of the essence for the success of these instruments.[10] As is also referenced by Norel Rosner in his brief introducto-

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7 The Hague Programme: strengthening freedom, security and justice in the European Union, 13 December 2004, O.J. 2005, C 53/1. For criticism on the lack of coherence in European civil procedure, see n. 2.

8 EU Justice Agenda for 2020, cited n. 3, Section 4.1.

9 EU Justice Agenda for 2020, cited n. 3, Section 4.1, where it reads that "Instruments agreed at EU level must be transposed by Member States, effectively implemented and used. When such rights are not respected, there should be effective remedies available".

10 However, there are incidental studies focusing on the implementation into a particular jurisdiction. See, for instance, for a study on the implementation of the Service Regulation and European uniform procedures in Belgium L. Samyn, De uitdagingen van het Europees (international) procesrecht voor het Belgisch procesrecht, PhD thesis University of Antwerp, 2013. On the implementation of European uniform procedures in the Netherlands, see X.E. Kramer, "European Procedures on Debt Collection: Nothing or Noting? Experiences and Future Prospects", in B. Hess, M. Bergström &. E. Storskrubb (eds), EU Civil Justice – Current Issues and Future Outlook, Hart Publishing, 2016, at 97-122, and in the same book, on England, C. Crifò, "Trusted with a muzzle and enfranchised with a clog": the

ry paper in the present book[11], a comparative legal analysis commissioned by the European Commission has been carried out in relation to the service of documents,[12] with a view of obtaining information on national laws and practices and to evaluate the possibility of creating minimum standards. In line with this endeavour, an extensive evaluation study commissioned by the European Commission was carried out by an international consortium led by the MPI Luxembourg on the application of national and EU procedural law and its effect on the free circulation of judgments and consumer law.[13] This research report, based on national reports and an extensive collection of data, sheds light on the interaction between national procedural laws and EU law and includes recommendations to improve the operation of legal instruments and practices.[14]

In the same vein, the European Parliament has been very active in recent years in the area of European civil procedure, as is confirmed in the chapter by Robert Bray in the present book.[15] Following studies on the codification of private international law that also encompass international procedural law instruments,[16] the European Parliament has initiated several studies on "common minimum standards" in European civil procedure

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British approach to European civil procedure, at 81-96. An extensive study is E.A. Ontanu, Cross-Border Debt Recovery in the EU. A Comparative and Empirical Study on the Use of European Uniform Procedures (PhD thesis Erasmus University Rotterdam), Antwerp, Intersentia, 2017.

11 See Part I, second chapter.

12 Study on the service of documents. Comparative legal analysis of the relevant laws and practices of the Member States, carried out by DMI in consortium with the University of Florence and the University of Uppsala, TENDER No JUST/2014/JCOO/PR/CIVI/0049, 6 October 2016.

13 A comprehensive 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, as commissioned by the European Commission, JUST/2014/RCON/PR/CIVI/0082 (2017).

14 The study will be published as a book in two volumes in 2017/2018.

15 Part I, third chapter. See http://www.europarl.europa.eu/legislative-train/theme-area-of-justice-and-fundamental-rights/file-common-standards-in-the-field-of-civil-procedure (last consulted 5 July 2017).

16 See X.E. Kramer, M. de Rooij, V. Lazić, E.N. Frohn & R.J. Blauwhoff, "A European framework for private international law: current gaps and future perspectives", study, European Parliament, 2012; X.E. Kramer, "Current gaps and future perspectives in European private international law: towards a code on private in-

in the past years. In 2015, a report by its Research Service presented an analysis on the Europeanisation of civil procedure, which included the mapping of existing instruments and the investigation of the possibilities of a directive on minimum standards for the fundament rights protection in civil litigation.[17] This was followed in 2016 by an Added Value Assessment and a research paper on common minimum standards of civil procedure[18] as well as an in-depth analysis authored by Burkhard Hess.[19] After releasing a Working Document by rapporteur Emil Radev in December 2015, a Draft Report with recommendations to the Commission on common minimum standards of civil procedure was published.[20] Early in 2017, this was followed by a Draft Report calling upon the Commission to table a Directive on common minimum standards of civil procedure in the EU, with its legal basis in Art. 81(2) TFEU.[21] With some amendments, the report was adopted on 6 June 2017.[22] The annexed Draft Directive consists of 28 provisions containing minimum standards for civil proceed-

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ternational law?", briefing note, European Parliament, 2012; X.E. Kramer, "European Private International Law: The Way Forward", in-depth analysis, European Parliament, in: Workshop on Upcoming Issues of EU Law. Compilation of In-Depth Analyses, European Parliament, Brussels, 2014, p. 77-105; J. von Hein & G. Rühl, "Towards a European code on private international law?", study, European Parliament, in: Cross-border activities in the EU: Making life easier for citizens, Workshop for the JURI Committee, 2015, at 8-53.

17 European Parliamentary Research Service (Rafał Mańko), "Europeanisation of civil procedure. Towards common minimum standards?", June 2015.

18 M. Tulibacka, M. Sanz, R. Blomeyer, "Common minimum standards of civil procedure", European Added Value Assessment, Annex I, Research paper, Blomeyer & Sanz,, April 2016.

19 B. Hess, Harmonized Rules and Minimum Standards in the European Law of Civil Procedure, In-depth analysis European Parliament, June 2016—stressing the missing concept of "minimum standards".

20 European Parliament, Working document on establishing common minimum standards for civil procedure in the European Union – the legal basis, 21 December 2015.

21 European Parliament, Draft report with recommendations to the Commission on common minimum standards of civil procedure in the EU (2015/2084(INL)), 10 February 2017.

22 European Parliament, Report with recommendations to the Commission on common minimum standards of civil procedure in the EU (2015/2084(INL)), 6 June 2017. The procedure was closed on 4 July 2017.

ings.[23] These rules do not replace national rules of civil procedure, but rather "allow for more protective and effective national procedural rules"; these minimum procedural standards aim to "contribute to the modernization of national proceedings, to a level playing field for businesses, and to increased economic growth via effective and efficient judicial systems, while facilitating citizens' access to justice in the EU."[24]

This initiative by the European Parliament is so far the most ambitious one from a policy and legislative point of view, though it is purportedly limited to cross-border cases only.[25] Minimum protective standards have been established most explicitly in the European Enforcement Order Regulation for the purpose of serving documents and providing the debtor with information on the claim.[26] A number of other – mostly sector-specific instruments – also contain what can be regarded as minimum standards.[27] However, the directive proposed by the European Parliament creates a *horizontal* framework for cross-border civil and commercial matters, including family matters and other specific matters that are excluded from most other regulations in this area.[28] Whether the European Commis-

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23 Annex to the motion for a resolution: Recommendations for a Directive of the European Parliament and of the Council on common minimum standard of civil procedure in the EU.

24 Report with recommendations to the Commission on common minimum standards of civil procedure in the EU, (2015/2084(INL)), 7 June 2017, Explanatory Statement.

25 See Arts. 1 and 3 of the proposed directive, cited n. 22, 23. The initiative is based on Art. 81 TFEU, which only confers legislative powers on the Union in cross-border settings, cf. B. Hess, Europäisches Zivilprozessrecht (2010), at 2, paras. However, the resolution of the Parliament proposes a broad reading of "cross-border" that includes all cases when Union law is applied by national courts; see Art. 3 (1)(c) of the Draft Directive.

26 Regulation (EC) No. 805/2004 of the European Parliament and of the Council of 21, April 2004, which created a European Enforcement Order for uncontested claims, OJ 2004, L 143/15, Arts. 12-19.

27 For instance Directive 2013/11/EU on alternative dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Directive on consumer ADR), OJ 2013, L 165/63.

28 In Art. 2(1) of the proposed directive, excluded matters are only "rights and obligations, which are not at the parties' disposal under the relevant applicable law", as well as "revenue, customs or administrative matters or to the liability of the State for acts and omissions in the exercise of State authority ('acta iuse imperii')". In this respect, the proposed directive refers to the material scope of the Brussels I-bis Regulation.

sion will indeed table this draft for legislation remains to be seen, but it ties in with questions posed in the evaluation study carried out on behalf of the European Commission relating to the desirability of introducing common minimum standards.[29] In Section C, we will briefly discuss some of the challenges of creating minimum standards of civil procedure as a way forward in European civil procedure.[30]

(2) An Academic Endeavour: the ELI-Unidroit European Rules of Civil Procedure

Within the academic sphere, European civil procedure has meanwhile gained the status of an independent area of research and is enriched by a growing number of papers, monographs and edited collections. Many European academics and practitioners, aided by observers from Europe and beyond, have come to collaborate in an ambitious soft law project organized by the European Law Institute (ELI) and Unidroit. It was kicked off in 2013 under the name "From Transnational Principles to European Rules of Civil Procedure".[31] As a starting point, the project builds on the ALI-UNIDROIT Principles of Transnational Civil Procedure, adopted in 2004. It aims to develop these principles into European Rules of Civil Procedure, taking into account pertinent sources of European law and common traditions of European countries.[32] The Rules aim at promoting the effectiveness, efficiency and reliability of civil procedure (not only in cross-border settings) and should be considered as a Model Law for national and supranational law making within Europe.

The pilot project started with three specific topics of civil procedure, but its scope has been extended to nine topics and corresponding working

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29 See n. 1.

30 See Section C(3) for further explanation.

31 Exploratory workshop, Vienna, 18-19 October 2014. Many of the papers presented at this workshop have been published in the Uniform Law Review 2014(2) and 2014(3). More information and related documents on the project are available on the websites of ELI and Unidroit.

32 In the initial report of the project, available at the website of ELI and Unidroit, p. 2, the following sources are enlisted: 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; and v) other pertinent European sources.

groups to date, covering all substantial areas of civil procedure.[33] Eight working groups deal with specific topics: (1) Service and Due Notice of Proceedings; (2) Provisional and Protective Measures; (3) Access to Information and Evidence; (4) Obligations of the Parties, Lawyers and Judges; (5) Res Judicata and Lis Pendens; (6) Costs; (7) Judgments; and (8) Appeals. In 2016, a horizontal working group on the overall structure of the work – the "Structure" group – was established.[34] This overarching group has the challenging and much-needed task of coordinating the parallel work of the other working groups and framing this work, to ensure a coherent set of rules to be used by the European legal community as well as securing consistent terminology.

Though its precise scope and methodology was not evident from the start,[35] it is now clear that the project covers civil and commercial matters, with the exclusion of family law and some other specific matters in particular.[36] Each working group has two co-rapporteurs and four to eight group members from different Member States or associated European countries to assure representativeness of the rules as far as possible. The rules are complemented by short explanatory comments. The Structure Working Group has drafted a framework that will accommodate the rules and is accompanied by a number of general rules. The work is expected to continue until the end of 2018 and should be adopted by the ELI and Unidroit.

This future Model Law, apart from being the synthesis of an academic effort, may also be of value for both national and European policy makers and legislators. The European Parliament has been interested in the work

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33 For the work in progress, see X.E. Kramer, "Towards ELI-Unidroit Model Rules of Civil Procedure: Basic Premises and Challenges" paper presented at the Bay Area Civil Procedure Forum, Hastings, San Francisco, 19 April 2016, available at SSRN: https://ssrn.com/abstract=2828148; B. Hess, "Ein einheitliches Prozessrecht?", 6 Int'l J Proc., (2016), 55–85; Koechel F., "Harmonization and Unification of Civil Procedural Law", L 6 Int'l J Proc., (2016), 86–102 (reporting the discussion of the article of B. Hess at the conference in Ghent 2015).

34 Referring to Principle 9 of the ALI/Unidroit Principles of Transnational Civil Procedure, on which a paper at the first exploratory working group was presented, see X.E. Kramer, "The Structure of Civil Proceedings and Why It Matters: Exploratory Observations on Future ELI-UNIDROIT European Rules of Civil Procedure", 2 Uniform Law Review (2014), 218-238. The task of the working group, however, goes beyond providing rules on the structure of proceedings as such.

35 See also Kramer, supra n. 33, at 8-10.

36 Rules on the scope of the European Rules of Civil Procedure are currently being drafted (last update 3 July 2017).

from the beginning and has hosted a number of meetings to discuss the progress of the different working groups. Representatives from the European Commission regularly participate in meetings as observers. In this regard, the project is a promising contribution for the further development towards a European civil procedure. It can serve as a model law for future developments and modernization at the European and domestic level.[37] The latest developments demonstrate that the Europe law of civil procedure remains a dynamic area of European integration.

(3) From Common Rules to Best Practices

The theme of the present book is inspired by the shift in focus from the establishment of new legislation with common rules to a focus on the actual implementation, application, and operationalization of the rules on cooperation in civil justice. While the discussion of common rules continues to be important and has regained importance as a result of the "common minimum standards" initiative of the European Parliament, some papers in this book also focus on how to move beyond common rules and towards best practices.[38] These "best practices" in applying European instruments, implementing new pathways to civil justice – including eJustice, alternative dispute resolution (ADR) and collective redress — and the operationalizing of judicial cooperation, for instance through the European Consumer Centres and the European Judicial Network, give body to the principles of mutual trust and judicial cooperation. These can in turn feed the further development of the European civil procedure framework from the bottom up.

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37 In this respect, it is worth recalling that the proposals of the Storme group, which were much criticized in the 1980 and 1990 s, finally made their way into several EU instruments on civil procedure, cf. B. Hess, Europäisches Zivilprozessrecht (2010), at 13, paras 4–7.

38 At the Rotterdam conference, additional presentations on best practices, including on the "Rechtwijzer" project (by Jin Ho Verdonschot) and on the European Judicial Network in Civil and Commercial Matters (by Ilse Couwenberg) were given, but these are not included in the present book.

(B) Four Perspectives on EU Civil Justice

The papers in this book are organized around four main subthemes of importance, presented following the introductory remarks from the viewpoint of the European Commission and the European Parliament. Part I is a general part dedicated to common standards of EU civil procedure, focusing on the harmonization of civil procedure and judicial cooperation in general. Parts II and III centre on two important developments in contemporary civil procedure, i.e., procedural innovation through e-justice and ADR as a means of judicial management and cooperation. Part IV contains short contributions on promoting best practices in judicial cooperation. The book is concluded with the presentation of the dinner speech given by Marcel Storme, one of the founding fathers of European civil procedure. In his view, European civil procedure will only become a real branch of the law once civil procedure is harmonized in all the Member States.

(1) Common Standards of EU Civil Procedure: Harmonization and Cooperation

The central questions of this part concern whether there is a need for common standards of EU civil procedure, how to identify them, and whether we need harmonization to achieve harmonious cooperation.

Questioning what can be understood by "common standards", Remo Caponi states that establishing such standards requires a "process of cultural exchange and approximation amongst peoples and, especially, professionals who live in countries whose legal systems are to be harmonized." It is exactly this exchange that is much needed in the European Union, especially now that Brexit has become a reality and the status of the Union and of EU law seems no longer to be self-evident.[39] He concludes that the uncertainties with regard to regulatory techniques also reflect divergences on the purposes to be achieved by civil justice systems: whether this might be implementing the rule of law or primarily a tool or

39 During the conference leading to this book, held on 25-26 February 2016, this possibility was discussed, but not thoroughly, as many still believed this would not materialize. On the consequence of Brexit for European law of civil procedure, see B. Hess, "Back to the Past: BREXIT und das europäische internationale Privat- und Verfahrensrecht, IPRax (2016), 409-416.

an easy and cost-effective dispute resolution. C.H. (Remco) van Rhee, partly in response to Caponi, discusses whether harmonization is necessary, and how it can be achieved. He concludes that harmonization is indeed necessary as long as we do not have supra-national EU courts dealing with substantive EU law. The starting point of such harmonization or alignment can be the identification of best practices that should not be regarded as minimum standards, but aim at high-quality civil litigation.

Marta Requejo Isidro answers the question on whether harmonization is required to achieve harmonious cooperation by using insights from the field of judicial cooperation in criminal matters and by comparing these with judicial cooperation in civil matters. Mutual trust and procedural safeguards have so far been put to the test in the area, and particularly in the context of the European Arrest Warrant (EAW).[40] The major interest with regard to criminal matters stems from the fact that the EU legislator adopted a Framework Decision on procedural minimum standards. The practical impact, however, has remained limited. Therefore, Marta Requejo Isidro concludes that the state of affairs in judicial cooperation in criminal matters suggests that minimum standards will be just one step along the path to an area of justice, security and freedom and cannot be regarded as the final and effective solution. However, they can be regarded as a measure of trust-enhancing legislation. Monique Hazelhorst concludes in response to Requejo's paper that though it can be agreed that there are disparities between the two areas of law, we can learn from experiences in the criminal sphere. The CJEU judgments in this area are highly informative to understand the possibilities and risks of judicial cooperation on the basis of harmonized EU legislation.

Two chapters focus on the extent to which the United States can be considered as a model for the EU. Christopher Whytock discusses what lessons can be learned from taking a US perspective on harmonization of civil procedure. He concludes that the US example in fact shows the limits of procedural harmonization due to diversity in politics, local practices and legal culture. The EU faces even bigger challenges (especially cultural and language hurdles) in this respect. In his view, however, the EU is already on its way toward a "full faith and credit" that coupled with mini-

40 The EAW was established by Council Framework Decision 2002/584/JHA of 13 June 2002 2002/584/JHA: Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, OJ 2002, L190/1.

mum standards can foster judicial cooperation. Jan von Hein responds that the emulation of the US Federal Rules of Civil Procedure by state legislation is not a model for the EU because the EU does not have separate European courts applying their own procedural rules.[41] Nevertheless, the US "full faith and credit" clause offers inspiration for the EU concept of mutual trust. Against the policy tide, he concludes that with the considerable divergences between the domestic legal systems in the EU, the time is not ripe to abolish the exequatur. This view has recently been confirmed by the president of the CJEU.[42]

The last chapter of this part focuses on the diverging litigation costs. Offering rich insights on access to justice in cross-border cases, Adriani Dori and Vincent Richard discuss litigation costs and the diverging procedural cultures in the EU in this regard. The authors provide insights on how the considerable discrepancies of the different procedural cultures in the EU Member States impact litigation costs. They conclude that enacting common rules cannot lead to a harmonized and coherent legal framework if the discrepancies in this area are not taken into account. Harmonization is not an issue as long as a common understanding of core values is missing. As an alternative, the coordination rules of European international procedural law may mitigate the major discrepancies in cross-border cases. A practical example of the enduring divergences was the failure to impose maximum court fees in the amended European Small Claims Procedure. In this field, the European lawmaker should refrain from imposing uniform solutions as long as a consensus on basic principles has not been reached.

(2) Procedural Innovation and e-Justice

The chapters included in Part II of the book are organized around the question as to whether and how innovative mechanisms for dispute resolution can enhance cooperation in the field of civil justice. E-Justice has been one of the spearheads of the European Commission to improve ac-

41 The new patent litigation system might be a first step into a comparable (although sectorial) direction.

42 K. Lenaerts, "La vie après l'avis; exploring the principle of mutual (but not blind) trust", CMLRev, 2017, 805–839.

cess to justice, with the establishment of the e-justice portal as the main achievement.[43]

Marco Velicogna and Giampiero Lupo discuss the e-CODEX project, and in particular the development of a techno-legal system to pilot "live" cross-border judicial procedures.[44] This EU co-financed European collaboration to improve cross-border litigation ran from 2010 until 2016 and is currently being followed up by the Me-CODEX project.[45] They conclude that e-CODEX is more than just a technological tool to assist judicial procedures, but in fact it touches upon key elements that lay the foundations of offline juridical proceedings. John Sorabji discusses the digitalization of civil courts in England and Wales. He illustrates how these developments are affected by austerity measures as part of the economic crisis and suggests that – considering that budget constraints exist across Europe – European countries collaborate to co-design a common Online Court with common processes and common training for its staff. Ernst Steigenga and Marco Velicogna, having closely collaborated as "EU e-justice practitioners" and co-founders of the e-CODEX project, take a broader view and analyse how e-justice should be designed so as to guarantee (easy) access to cross-border justice. They plead for the establishment of a governance infrastructure for EU e-justice. Eva Storskrubb discusses the triad between e-justice, innovation and the EU, zooming in on the e-service of documents in particular. She underlines the balance between e-justice and fundamental rights, quoting an Opinion of the Consultative Counsel of European Judges that "justice is and should remain humane as it primarily deals with people and their disputes."[46] She concludes that in the EU context e-justice has the potential to contribute to true change and to strengthen judicial cooperation for the benefit of the enduring diversity of cost rules in the national procedures impeding citizens in the enforcement of their rights.

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43 For the EU-context, see X.E. Kramer, "Access to Justice and Technology: Transforming the Face of Cross-Border Civil Litigation and Adjudication in the EU", in K. Benyekhlef, J. Bailey, J. Burkell and F. Gelinas (eds.), eAccess to Justice, University of Ottawa Press, 2016, at 351-375.

44 e-Codex stands for e-Justice Communication via Online Data EXchange.

45 See https://www.e-codex.eu/ , accessed 1 July 2017.

46 Opinion No.(2011)14 of the CCJE, "Justice and information technologies (IT)", 9 November 2011.

(3) Alternative Dispute Resolution and Judicial Cooperation

Part III is dedicated to alternative dispute resolution. Encouraging and improving Alternative Dispute Resolution (ADR) mechanisms, in particular for consumers, is another focal point in EU policy to simplify access to justice in recent years and has received ample scholarly attention.[47] This has resulted in the Directive on Consumer ADR[48] and the Regulation on Consumer Online Dispute Resolution (ODR)[49] along with the establishment of the ODR platform. The central question in this part of the book is how can alternative mechanisms for dispute resolution contribute to judicial cooperation and what is needed to ensure effective enforcement in cross-border cases.

Christopher Hodges and Stefaan Voet focus on the development of consumer dispute resolution (CDR). They conclude that ADR has moved beyond being only an alternative to court litigation and in some situations has become mainstream. Responding to concerns that have been raised in relation to ADR,[50] they argue that it appears that the rule of law is not fundamentally threatened by the emerging new dispute resolution systems because it is based on compliance structures which are founded on fundamental values, such as the rule of law. In advocating that there is a need for synergy between judicial cooperation and dispute resolution, Pablo

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47 For an extensive treatment, see C. Hodges, I. Benöhr, N. Creutzfeldt, Consumer ADR in Europe, Hart Publishing, 2012; Hess et al., supra n. 1, Strand 2, paras 533 – 635.

48 Directive 2013/11/EU on alternative dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Directive on consumer ADR), OJ 2013, L 165/63.

49 Regulation (EU) No 524/2013 on online dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Regulation on consumer ODR), OJ 2013, L 165/1.

50 See, for instance, Cynthia Alkon, Lost in Translation: Can Exporting ADR Harm Rule of Law Development, 1 Journal of Dispute Resolution, 2011, 165-188; Hazel Genn, What is Civil Justice For? Reform, ADR, and Access to Justice, 24(1) Yale Journal of Law & the Humanities, 2012, 397-417; J. Resnik, "Diffusing Disputes: The Public in the Private of Arbitration, the Private in Courts, and the Erasure of Rights", The Yale Law Journal, 2015, at 2804-2939; T. C.W. Farrow, Civil Justice, Privatization and Democracy, Toronto: University of Toronto Press, 2014; G. Wagner, "Private Law Enforcement through ADR: Wonder Drug or Snake Oil?", 51 Common Market Law Review, 2014, at 165-194; B. Hess, Prozessuale Mindeststandards in der Verbrauchermediation, JZ 2015, 548-554.

Cortés points out why the European Small Claims Procedure is not as effective as was anticipated and how the recent amendments are hoped to improve its effectiveness. He calls for an online single point of entry to enforce judgments. Fernando Gascón Inchausti analyses how ADR mechanisms can contribute to the improvement of court litigations in cross-border cases through pre-action ADR and court-annexed ADR. Court proceedings can also learn from the flexibility of experiences provided by international arbitration and consumer ADR. Offering a consumer perspective, Jolanda Girzl points out the fallacies of ADR mechanisms. She identifies that ADR systems often lack competence, creating gaps in the coverage of ADR entities. Furthermore, there is a lack of awareness of the ADR options on the part of consumers, and even if they are used, traders often refuse to participate.

(4) Promoting Best Practices in Judicial Cooperation

Part IV includes a number of short chapters on best practices in the EU to operationalize judicial operation and to improve mutual trust. Gilles Cuniberti discusses ideas on the feasibility and desirability of furthering mutual trust by way of promoting best practices. Karim Mahari discusses the difficulties that businesses experience in using the European Order for Payment Procedure from the perspective of a French Chamber of Commerce. Within the scope of best practices, Arturo Picciotto focuses on how best practices of legal professionals can contribute to improve mutual trust from the perspective of a judge. To assess whether best practices can indeed contribute to mutual trust, Alina Ontanu analyses the implementation of the European Order for Payment and European Small Claims procedures in England & Wales, France, Italy and Romania to see whether these procedures have indeed contributed to mutual trust. She concludes that best practices are desirable in the present patchy national legislative approach in the application of these European procedures.

(C) Some Observations on Challenges and Future Avenues

Since February 2016, the political landscape in Europe has changed considerably. On the one hand, there are growing political tensions within EU Member States that directly affect their justice systems – the most promi-

nent examples in this respect are Poland and Hungary. On the other hand, the vote of the United Kingdom to leave the Union deeply impacts European law of civil procedure. As a result, the prospects for judicial cooperation have changed and the *acquis communautaire* is increasingly challenged. European procedural law is experiencing a time of crisis and rejection. Against this background, the last part of this introduction addresses the present challenges and explores possible avenues of future development.

(1) Justice for Growth and Justice as an End in Itself

As a reaction to the critique about the lawmaking of the Union, which is considered to be too broad and comprehensive, the Juncker Commission has changed the lawmaking process. As a result, the Commission adopted a programme which provides a guideline of clear priorities. Each political initiative must be a part of one of these priorities. Civil justice as such has not been chosen as a priority.[51] Consequently, any political initiative must be connected to one of the priorities of the Commission. Against this background, the Commission's legislative proposals have been placed in the context of justice for growth.

This perspective seems to be beneficial insofar as it focuses on the importance of the justice system for economic wealth and stability. However, one should not forgot that civil justice aims at further objectives – it does not only seek efficiency, but serves to resolve disputes in fair and just proceedings and provides for the stability of the legal systems, which are perceived as fair and well-controlled by independent judges. In this context, the respect of fundamental rights by independent courts, which are accessible for all citizens, is of key importance for the trust of citizens in the justice systems. It is also essential for the fostering of mutual trust among the judges of different Member States operating within one European Judicial Area.

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51 The Political Guidelines of the President of the EU Commission (2014) also address "An Area of Justice and Fundamental Rights Based on Mutual Trust", see https://ec.europa.eu/commission/sites/beta-political/files/juncker-political-guidelines-speech_en_0.pdf

(2) Horizontal and/or Vertical Harmonization: Towards More Coherence

Nevertheless, the critique of the lawmaking processes should also be taken as an incentive to improve the present situation. These improvements should primarily address the regulatory techniques applied so far. During the last two decades, many lawmaking activities of the Union with regard to civil justice have considerably improved the situation of litigants in cross-border settings.[52] However, the number of sectorial instruments tackling specific areas (such as jurisdiction and applicable law in different instruments on matrimonial property, on maintenance, on succession) has created the context in which the regulatory framework has become too complex and, therefore, difficult to access. Even specialists in family law, insolvency or cross-border litigation are no longer familiar with the whole area of European procedural law. The situation is even worse for practitioners and judges who only occasionally deal with cross-border cases. One cannot expect that they are familiar with the whole system and that they will find the right instrument and apply it properly.[53] Even worse, within some EU instruments, there is a lack of uniformity in concepts and terminology. In this regard, the lawmaking processes should be improved and the existing instruments be carefully assessed. As the lawmaking process in EU procedural law has been generally slowed down, this might be the right moment to carefully assess and evaluate the acquis in order to make targeted improvements.

In order to reduce the complexity of the multitude of EU instruments, the EU legislator might adopt a less sectorial and more horizontal approach. The proposal of the European Parliament on a Directive on Procedural Minimum Standards might be understood as a (first) step in this direction. However, the Union actualizes only limited competences, and the

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52 A telling example is the Insolvency Regulation (Reg. 1346/2000), which has enabled cross-border insolvency proceedings (and restructurings) within the Union. Before its enactment, cross-border insolvencies had been rare exceptions. Within the framework of the Insolvency Regulation, multi-state insolvency proceedings can be handled efficiently. In this area of law, the case-law of the ECJ has been beneficial as well. See Hess, Europäisches Insolvenzrecht und der Brexit, (to be published in KTS (2018)).

53 The lack of information about the different instruments and the lacking familiarity with their application has been mentioned as a major impediment to the free movement of judgments, cf. F. Gascon Inchausti & M. Requejo Isidro, in Hess et al. (ed.), supra n. 1.

enacting of a comprehensive instrument addressing civil proceedings might be too far-fetched. As a result, the Union is expected to enact additional sectorial instruments (i.e., with regard to collective redress or concerning the protection of privacy). However, it would be of great help if the basic structures of the parallel instruments were better coordinated and the terminology of the instruments was used in a uniform way.[54]

(3) Towards "Minimum Common Standards"?

The proposal of the EU Parliament on a Directive on Procedural Minimum Standards is a first step to a more comprehensive approach of lawmaking in procedural law. However, the proposed instrument (as it stands today) is not sufficiently coherent, and the underlying regulatory concept is not entirely clear. First, the regulatory concept of minimum standards has not been explored sufficiently. "Standards" stand somewhere in the middle of (constitutional and general) procedural principles (such as access to justice, fair trial, party autonomy) and the definitive rules of civil procedure (such as rules on direct and substituted service). An aim or objective of "standards" might be to detail further general and constitutional principles of procedural law. A different aim is the setting of a common threshold or common rules for specific constellations (such as provisional measures, the taking of evidence or the service of the lawsuit). If one reads the provisions of the draft directive as adopted by the European Parliament in July 2017, the regulatory concept remains unclear: some rules simply reiterate the wording of constitutional guarantees, whereas others provide for rules addressing very specific issues. Furthermore, some rules address the proceedings themselves, while others mainly address the organization of the judiciary or the relationship between the parties and the lawyers in civil proceedings. All in all, the draft directive needs considerable further improvement and refinement.

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54 A telling example in this respect is the unsettled relationship between the rules on jurisdiction, pendency and recognition in the General Data Protection Regulation (2016/679) and the Brussels I-bis Regulation, cf. Kohler, Conflict of Law Issues in the 2016 Data Protection Regulation of the European Union, Riv dir int e proc (2016), 653 *et seq.*

(4) Best Practices: Uniform and Effective Application

Before taking the next regulatory step of adopting a horizontal instrument on civil procedure, the EU legislator should undertake research on the uniform and effective application of the existing instruments in the EU Member States. The Rotterdam conference was based on the idea of addressing the most important practical issues of European procedural law in order to get a better comprehension of areas where its application operates smoothly and to understand why its application entails problems in other areas (or regions). Furthermore, the EU Procedural Law Study organized by the Max Planck Institute Luxembourg took the same approach. A better understanding of the application of instruments in legal practice is key for the elaboration of feasible improvements. Although this is a truism, our current knowledge of the application of the EU instruments is still insufficient. A major impediment in this respect is the lack of reliable data about the application of different instruments. In this respect, it is high time that the EU Member States collect the pertinent data within their justice systems in order to permit valuable empirical research.

(5) Changing Dynamics in the EU

At present, the upcoming Brexit constitutes the biggest challenge for the European law of civil procedure.[55] In 2019, the United Kingdom will become a third state, and all instruments adopted in the area of civil justice will cease to be applicable between Britain and the remaining 27 EU Member States. Still, it is unclear whether there will be a transitional regime or not. There are two major issues that deserve attention: On the one hand, there is a need for a new regime which permits the continuation of the cooperation in civil matters between the UK and the European Union in the interest of litigants. On the other hand, the EU must be attentive with regard to the cohesion of the Civil Justice Area, which might be undermined or even impaired by a parallel system that is not based on a

55 For an English perspective, A. Dickinson, "Close the Door on Your Way Out - Free Movement of Judgments in Civil Matters – A Brexit Study", ZEuP, 2017, 538-568.

common understanding of shared values and principles, like mutual trust and access to justice, as guaranteed by the EU Treaty and the TFEU.[56]

The UK government has announced that it will repeal the European Communities Act 1972, end the jurisdiction of the CJEU and copy the existing EU acquis into UK law via a "Great Repeal Act", which shall ensure that the legal practice remains unaffected. However, it seems to be improbable that this unilateral measure will prevent the UK from being (treated as) a third state. Even the most basic achievement of the Union in this area, the free movement of judgments between Britain and the Continent, will cease, as the legal bases are no longer applicable. Ratifying the Lugano Convention will not provide a solution: it either presupposes that the UK will (again) become a Member of EFTA[57], or it requires the ratification of the Convention by the European Parliament. In this context, one has to carefully consider whether the Protocol no 2 on the uniform interpretation of the Convention according to the case law of the CJEU provides for sufficient safeguards. As Brexit aims at regaining the sovereignty of the UK from the case law of the Court of Justice, there might be a tendency of the courts of the UK legal systems to interpret the Convention according to the cultural context of the common law. Alternatively, a solution based on international treaties (especially those of the Hague Conference) might be a better solution in order to avoid the negative impacts of a "half" Brexit on the functioning of EU procedural law. Treaty-based solutions might also be the way forward in areas where no substitute for the existing EU instruments exists, as is the case in insolvency and (most) family matters.[58]

Although the technical challenges of Brexit might be solved (certainly at a price that London, as one of the most favored places for litigation under the Brussels I-bis Regulation, will probably have to pay), the cultural losses for the European law of civil procedure will be much bigger. Since 1978, the cross-fertilization between the Continental and the Common

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56 In this respect, the role of the case law of the CJEU is key to the coherence and the functioning of the present system.

57 Art. 69(1) Lugano Convention 2007.

58 I.e., rules on jurisdiction and recognition of divorce judgments, which are currently found in the Brussels II-bis Regulation, cf. J.M. Carruthers & E.B. Crawford, "Divorcing Europe; reflections from a Scottish perspective on the implications of Brexit for cross-border divorce proceedings", Child & Family Law Quarterly, 2017, (Special Brexit Issue).

Law approaches to procedural law has been very fruitful and has constituted one reason for the success of this area of law.[59] In this respect, regrets are shared on both sides of the Channel.[60] Yet, what counts is the protection of litigants affected by Brexit. Just to take up one example, family disputes across the Channel will continue after 2019, and it is of paramount interest for all European families which settled in Britain and on the Continent that a solid framework for the resolution of their disputes will be available at this time. Or to put it differently, limping marriages between Britain and the EU27 must avoided.[61]

(D) Concluding Remarks

Now that flood of new instruments experienced in the past fifteen years is over, the time has come to take stock, and to evaluate and reflect on the process of Europeanization of civil procedure and what has been achieved. However, before focusing on individual instruments and trends in European civil procedure, with the development of collective redress, ADR and e-justice as perhaps key issues in the current debate, it is important to take a step back and consider what the fundamentals of EU civil procedure are. In recent years, the economic crisis, accompanied by the quest for economic growth, has been the main driver of legal policy initiatives and legislation. While the economic perspective will continue to be important, it is essential that delivering justice to EU citizens based on the rule of law and through fair and efficient proceedings is the primary goal. The vision on the future of EU civil justice should be built on these notions.

In the further development of EU civil procedure, horizontal instruments to implement common – not necessarily *minimum* – rules are of the essence to secure these fair and efficient proceedings, coupled with tailored sector-specific instruments. While EU law making is to a large extent a top-down process, best practices – both in law making and legal

59 Hess, IPRax, supra n. 39, at 418.

60 Dickinson, supra n. 55, at 562-563. Different opinion A. Briggs, Secession from the European Union and private international law, COMBAR lecture 24 January 2017, at: https://www.blackstonechambers.com/news/secession-european-union-and-private-international-law-cloud-silver-lining/.

61 A. Dutta, "Brexit and international family law from a continental perspective", 29 Child and Family Law Quarterly, (2017), 199, at 204.

practice – in the Member States can and should also be more actively promoted. Though the concept of "best practices" is inherently complex, as what works within the specific procedural context of one Member State does not necessarily work in another, when it comes to the application of EU instruments in particular, such practices in terms of fairness and efficiency can be discerned. Judicial cooperation will benefit from sharing experiences, creating mutual understanding and genuine mutual trust in the European area of justice. In the changing composition and inherent dynamics of the European Union today, this is more important than ever.