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Focus

Principles of civil procedure under ELI-UNIDROIT rules: convergence through a uniform approach to procedural obligations?†

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Abstract

Harmonizing civil procedure across different legal systems is a complex challenge. The European Law Institute (ELI) – International Institute for the Unification of Private Law (UNIDROIT) project, From Transnational Principles to European Rules of Civil Procedure, demonstrates that meaningful convergence is best achieved not through mandatory rules but through the voluntary adoption of well-designed procedural models. Genuine procedural convergence does not entail merely copying isolated legal rules but, rather, embracing a common procedural model rooted in a shared legal ideology. This shared foundation is best established through a unified approach to procedural principles. This article examines the constellation of procedural principles developed by the Obligations Working Group of the ELI–UNIDROIT project, which positions the principle of loyal cooperation as the overarching procedural principle. This principle underscores the joint and shared obligations of all participants in civil litigation—courts, parties, and lawyers—to collaborate in ensuring a fair, efficient, and accessible dispute resolution process. Other procedural principles function either as clarifications of this core principle's goals and values or as methods and tools for achieving them. To illustrate how this common understanding fosters convergence, the article analyses Croatia's recent procedural reforms, which reflect the ELI–UNIDROIT's approach to procedural principles. Examples of converging norms include the redrafting of the principle of loyal cooperation in Article 10 of the Croatian Code of Civil Procedure and the introduction of a pre-procedural obligation to attempt settlement in the new Act on Amicable Dispute Resolution. Additionally, the 2022 Code of Civil Procedure amendments incorporated a modernized approach to illegally obtained evidence, aligning with the principle of proportionality and Rule 90 of the ELI–UNIDROIT Rules.

† Co-Reporter of the Working Group on Obligations of Judges, Parties, and Lawyers in the ELI–UNIDROIT project from Transnational Principles to European Rules of Civil Procedure. The author wishes to express his gratitude, in particular, to Professor C.H. van Rhee, a colleague who has played a significant role in shaping many of the ideas presented in this article. As my Co-Reporter in the same working group and a renowned specialist in legal history and comparative civil procedure, he has profoundly influenced both the concept and the development of the introductory sections of the ELI–UNIDROIT Rules.

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I. Introduction

Harmonizing civil procedure is a notoriously difficult task. The modest success of several decades of European efforts to align procedural legislation among European Union (EU) countries demonstrates that, in the absence of a clear concept and comprehensive common legislation, the outcome is inevitably fragmented, inconsistent, and user-unfriendly. However, as shown by successful harmonization efforts under the auspices of the United Nations in other areas of dispute resolution,[1] model legislation, when accompanied by persistent joint dissemination efforts, can achieve what conventional legislative projects cannot: it can effectively bring legal systems closer together. The European Law Institute (ELI) – International Institute for the Unification of Private Law (UNIDROIT) project on model procedural legislation for Europe has already demonstrated that convergence is better fostered not through mandatory legislative provisions but, rather, through the voluntary adoption of well-designed rules, supported by persuasive explanations developed by a broad international team of recognized experts in national justice systems and comparative law.[2]

This article argues that model legislation is especially effective when it is based on a clear and comprehensible foundational concept, which can be articulated through a set of interconnected and hierarchically ordered fundamental rules defining the purpose, goals, and main objectives of civil procedure. This approach partially aligns with past procedural law reform efforts.[3] However, in many countries, 'principles'—the most general directive rules—have been removed, over time, from legislative texts and have been relegated to legal textbooks and academic works. This shift may be a natural and understandable response in practice-oriented legislative environments that are satisfied with their fundamental premises and their practical application. Nevertheless, while procedural principles may fall out of favour in times of peace and stability, they become crucial in dynamic periods when we must rethink the fundamentals, significantly alter both legal approaches and procedural routines, and establish common ground with other legal systems. In such circumstances, the first step must be to clarify and revise key procedural principles.

The author of this text was part of a team that worked jointly and intensively on the project that lasted nearly seven years (2013–20). The task that was assigned to our group was to draft rules governing the procedural obligations within the ELI–UNIDROIT Working Group for the Obligations of Parties, Lawyers and Judges (Obligations WG).[4] Our work evolved into a comprehensive examination of key principles, leading to a reformulation of a modern approach to civil litigation, particularly emphasizing proactive case management as a method of achieving the fixed goals. The result was a set of rules addressing several key procedural issues, structured around a single fundamental principle—the principle of loyal cooperation.[5] This principle was further elaborated in specific areas, including the

[1] In particular in the field of international commercial arbitration, where the UNCITRAL Model Law of 1985 influenced legislation adopted in 93 States across 126 jurisdictions. See <https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_arbitration/status> accessed 17 April 2025.

[2] Compare Wolfgang Hau, 'Europeanisation of Civil Procedure: Overcoming Follow-Up Fragmentation through Bottom-Up Harmonisation?' in A Nylund & M Strandberg (eds), *Civil Procedure and the Harmonisation of Law* (Intersentia 2019) pp 61–75.

[3] On such procedural reforms in history, see CH van Rhee (ed), *European Traditions in Civil Procedure* (Intersentia 2005).

[4] This working group of the European Law Institute and UNIDROIT was established at the end of 2014 in the second wave of 'intermediate groups', together with the WG on *Res Judicata* and *Lis Pendens*. It was chaired by Professor C H van Rhee and Professor Alan Uzelac. Members of the Working Group were Professors Emmanuel Jeuland (Paris), Bartosz Karolczyk (Warsaw), Walter Rechberger (Vienna), Elisabetta Silvestri (Pavia), John Sorabji (London) and Magne Strandberg (Bergen).

[5] See C. H. van Rhee, 'Case management in Europe: A modern approach to civil litigation', 8 *International Journal of Procedural Law* (vol 1, 2018), pp 65–84; C. H. van Rhee, 'Case management and co-operation in the model European Rules of Civil Procedure', 9 *Journal of International and Comparative Law* (vol 2, 2022), p 1–16; Alan Uzelac, 'Towards European Rules of Civil Procedure: Rethinking Procedural Obligations', 58 *Hungarian Journal of Legal Studies* (vol 1, 2017), pp 3–18.

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duty to attempt autonomous dispute resolution, the organization of proceedings that ensures swift, cost-effective, and efficient litigation, the cooperative establishment of facts and legal arguments, and the encouragement of settlement, whenever possible.

The rules on the obligations of judges, parties, and lawyers—produced in both English and French by the Obligations WG—underwent the most transformations compared to the rules developed by the other nine working groups. This was partly due to their structure, which encompassed both highly general rules ('principles') and their implementation in areas that partially overlapped with the subject matter assigned to other groups (for example, access to information and evidence). Only a small portion of these changes (which will be further addressed in section II of this article) resulted from hesitations regarding certain elements of the draft text submitted by the Obligations WG.

Nevertheless, the key elements of the texts finally adopted were preserved, and, to a great extent, they found their place at the very beginning of the European Model Rules finally adopted. Following the first article, which defines the scope of the Model European Rules of Civil Procedure (MERCP), the subsequent nine articles (rules) form the section on Principles. In the preface, the commentary—albeit somewhat understated—refers to 'a number of overarching procedural duties imposed upon the court, parties, and their lawyers' in Rules 2–10.[6] These duties are largely the product of the Obligations WG's work and are based on a distinct concept of procedural principles that were developed through extensive discussions at numerous meetings and conferences.[7] This process benefitted from the research of group members and an analysis of past reforms and transformations of civil procedure in Europe and beyond.[8]

The original draft rules proposed by the Obligations WG[9] expressed the overarching approach to procedural principles in a clear and unequivocal manner. While the ideas remain unchanged in the version adopted, the redistribution of articles and their integration with other rules may have somewhat diminished the clarity of the original concept. For this reason, in this article, the main elements of this new approach to procedural principles will first be briefly summarized, highlighting the central role of the overarching principle of loyal procedural cooperation and its relationship with other key rules that define additional procedural principles (section II). While this approach is new only in a relative sense, it has several significant implications for the established practices of key actors in civil litigation across various European countries. The potential for change—and the added value this approach brings—will be discussed in section III. Finally, in section IV, examples from Croatia will be presented that illustrate the initial stages of convergence prompted by the MERCP principles and individual provisions of the European Model Rules.

[6] European Law Institute and UNIDROIT (eds), *ELI–UNIDROIT Model European Rules of Civil Procedure: From Transnational Principles to European Rules of Civil Procedure* (Oxford 2021; online edn, Oxford Academic, 18 Nov. 2021), p 27 at 2.

[7] The work of the Obligations WG proceeded in nine separate meetings in Maastricht, Leuven, Pavia, Paris, Rome, Bergen and Dubrovnik between February 2015 and March 2018. In addition, individual members of the group participated in numerous locally organized events at which the work of the group was presented and discussed.

[8] See *inter alia* Alan Uzelac and CH van Rhee (eds), *Transformation of Civil Justice. Unity and Diversity*, (Springer 2018); Alan Uzelac (ed), *Goals of Civil Justice and Civil Procedure in Contemporary Judicial Systems* (Springer, 2014); CH van Rhee, 'Approximation of civil procedural law in the European Union', in: B Hess & X Kramer (eds), *From common rules to best practices in European civil procedure* (Nomos/Hart 2018), pp 63–75.

[9] The completed text of the rules with a commentary produced by the Obligations WG was presented at the plenary meeting of the ELI–UNIDROIT project in November 2017. See ELI–UNIDROIT, 'Draft Rules of WG Obligations of Parties, Lawyers and Judges', Vienna, 16–17 November 2017 (unpublished, available at <https://www.alanuzelac.from.hr/pubs/M02_ELI-Unidroit_Draft_Obligations_Rules.pdf> accessed 17 April 2025). A detailed description of the draft is available in CH van Rhee, 'Judicial Case Management and Loyal Cooperation'. Towards Harmonized European Rules of Civil Procedure' in R Aarli & A Sanders (eds), *Courts in evolving societies. A Sino–European dialogue between judges and academics* (Leiden/Boston: Brill-Nijhoff 2020) pp 168–202.

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II. The constellation of procedural principles: *non multa, sed multum*

The notion of procedural principles is not entirely uncontroversial. At a certain level, any legal rule of a higher degree of generality can be called a 'principle'. However, the question arises: what level of generality must a rule possess to be considered a principle? For instance, the label of 'procedural principles' can also be applied to rules formulated as legal standards—guidelines that are useful but not sufficiently clear unless accompanied by a set of implementing rules.[10] The threshold for defining principles can be set even higher. At the highest level of abstraction, one might argue that procedural principles should be reserved only for meta-legal constructs—concepts that serve as guiding forces in the development, interpretation, and application of legal rules but are themselves not technically suited for inclusion in legislative texts.[11] These higher-level principles are often framed as opposing pairs of conflicting concepts or approaches. For example, we speak of the adversarial and inquisitorial principles, the principles of orality and writing, and the principles of disposition and officiality.[12]

In an international context, the ambivalent use of the term 'procedural principles' is most prominently evident in the American Law Institute (ALI) / UNIDROIT Principles of Transnational Civil Procedure.[13] As part of model legislation, the Transnational Principles were originally conceived as a short set of overarching norms suitable only to provide general guidance, while a more detailed set of provisions was intended to be part of the Transnational Rules. However, as the adoption of such rules proved to be politically challenging, the Transnational Principles evolved into a relatively extensive document, containing provisions that are undeniably legal in the technical sense (they are 'legal rules' as equally fit for adoption as the Transnational Rules). Ultimately, the distinction between principles and rules became more a matter of political labelling than of substantive difference. As one of the authors of the ALI/UNIDROIT Principles noted, they are 'not restricted to the largely uncontroversial "high terrain" of constitutional guarantees of due process' but are instead 'skilfully pitched at the difficult mid-point between uncontroversial procedural axiom and the fine texture of national codes'.[14]

While it is undoubtedly difficult to pinpoint the exact threshold where principles become rules, we can agree with the same author that fundamental procedural principles serve to bring 'order out of chaos'. Another key point—also accepted by the Obligations WG—is that procedural principles operate at different levels of significance. To provide adequate guidance, principles must be hierarchically structured. Regarding the ALI/UNIDROIT Principles, Neil Andrews identifies three levels of importance: 'fundamental procedural guarantees', 'other leading principles', and 'framework of incidental principles'.[15]

[10] On a broad comparative approach to procedural principles inspired by the utilitarian philosophy of Jeremy Bentham see John Sorabji and Hector, 'Principles of civil procedure', in Margaret Woo and CH van Rhee (eds), *Comparative civil procedure*, (Elgar 2025), pp 63–90; for a more narrow, functionalist notion of procedural principles, see K Bado, A de Castro Mendes, and S Huber, 'Procedural Rights, Principles, and Approaches Influencing the Structure of Civil Litigation' in B Hess, M Woo, L Cadiet, S Menétrey, and E Vallines García (eds), *Comparative Procedural Law and Justice* (Part VI Chapter 1), <https://cplj.org/a/6-1> accessed 17 April 2025.

[11] In this sense, the procedural principles are conceived as 'the guiding maxims on which the procedural rules are based in shaping the proceedings' (*leitende Maximen, von denen die Prozeßordnung bei der Gestaltung des Verfahrens ausgeht)*, arguing that '[t]hey are rarely expressly provided for in procedural law and even more rarely realized in their pure form'. W Rechberger and D Simotta, *Grundriß des österreichischen Zivilprozeßrechts* (Manz: Wien 1994), p 138. Jeuland defines fundamental procedural principles as 'condensations of various legal rules that share the same purpose'. Emmanuel Jeuland, *Droit processual general* (Montchrestien 2012), p 173.

[12] Croatian textbooks of civil procedure recognize these three contradictory pairs of principles and about 15 other different procedural principles, see S Triva and M Dika, *Građansko parnično procesno pravo* (Narodne novine: Zagreb 2004), §§ 22–36.

[13] See ALI/UNIDROIT, *Principles of Transnational Civil Procedure* (Cambridge University Press, 2006) and <https://www.unidroit.org/english/principles/civilprocedure/ali-unidroitprinciples-e.pdf> accessed 17 April 2025.

[14] Neil Andrews, 'Fundamental Principles of Civil Procedure: Order Out of Chaos' in XE Kramer and CH van Rhee (eds), *Civil Litigation in a Globalizing World* (Asser, Hague 2012), p 21.

[15] Ibid, p 22.

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The understanding of Principles in Section 2 of the ELI–UNIDROIT Rules is clearly narrower than that found in the ALI/UNIDROIT Principles. This section is divided into segments addressing cooperation, proportionality, settlement, the right to be heard, representation and assistance, oral, written, and public proceedings, and languages, interpretation, and translation. While this structure provides a more precise delineation between principles (Rules 2–20) and ordinary rules (over 200 rules that follow), it still groups under principles various norms of differing levels of generality.

For these principles to serve as a genuine foundation for the convergence of national procedural rules—which are often susceptible to excessive detail and unsystematic procedural fragmentation—a structured order must be established. Such an order is essential to counteract the chaos of voluntaristic interpretations. The best way to achieve this order is to conceive of procedural principles as a constellation. In every constellation, some stars shine more brightly than others. These constellations typically revolve around a central star, and, in our framework, the central star in the constellation of procedural principles is the principle of loyal cooperation.

The principle of loyal cooperation, embodied in Rule 2 of the MERCP, serves as the central element of the new approach to procedural principles. Its title—unlike those of all other principles in the same section—explicitly denotes it as a 'general' principle, though this designation may actually understate its significance. A more accurate description would be that it constitutes the most fundamental of the 'overarching procedural duties', while also functioning as the central principle that shapes the approach to all other procedural principles.

In the understanding of the Obligations WG, '[t]he procedural model of the Model European Rules of Civil Procedure takes as its starting point that all participants in a civil lawsuit, ie the court, parties, and their lawyers, share the responsibility of putting an end to the dispute in a fair, efficient, and speedy manner.'[16] In the preamble of the Draft Rules on Obligations, it is further explained that the purpose of this overarching rule is to avoid a strict adversarial-inquisitorial divide, as the 'underlying idea of the rules is that there is no mutually exclusive division of labour between the various participants in a civil lawsuit; there are only shared obligations'.[17]

The historical context in which this procedural model is to be located includes two of the most successful legal reforms of civil procedure in the past two centuries—the Austrian reform of civil procedure conceived by Franz Klein in the 1890s and the English reform of civil procedure led by Lord Woolf in the late 1990s. The political ideology behind both of these reforms, which were also based on the cooperation principle, was that civil procedure must serve not only individual litigants but also society as a whole. The State-based civil justice system, while designed to resolve private disputes, must ensure that it remains effective and accessible to all members of society. Given the inevitably limited resources available, all participants in the process should bear an obligation to optimize the use of these key resources.[18] The same fundamental importance of the cooperation principle can also be seen in the French *principe de coopération*, which is characterized as a 'guiding procedural principle' (*principe directeur du procès*).[19]

The main actors responsible for ensuring that the litigation process is just—based on accurately established facts and the correct application of law—while also being quick, effective, and proportionate are the judges. However, the parties must also cooperate, and

[16] CH van Rhee, 'Case Management and the Principle of Co-operation in Europe: A Modern Approach to Civil Litigation' in L Cadiet & Y Fu (eds). *On Judicial Management from Comparative Perspective: International Association of Procedural Law Conference (8–10 Nov. 2017, Tianjin, PRC)* (Singapore: Springer Nature 2023) p 16.

[17] Draft Obligations WG Rules, *supra* n 9, p 4.

[18] Compare CH van Rhee, *Case Management and Co-operation in Model Rules*, *supra* n 6, at II.

[19] CH van Rhee, 'Principe de coopération', in E Jeuland & S Lalani (eds), *Recherche lexicographique en procédure civile—Lexicographical research in civil procedure* (Bibliothèque de l'Institut de Recherche Juridique de la Sorbonne—André Tunc; Vol. 85), (Paris: IRJS Editions, 2017) 207, p 207.

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this duty extends to all other participants in litigation—most notably lawyers, who are the most frequent and influential professional users of the dispute resolution services provided by State judiciaries. Thus far, collaborative and active case management has been at the core of the principle of loyal cooperation. The boundaries of case management duties do not rest solely on one side—the courts as 'providers' of dispute resolution services. The recipients of court services must also be involved. Their duty to actively contribute to the proper and effective course of litigation is not confined to a single element necessary for achieving a just resolution of the underlying conflict.

Unilateral and oversimplified formulas—such as *da mihi factum, dabo tibi jus*—that is, the designation of parties as solely responsible for supplying factual material while the court is exclusively responsible for determining the applicable law—should be reconsidered in favour of a model based on joint and shared responsibility for both factual and legal determinations.[20] Thus, in the Obligations WG, we were clear about the concept that 'the court also has certain obligations regarding facts and evidence, whereas parties share the responsibility for the assessment of the pertinent legal issues with the judge'.[21] Our aim was to move beyond the dichotomy of two mutually opposing models of civil procedure, each defined by a corresponding principle that represents its conceptual opposite.

The first is the adversarial process, a model in which the parties are active while the judge remains passive. The second is the inquisitorial process, characterized by an active judge and passive parties. In the new model approach, which may be described as an integrative approach, civil litigation is understood as a system in which both the parties (or their lawyers) and the judge (or the 'court') have both the right and the obligation to be active. All those who benefit from State justice services should share a common responsibility for ensuring a just and effective process.

Effectively, the same idea was already expressed in Principle 11 of the ALI/UNIDROIT Transnational Rules of Civil Procedure, which served as the starting point for the work of the Obligations WG.[22] In particular, its second clause also refers to a 'shared responsibility' of the court and the parties 'to promote a fair, efficient, and reasonably speedy resolution of the proceeding'.[23] Principle 11 further outlines the parties' obligations concerning the determination of law and facts (Principle 11.3) and the special professional obligation of lawyers to assist the parties in fulfilling their procedural duties (Principle 11.5). However, in the ELI–UNIDROIT Rules—at least in those drafted by the Obligations WG—this general idea was expanded into a network of interconnected and functionally interdependent notions, which operate as sub-principles closely linked to the principle of loyal cooperation. Essentially, the relationship between these principles is illustrated in Figure 1:[24] 'The central principle of loyal co-operation is elaborated in three rules: one as a general rule (Rule 2), one addressing the principle from the perspective of the parties and their lawyers (Rule 3), and the other from the perspective of the court and judges (Rule 4).'

In the original text produced by the Obligations WG, these rules were phrased in terms of 'obligations'. However, in the final editing of the text by the Structure WG, the headings of these and subsequent rules replaced references to 'obligations' with the notion of 'role' of the parties/lawyers/judges. Since the text of the rules themselves remains unchanged—still specifying what each actor 'must' do or ensure—the substantive meaning is not altered.

[20] See more in Alan Uzelac, 'Rethinking procedural obligation', *supra* n 5, at 14–15.

[21] CH van Rhee, 'Case Management and the Principle of Co-operation in Europe', *supra* n 16, p 17.

[22] For an analysis of Principle 11, see more in CH van Rhee, 'Obligations of the Parties and their Lawyers in Civil Litigation: The ALI/UNIDROIT Principles of Transnational Civil Procedure' in J Adolphsen et al (eds), *Festschrift für Peter Gottwald zum 70. Geburtstag* (Beck 2014) pp 689–99.

[23] *ALI/UNIDROIT Principles*, n 13, see Principle 11, p 778.

[24] This is the figure presented by the author of this text at the ERA Conference in Trier, where the results of the ELI–UNIDROIT project were discussed in November 2018, see <https://www.era.int/upload/dokumente/20722.pdf> accessed 17 April 2025.

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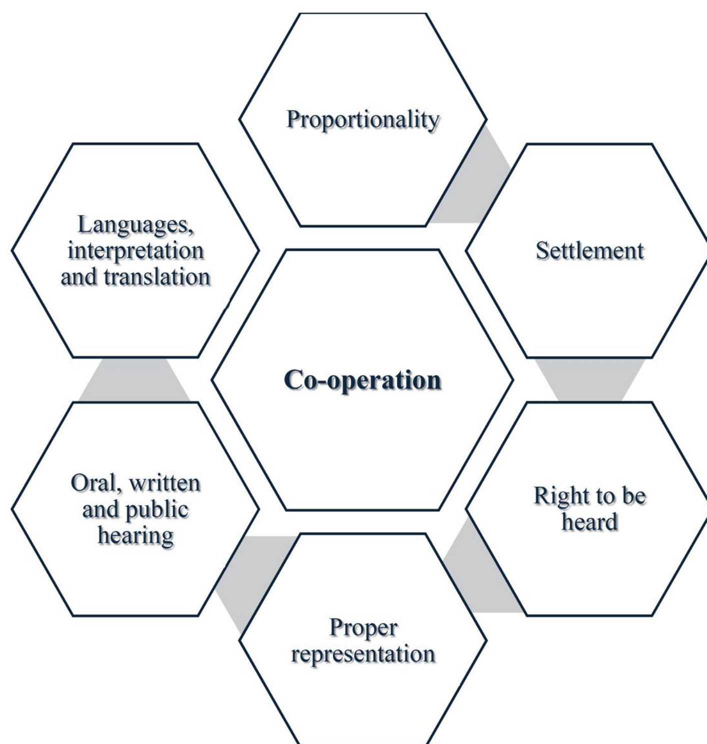

Figure 1. Sub-principles in the principle of loyal cooperation

However, this softening of the language may hinder a proper understanding of the underlying concepts.[25]

While the principle of cooperation is at the core—expressing the fundamental idea at the base of procedural legislation—other 'satellite principles' in this constellation revolve around it, contributing to its clarification and implementation from different perspectives. The two key principles that ensure a procedure aligned with the ideals of loyal cooperation are reflected in the concepts of proportionality and settlement, as set out in the following segments of the MERCP (segment B, Rules 5–8, and segment C, Rules 9–10). These principles are regulated in a manner similar to the general principle, addressing both the parties' perspective and the court's perspective.

Both proportionality and settlement serve as key mechanisms for achieving the objectives of the principle of loyal cooperation. To ensure that the justice system serves all its users within the constraints of available resources, participants in civil litigation must conduct proceedings in a manner that adapts to the nature, importance, and complexity of each case. In this sense, cooperation aims to establish a process where time, effort, and resources are allocated proportionately to what is at stake, ensuring optimal outcomes—the fulfilment of the 'general management duty' of the court and the achievement of 'proper administration of justice'.[26]

[25] It is also worth noting that this change deviates from both the original mandate of the *Obligations WG* and the heading of Principle 11 of the ALI/UNIDROIT Transnational Principles, which explicitly reads '*Obligations of the Parties and Lawyers*'.

[26] See Rule 5(2) of the MERCP.

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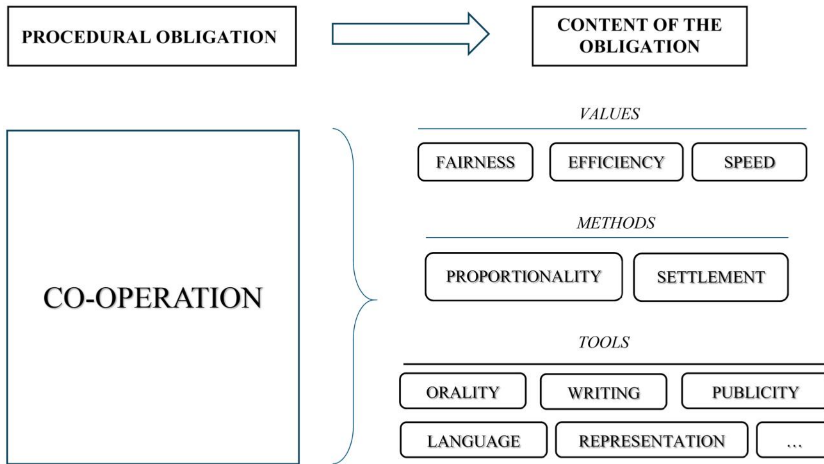

Figure 2. Procedural principles

Ideally, however, the purpose of a proportionate process is best fulfilled when disputes are not unnecessarily brought before the court. In this respect, the (pre)procedural obligation of the parties is 'to co-operate in seeking to resolve their dispute consensually, both before and after proceedings begin'.[27] Thus, attempts to reach a settlement constitute a fundamental part of the parties' obligation to co-operate and represent another key mechanism for achieving the intended procedural goals. These goals are, however, further elaborated in the procedural principles that define the key values of civil procedure—the right to be heard (segment D, Rules 11–13) and proper representation of the parties (segment E, Rules 14–16). These values are in the MERCP phrased in a way that makes them compatible with the overarching procedural principle—that is, with the task of ensuring proceedings that are just but, at the same time, also efficient and speedy.

Finally, the circle of procedural principles concludes with a series of instrumental principles that steer proper case management of individual disputes. These instrumental principles are the tools used to organize the proceedings in a way that is both co-operative and adjusted to the declared procedural values and the needs of good administration of justice. They are in the MERCP listed as principles of oral, written, and public proceedings (segment F, Rules 17–18) and languages, interpretation, and translation (segment G, Rules 19–20), see Figure 2.

The mutual relationship of the role and purpose of the above-discussed procedural principles was presented in the following graph at the Trier 2018 ERA Conference:

> Providing proper guidance through a teleologically formulated central principle is the approach that gives procedural principles greater coherence. Instead of a loosely connected and often contradictory set of 'principles', the history of procedural reforms in Europe and worldwide has demonstrated that a monistic system—built around one core ('overarching', 'overriding', 'underlying', 'fundamental' …) principle—provides a stronger foundation for both understanding and action.

[27] See Rule 9 of the MERCP.

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As expressed by Plinius Secundus, *non multa, sed multum*: we do not need to achieve much by having many principles; rather, we need to achieve much through one clear directive procedural principle—a principle that is explicitly elaborated through methods, goals, objectives, and techniques, each occupying a well-defined place within the constellation of leading civil procedural concepts.

III. Overcoming non-collaborative practices through a collaborative model

As already noted, the principle of loyal cooperation is not a novel principle. It has held a central place in the reform of the litigation systems of both the common law and the civil law countries. However, the fact that it has been recognized before does not diminish its relevance in the current European procedural landscape. It suffices to recall some of the reasons why it has the potential to bring meaningful change to many civil justice systems that remain structured around non-cooperative practices. Rather than listing specific jurisdictions or examples, I will focus on a model-based presentation that contrasts collaboration-based systems with their conceptual opposite. For this purpose, I will refer to 'non-collaborative practices' without delving into further details. The procedural history of civil litigation—rich with examples of systems that have been conceived as 'war without a Red Cross' and with reforms aimed to improve and harmonize civil procedure—is explored in greater depth in other articles.[28]

The key issues in the comparison are the five individual segments that were separately examined by the Obligations WG and further elaborated in the rules proposed by the group. These are:

- The approach to procedural obligations of lawyers and parties to collaborate and act in good faith (*obligations of lawyers and parties*);
- The approach to the role of the court in the management of civil cases (*case management*);
- The approach to the determination of the factual basis for decision-making (*facts*);
- The approach to the determination of applicable legal rules and their interpretation (*law*); and
- The approach to settlement attempts (*settlement*).

At the level of obligations of lawyers and parties, a collaborative model assumes that efficient litigation and prompt resolution of disputes are in the common interest of all participants. Therefore, legal professionals must be actively involved and obligated to pursue this shared goal, acting in good faith and proactively contributing to the fair and effective processing of legal disputes. For these reasons, the practice of litigation is structured to ensure that lengthy and abusive litigation does not pay off. Civil litigation is effectively monitored by the court. To enhance the effectiveness of this monitoring, the litigation process is transparently organized, enabling judicial administration bodies to support effective practices and identify problem areas.

Professional organizations, such as bar associations, also play a constructive role by promoting loyal cooperation and sanctioning abusive behaviour by lawyers when it constitutes a serious breach of their professional obligations. The system of sanctions for violations of procedural duties is appropriate, diverse, and effective, ranging from negative inferences to cost sanctions, and even including summary dismissals and fines for contempt of court. However, the legal landscape also includes non-collaborative practices, which stubbornly persist in a number of jurisdictions. Typically, the non-collaborative model of procedure

[28] See CH van Rhee, 'Harmonisation of Civil Procedure: An Historical and Comparative Perspective, in XE Kramer and CH van Rhee (eds), *Civil Litigation in a Globalising World* (TMC Asser and Springer 2012) pp 39–60.

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refuses to recognize the very existence of procedural obligations for parties and lawyers, arguing that litigation should be entirely governed by the parties, who are the 'true masters of litigation' (*domini litis*) and, at most, bear only 'burdens' rather than proper 'obligations'.[29]

Within this model, any strategy that benefits the parties—and even more so, their lawyers—is considered permissible, if not commendable. In the worst-case scenario, there are even financial incentives for prolonging judicial proceedings, such as fee schedules and tariff structures that reward lawyers for lengthy litigation. In such an environment, delaying proceedings becomes a customary practice, to the extent that, for insiders, attempts to ensure prompt litigation are regarded as unprofessional. Conversely, there is widespread tolerance for procedural delays and stalling tactics, which are justified by various pretexts—from the need for a thorough 'pursuit of truth' where 'no stone should be left unturned', to concerns about fair trial rights should the court attempt to limit an endless exchange of uninvited party submissions. If the law does provide for sanctions against procedural abuse, they tend to be weak and ineffective in a non-collaborative model. Their enforcement is often discouraged by complex procedural requirements, the additional time and effort involved in implementing them, and the suspensive effect of appeals, which further undermines their deterrent effect.[30]

At the level of case management, a collaborative model of proceedings recognizes the court's duty to actively monitor and manage litigation, but not in an authoritarian manner. The parties and their lawyers are consulted whenever necessary and possible, as co-responsible partners in ensuring the just and effective organization of civil litigation. Acknowledging the parties' positions and maintaining an ongoing dialogue on all matters relevant to the course of litigation enable and promote early case planning, which is structured through case management meetings and conferences, ultimately resulting in mutually agreed procedural calendars. The division of labour is clearly defined, with the roles and responsibilities of both the court and the parties established in advance.

Efforts invested at the very beginning of the proceedings ('frontloading') prevent litigation from becoming stalled at a later stage, when even an outburst of efforts ('backloading') may no longer be sufficient to achieve satisfactory results. The collaborative model encourages flexible procedural forms adapted to the nature of each case and recognizes procedural proportionality as the key guiding method for selecting the appropriate type and form of procedure.

Active case management in this model also entails the right and obligation of the court to enforce jointly established case management decisions, ensuring compliance with agreed limitations on deadlines, as well as the number and length of submissions. Clarity in procedural organization further reduces or eliminates the need for appeals, which are typically available only once a decision on the merits has been made.[31] In contrast, non-collaborative practices reject the very notion of case management. Although the formal supremacy of the court may be recognized, proceedings in such a procedural model are essentially unmanaged. They are reactive and depend almost entirely on lawyers' initiative. In the absence of such initiative, nothing happens—the proceedings are prolonged indefinitely, sometimes leading to an 'eternal resting of the proceedings' (*ewiges Ruhen des Verfahrens*).

The reactive nature of such proceedings excludes collaborative efforts in planning litigation. Instead, proceedings are either governed by party-driven input or dictated by top-

[29] On distinction of procedural obligations and procedural burdens see CH van Rhee, 'Burden & Duty', in E Jeuland & S Lalani (eds), *Recherche lexicographique en procédure civile*, *supra* n 19, p 77–80.

[30] For further examples of a non-collaborative procedural model see Alan Uzelac, 'Reforming Mediterranean Civil Procedure: Is There a Need for Shock Therapy?', in: CH van Rhee & A Uzelac (eds), *Civil Justice between Efficiency and Quality: From Ius Commune to the CEPEJ* (Intersentia 2008), pp 71–99.

[31] On the absence of case management even in nominally inquisitorial (post)Socialist civil justice systems see Alan Uzelac, 'Croatia: Omnipotent judges as the Cause of Procedural Inefficiency and Impotence' in CH van Rhee and Y Fu (eds), *Civil Litigation in China and Europe* (Springer 2014) 197–221.

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down directives imposed without consulting the parties. In both cases, advance planning is minimal, and detailed procedural calendars extending beyond the next procedural step are virtually non-existent. Even when timetables are established, enforcing them is difficult due to the court's reluctance to disregard belated or vexatious submissions and evidence. Since the court itself is passive and unprepared, it tends to tolerate similar behaviour from the legal profession.

In passively managed proceedings, procedural rigidity prevails, as proceedings are shaped primarily by inflexible procedural norms. These norms either do not permit adjustments to procedural rules or provide only limited and mechanical guidelines for determining procedural form. Additionally, there is little incentive to adopt approaches that proved to be functional in similar cases and leverage synergies from repetitive proceedings to accelerate litigation—for instance, through advanced case management techniques or the introduction of pilot procedures. The absence of case management in the non-collaborative approach extends into the appeals stage. In such systems, interim appeals are usually widely available, and appeals frequently lead to remittals, sometimes resulting in an endless loop of successive remittals and appeals. In unstructured proceedings, the notion of finality becomes weak and relative, as *res judicata* no longer guarantees the irrevocability of the final judgment.

Extending this comparison to the determination of facts and law, in a collaborative model, both fact-finding and the application of law are considered a shared responsibility of the court and the parties. While the parties are naturally in a better position to present their factual allegations and support them with adequate evidence, the court cannot remain entirely passive. Although the court will ordinarily refrain from interfering with or replacing the parties' initiative, the possibility of exceptionally allowing the taking of evidence *ex officio* cannot be entirely dismissed. On the contrary, when required in the interest of justice, the court must have the necessary authority to prevent manifestly erroneous or unfair determinations of fact.

As stated in the commentary to the rule of the Obligations WG regarding the parties' obligation to present facts and evidence, in civil litigation, 'the court does not search for facts' and 'instead, facts are submitted by the parties'; however, the parties' 'freedom in that regard cannot be unlimited'.[32] On the one hand, this freedom is limited by the duty to identify and present evidence at an early stage, diligently and comprehensively. On the other hand, it is constrained by the court's power to take certain facts into account *ex officio*. Under the ELI–UNIDROIT Rules, 'the court may consider such facts not specifically addressed by a party but that are necessarily implied by matters of fact put forward by the parties or which are contained within the case file'.[33] The court is also empowered to invite the parties to clarify or supplement their factual allegations,[34] to supplement their offers of evidence, and, in exceptional circumstances, even to take evidence on its own motion.[35] The Obligations WG similarly provided that the court may 'take evidence on its own motion if it deems that, under the circumstances, it is necessary to the proper adjudication of the case'.[36]

In the same fashion, a collaborative model implies that legal determinations are not the exclusive domain of the court. Formulas like *jura novit curia* may suggest that the court should take a proactive role in determining and interpreting the applicable law, but they do not imply that the parties have no role in legal argumentation. Especially when legally represented, the parties share responsibility for presenting and discussing legal arguments and should, in particular, have the right to respond to both the legal arguments put forward by

32 Draft Rules of the Obligations WG, *supra* n 9, pp 16–17.
33 Rule 24(3) MERCP.
34 Rule 24(1) MERCP.
35 Rule 25(3) MERCP.
36 Rule 12 of the Draft Rules (n 9).

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the opposing party and the legal reasoning of the court. When proposing the rule that parties must present their legal arguments in reasonable detail, particularly when represented by a lawyer (Rule 17(1)), the Obligations WG noted that '[i]n most European systems of civil procedure, the parties have both the right and obligation to present their legal arguments' and that 'it is generally not sufficient to limit the parties' submissions merely to the bare presentation of facts on the expectation that the court will simply and passively identify the right legal provisions and apply them to the present case'.

A similar approach is reflected in Principles 11.3 and 19.1 of the ALI/UNIDROIT Principles, which state that parties have an obligation to present their legal contentions in reasonable detail, ordinarily already in their initial written submissions. The ELI–UNIDROIT Rules, in their final version, support this approach by providing that the parties and their lawyers must assist the court in both determining the facts and identifying the applicable law (Rule 3(d)).[37] On the opposite side of this approach, non-collaborative practices are rooted in a strictly adversarial or strictly inquisitorial paradigm for determining facts and law. These systems assume that facts, evidence, and legal determinations fall exclusively within either the domain of the parties or the domain of the court, enforcing a rigid division of labour with little room for collaboration. In other words, regardless of whether this approach leads to just outcomes, the court is stripped of any authority over the determination of facts and identification of evidence. Likewise, irrespective of whether the parties have access to the most qualified and competent lawyers, they have no formal obligation to plead the law.

Moreover, non-collaborative practices also exclude cooperation between the parties and the court regarding the timing and sequence of factual pleadings and evidentiary proposals. This results in a broad allowance for the belated introduction of new submissions and evidence, permitting new facts to be introduced even at the main hearing—or in some cases, at the appeal stage. The absence of an obligation to cooperate extends to the presentation of evidence, where parties are generally not required to disclose evidence adverse to their case, whether during pre-trial proceedings or in the preparation stages of litigation. Contrary to the principle that all participants should contribute to the full and accurate establishment of facts, the conventional stance in a non-collaborative approach is that no party is obligated to present evidence that could work against its case or interests (*nemo contra se edere debetur*).

On the other hand, in a non-collaborative system, the court has no obligation to collaborate or interact with the parties regarding its interpretation of applicable legal norms and their relevance to the dispute. In the extreme case, the court functions as an *oraculum*—an oracle that pronounces the law as a largely unpredictable prophecy only at the very end of the legal process, irrespective of any legal pleadings or expectations of the parties. Moreover, any form of communication that might help prevent a 'surprise judgment' (*Überraschungsurteil*) is entirely foreign to a non-collaborative model. Finally, while a collaborative model requires efforts to engage in communication and attempts to reduce the number of disputed issues even before litigation begins, the non-collaborative model traditionally disregards any 'alternatives' to litigation, adhering to the rule: litigate first, negotiate later. Even at a later stage, efforts towards early peaceful dispute resolution by a consensual solution—settlement—are often perceived as a waste of time and resources.

Whereas the collaborative model views litigation as the means of last resort (*ultimum remedium*) in securing a just resolution of disputes, proponents of the non-collaborative paradigm consider formal court proceedings to be the primary—and in most cases, the only—method of access to justice. At the same time, the non-collaborative approach

[37] However, in the Rule 26(1) MERCP, this is considerably softened, because the rule merely asserts that the parties 'may' present their legal arguments. This departure from the original proposal of the Obligations WG is probably the most far-reaching deviation from the original concept of joint and shared obligations for determination of all matters relevant for proper adjudication.

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conceives justice as the outcome of a heteronomous process, where a decision is imposed by a third party. Thus, while a collaborative model encourages and promotes mediation and other forms of alternative dispute resolution (ADR), the non-collaborative model remains reluctant to engage with available out-of-court settlement options. It does not embrace discretionary referral to third-party-assisted settlement attempts, though it is less resistant to mandatory mediation (which, in any case, remains ineffective if bad faith participation is left unsanctioned and is instead used as a tactic to gain time or generate additional legal fees).

While a collaborative approach seeks to develop a multi-door courthouse that facilitates win-win solutions, the non-collaborative approach is often more concerned with seeing the other side lose than with securing its own victory. The collaborative and non-collaborative models described above are, in reality, ideal constructs that do not perfectly align with any single national system of civil procedure. However, comparative civil procedure reveals that many elements of the non-collaborative approach remain very much alive and continue to exert significant influence across Europe and the world. The ELI–UNIDROIT project on model rules for Europe should, above all, pursue meaningful convergence. It is the convergence that relies not on the mechanical adoption of isolated provisions from the MERCP but, rather, on a shared understanding of the core objectives and fundamental goals of civil justice. For this reason, clarity regarding key procedural principles, along with their hierarchical and functional ordering, is indispensable. To achieve this, it is essential to adopt as the starting point a constellation of principles—all anchored in the fundamental principle of loyal cooperation.

IV. First fruits of convergence: some examples from Croatia

The ELI–UNIDROIT project, From Transnational Principles to European Rules of Civil Procedure, generated considerable interest in Europe and beyond well before its formal completion. The leadership of UNIDROIT—a prominent global organization for law unification with extensive experience in developing international legal instruments—and the ELI, an agile new organization with many distinguished members from legal academia and beyond, ensured that the project would receive significant attention. Prominent observers from several European[38] and global[39] intergovernmental organizations and key professional associations and institutes[40] of procedural scholars, lawyers, judges, notaries, and bailiffs closely followed the progress of the project, which spanned seven years—from the first exploratory workshop in Vienna in October 2013 to the formal adoption of the Rules by ELI and UNIDROIT in August and September 2020.

The fact that over 50 civil procedure experts, including academics, judges, and practising lawyers, from 25 different countries and virtually all parts of Europe contributed to drafting the Rules significantly enhanced their impact and visibility. A multitude of project conferences and other events organized under the auspices of the project,[41] along with numerous locally organized events in Europe and beyond, created a chain reaction that stimulated discussion of the draft rules even before their formal approval. In this section,

[38] The observers from European organizations included European Commission, Court of Justice of the EU (CJEU), European Court of Human Rights (ECtHR), Juri Committee of the European Parliament, and the European Network of Councils for the Judiciary.

[39] Hague Conference on Private International Law.

[40] The American Law Institute, *Asociación Americana de Derecho Internacional Privado*, the Association for International Arbitration, the Council of Bars and Law Societies of Europe, the Council of the Notariats of the European Union, the International Union of Judicial Officers, the International Bar Association (IBA), the IBA Arbitration Committee, the IBA Litigation Committee, the International Association of Lawyers, the International Association of Procedural Law, the International Association of Young Lawyers, and Max Planck Institute Luxembourg.

[41] See <https://www.unidroit.org/instruments/civil-procedure/eli-unidroit-rules/eli-unidroit-european-rules/> accessed 17 April 2025.

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several examples demonstrating that the ELI–Unidroit Rules have played an important role in procedural reforms in Croatia will be highlighted, primarily through the adoption of procedural principles outlined therein—most notably, the fundamental principle of loyal procedural cooperation.

The most significant change in the Croatian Code of Civil Procedure in the past decade was triggered by the adoption of a modern approach to civil litigation, characterized by a broad understanding of the principle of loyal cooperation. An important step in this transformation took place in September 2019 with the adoption of an extensive set of amendments to procedural legislation.[42] The amendments introduced in this reform aligned with emerging trends, particularly in enhancing the public function of the Supreme Court and implementing new pilot procedures aimed at unifying case law. However, the most significant shift in procedural principles was brought about by a very minor textual change. A substantial step forward was achieved with the insertion of just a few words in Article 10 of the Code of Civil Procedure (CCP).

The original text of Article 10 of the CCP pertained to provisions designed to suppress procedural abuse. In legal doctrine, this was linked to the procedural 'principle' of 'conscientious use of procedural powers' (*načelo savjesnog korištenja procesnih ovlaštenja*). Even before the ELI–Unidroit project, it was associated with the concept of loyal cooperation, but the key legal provision in Article 10(1) of the CCP was drafted unilaterally, imposing obligations only on the court to suppress abuse of process. The original text stated: '**Art. 10(1)** The court is obligated to conduct the proceedings without delay, within a reasonable time, and with the least possible costs, while preventing any abuse of rights in the proceedings.' With the 2019 amendments, this provision, which previously only addressed the negative aspect—that is, the obligation to refrain from abuse (and the court's key duty to enforce this prohibition)—was revised to explicitly include the parties and emphasize their positive procedural obligation to actively contribute to the goals of litigation. In its amended version, Article 10(1) of the CCP now states: '**Art. 10(1)** The court, *the parties, and other participants* must strive to conduct the proceedings without delay, within a reasonable time, and with the least possible costs. The court is obligated to prevent any abuse of rights in the proceedings.'

In this way, the principle of loyal cooperation is clearly embraced, establishing a joint and shared obligation for all participants in civil procedure—most notably for both the court and the parties—to contribute to a fair, efficient, and reasonably speedy resolution of the proceedings. This formulation is now aligned with both Rule 2 of the ELI–Unidroit Rules and Principle 11.2 of the ALI/Unidroit Transnational Principles, demonstrating a high level of convergence with the fundamental ideological foundations of both model instruments. In the 2019 amendments, the change in the wording of this fundamental procedural principle was accompanied by other modifications aligned with the obligation of loyal cooperation. One significant step forward was the promotion of peaceful dispute resolution, achieved by granting judges broader powers to sanction non-cooperative behaviour by imposing cost sanctions.[43]

Another major advancement in reinforcing the pre-procedural duty to attempt consensual dispute resolution came in 2023 with the adoption of the new Act on Amicable Dispute Resolution,[44] which replaced the previous Mediation Act. Articles 9 and 10 of this law strengthen the parties' obligation to attempt settlement before initiating litigation or other contentious proceedings and empower the court to refer the parties to mediation if it

[42] See CCP Amendments, Off. Gaz. (*Narodne novine*) 70/2019 of 24 July 2019.

[43] Final proposal of the 2019 CCP Amendments, PZ 620, IX-1463/2019, p 35 (see amended text of Art. 186.d CCP).

[44] *Zakon o mirnom rješavanju sporova* (ADR Act), Off. Gaz. (*Narodne novine*) 67/2023, in force from 29 June 2023).

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finds that they have not adequately fulfilled this obligation. The formulation of the general pre-procedural obligation to co-operate in efforts to reach a settlement of disputes has, admittedly, been obfuscated by the re-drafting of the final legislative proposal, which narrowed the obligation to damage compensation claims. This limitation has been criticized in legal doctrine.[45] As work on new amendments to the ADR Act is underway, it will soon become clear whether convergence with the new approach to civil procedure—and a genuine understanding of the principle of loyal cooperation—will continue or whether this development will be halted or reversed.

In the meantime, it is worth noting that other changes in Croatian civil procedural legislation have also benefited from the ELI–UNIDROIT model legislation. As part of another significant partial reform of procedural law, the 2022 CCP Amendments[46] introduced a new provision on the use of illegally obtained evidence. Previously, Croatian civil procedural law contained no explicit rules regarding the treatment of illegally obtained evidence, although the Constitution imposed a general ban on their use. Following an initiative from the Croatian Bar to clarify this issue, the matter was placed on the agenda of the drafting committee.

As a result of intensive discussions within the drafting group, the final decision was to adopt the approach expressed in the ELI–UNIDROIT Rules. The governmental proposal for the new Article 220.a of the CCP noted that the 'newly introduced regulation of illegally obtained evidence contains a modern European approach' to the use of such evidence, emphasizing that the key to its application and interpretation lies in the test of proportionality.[47] In its current form, Article 220.a of the CCP reflects the essential content of Rule 90 of the ELI–UNIDROIT Rules: it generally prohibits the use of illegally obtained evidence but exceptionally allows it based on an assessment of whether the necessity to accurately establish the facts of the case outweighs the gravity of the infringement. Once again, considering the close connection between proportionality and the principle of loyal cooperation, it can be argued that a shared understanding of this key procedural principle has provided a solid foundation for convergence with the modern European approach outlined in the ELI–UNIDROIT model legislation.

V. Conclusion

Achieving convergence in a world of increasing divergence is a genuine challenge.[48] However, in the face of global conflicts, Europe should cultivate a renewed commitment to convergence in the field of dispute resolution. While the ultimate goal may be unity, Europe's proverbial strength lies in its plurality. Thus, it is both illusory and undesirable to expect the full uniformization of dispute resolution systems. How, then, can we move toward *e pluribus unum—unity in plurality*? Agreement on common fundamental principles offers a viable path forward. The embrace of cooperation and the overarching obligation of all stakeholders to contribute to a just, accessible, and efficient system of dispute resolution provides a solid foundation—one that is both promising and desirable, not only in the context of civil procedure.

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[45] A Uzelac and J Brozović, 'Zakon o mirnom rješavanju sporova: Korak unaprijed ili još jedna propuštena prilika?', *Ius-Info*, 14 June 2023, <https://www.iusinfo.hr/strucni-clanci/zakon-o-mirnom-rjesavanju-sporova-korak-unaprijed-ili-jos-jedna-propustena-prilika> accessed 17 April 2025.

[46] See CCP Amendments, Off. Gaz. (*Narodne novine*) 80/2022 of 11 July 2022.

[47] Final proposal of the 2022 CCP Amendments, PZE 264, X-827/2022, p 35.

[48] On these challenges from an empirical perspective, Alan Uzelac, 'Harmonised Civil Procedure in a World of Structural Divergences? Lessons Learned from the CEPEJ Evaluations' in XE Kramer and CH van Rhee (eds), *Civil Litigation in a Globalising World* (TMC Asser Press and Springer 2012) pp 175–205. See also Alan Uzelac, 'Wider Challenges—the EU, Europe, and the world' in XE Kramer, S Voet and A Dori (eds), *Handbook of the European Civil Procedure* (De Gruyter 2025, upcoming).

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