



# Role of the judge and the parties in establishment of the facts and the law

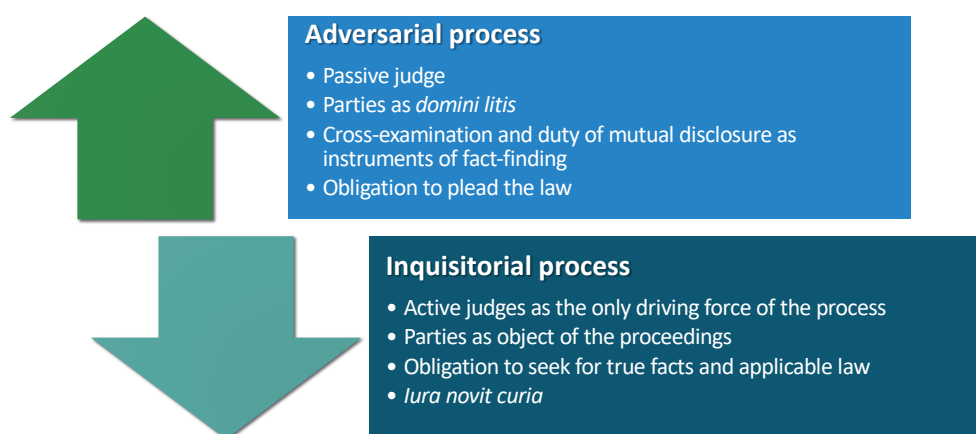
## AJEE Webinar on ELI-UNIDROIT Model Rules (ERCP)

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11 NOVEMBER 2021

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### Principle of loyal cooperation as a way to overcome the opposition of adversarial and inquisitorial proceedings



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Principle of loyal cooperation as a way to overcome the opposition of adversarial and inquisitorial proceedings



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## SECTION 2 – Principles

### A. Co-operation

#### Rule 2. General

Parties, their lawyers and the court must co-operate to promote the fair, efficient and speedy resolution of the dispute.

Fundamental principle: **loyal cooperation**

**Obligation of the parties and lawyers**

#### Rule 3. Role of the parties and their lawyers

Parties and their lawyers must:

- (a) take reasonable and appropriate steps to settle disputes amicably;
- (b) contribute to the proper management of the proceedings;
- (c) **present facts and evidence;**
- (d) **assist the court in the determination of the facts and the applicable law;**
- (e) act in good faith and avoid procedural abuse when dealing with the court and other parties.

Content of the duty:

- Presentation of facts
- Presentation of evidence
- Assistance to court's determination of facts and law

**Obligation of the court (judge)**

#### Rule 4. Role of the Court – the General Case Management Duty

The court is responsible for active and effective case management. The court must ensure that parties enjoy equal treatment. Throughout proceedings it shall **monitor whether parties and their lawyers comply** with their **responsibilities** under these Rules.

Duty to... monitor parties/lawyers (also with respect to their duty to present facts and evidence)

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**Rule 24. Facts**

- (1) The parties must put forward such facts as support their claim or defence. The court may invite the parties to clarify or supplement these facts.
- (2) The court must not consider facts not introduced by the parties.
- (3) 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. It may only do so if they are relevant to a party's claim or defence and the parties have been given a reasonable opportunity to respond.

**Rule 25. Evidence**

- (1) Each party is required to prove all the relevant facts supporting its case. Parties must offer evidence supporting their factual contentions. Substantive law determines the burden of proof.
- (2) Each party has, in principle, a right to access all forms of relevant, non-privileged and reasonably identified evidence. In so far as appropriate, parties and non-parties must contribute to disclosure and production of evidence. It is not a basis of objection to such disclosure by a party that disclosure may favour the opponent or other parties.
- (3) In so far as appropriate the court may invite the parties to supplement their offers of evidence. Exceptionally, it may take evidence on its own motion.

What does parties' obligation to present **facts** to the court mean?

Obligation to put forward facts that support their claim/defense (***onus proferendi***, duty of substantiation)

What is the obligation of the court (judge) as to facts?

- Generally: no obligation to consider facts not introduced by the parties; but,
- Right to consider facts implied or contained in the case file.

What does parties' obligation to present **evidence** to the court mean?

Obligation to prove all relevant facts (***onus probandi***, burden of proof)

- Obligation to **offer** evidence: where from?
- Right of access to information;
- Duty of disclosure and production of evidence (even against the interests of the party)

May the court (judge) take evidence on its own motion?

- Yes, exceptionally, it has right to take evidence ***ex officio***

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**B. Management of Evidence****Rule 92. Management and Presentation of Evidence**

(1) Whenever necessary and appropriate, the court must order the taking of relevant evidence offered by a party. Where the court makes such an order it may make case management orders concerning the sequence and timing of the production of evidence. The court may also make orders, where appropriate, concerning the form in which evidence will be produced. Rules 49(9) and (11), 50, 62, 64(3)-(6) and 107 apply.

(2) The court, while affording the parties an opportunity to respond, may suggest evidence not previously proposed by a party, which it considers may be relevant to an issue in dispute. If a party accepts such a suggestion, the court will order the taking of that evidence so that it may be offered in support of that party's contentions of fact and law.

(3) Exceptionally, the court may, while affording the parties an opportunity to respond, order the taking of evidence not previously proposed by a party.

(4) The court shall provide each party with a fair opportunity and adequate time to respond to evidence presented by another party or taken by the court.

**Rule 93. Admission by a Failure to Challenge Evidence**

The court may take a party's unjustified failure to make a timely response to an opposing party's contention as a sufficient basis for considering that contention to be admitted or accepted. Before doing so the court must inform the party that it is considering drawing such a conclusion concerning the evidence and provide them with an opportunity to respond.

**Rule 94. Early Party Identification of Evidence**

Parties must identify evidence which they intend to produce to support the factual allegations set out in their pleadings (see Rules 54 and 55).

**Rule 95. Notification of Evidence**

(1) Parties must make documentary or tangible evidence available to other parties.

(2) Parties may only propose witness evidence if notice is given to all other parties of the relevant witnesses' identity and the subject-matter of their proposed evidence.

(3) The court may direct that parties keep evidence of which they have been notified confidential.

**Rule 96. Additional Evidence after Amendment**

The court may, while affording the parties an opportunity to respond, permit or invite a party to clarify or amend their factual contentions and to offer additional evidence accordingly.

## In detail:

What is the role of the court and the parties in the presentation of evidence?

**COURT ROLE****Obligation to:**

- take evidence offered by the party (if necessary and appropriate)
- decide on sequence and timing of production of evidence
- determine form in which evidence is produced

**Power to:**

- suggest evidence not proposed (open justice approach)
- order taking of evidence ***ex officio***
- consider that failure to make a timely response is admission of the opposing party's contention
- invite parties to amend or clarify their factual contentions.

**PARTIES' ROLE****Obligation to:**

- identify evidence in an early stage (pleadings)
- make evidence available to the other side

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**Rule 99. Sanctions concerning Evidence**

The court, whether on its own motion or on application by a party, may impose sanctions under Rule 27 when:

- (a) a person **has unjustifiably failed to attend to give** evidence or to answer proper questions, or to produce a document or other item of evidence;
- (b) a person **has otherwise obstructed the fair application of the rules** concerning evidence.

**Rule 27. Sanctions for Non-Compliance with Rules and court Orders**

(1) The court shall disregard factual allegations, modifications of claims and defences, and offers of evidence that are introduced later than permitted by these rules or by court orders, including those concerning amendment. Preclusion does not apply if the court could have taken notice of the party's failure or mistake and itself failed to raise with the parties whether they wished to seek an amendment or relief from sanction.

(2) As a general rule, the court may continue the proceedings and decide on the merits based on the facts and evidence available to it.

(3) The court may draw negative factual inferences, order a party or their lawyer to bear the costs of non-compliance, or in serious cases of non-compliance render an *astreinte*, an order for payment of a fine, administrative sanction as provided by national law, or hold the non-compliant party in contempt.

**SECTION 2 – Access to evidence orders****Rule 100. General Framework**

When making orders under the Rules in this Part the court will give effect to the following principles:

- (a) as a general rule, **each party should have access to all forms of relevant and non-privileged evidence;**
- (b) in response to a party's application, under Rule 101, seeking access to evidence, the court will, if the application is granted, **direct the production of relevant, non-privileged, and sufficiently identified evidence held or controlled by another party or, if necessary, by a non-party, even if such production might be adverse to that person's interests.**

**Rule 110. Non-compliance with Access Orders**

(1) The court may impose any one or more of the following sanctions upon any party or non-party who is subject to, and aware of, an order requiring the giving of access to evidence, destroys or conceals such evidence, or otherwise renders it impossible to carry out the order successfully

- (a) **declaring as admitted** the facts which form the subject-matter of the relevant order for access to sources of evidence;
- (b) **treating the defendant or prospective defendant** as having impliedly conceded the basis or any relevant part of the claim which has been made or which was proposed by the applicant;
- (c) **imposing on the relevant respondent to the order** (and in accordance with the relevant court's established disciplinary powers) an appropriate penalty per day of delay in implementing the order.

## Duties and sanctions

Right of the court to:

- disregard late submissions
- draw negative inferences
- decide on the basis of available evidence
- impose cost sanctions and penalties
- declare facts as admitted
- declare claim as conceded
- impose penalty for delay

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## Determination of law

**Rule 26. Applicable law**

- (1) **The parties may present legal arguments** supporting their claim or defence.
- (2) The court must determine the correct legal basis for its decision. This includes matters determined on the basis of foreign law. It may only do so having provided the parties a **reasonable opportunity to present their arguments on the applicable law.**
- (3) Where parties are free to dispose of their rights, they **may agree on the legal basis of the claim** or on specific issues in the claim. Such an agreement must be explicit and must, even if it was made before commencement of the proceedings, be set out in the pleadings. The agreement binds the court.

**IURA NOVIT CURIA!**

Agreement on applicable law?

**Rule 12. Basis of Court Decisions**

- (1) In reaching any decision in proceedings the **court must consider** all factual, evidential, and **legal issues** advanced by the parties. Court decisions must specifically set out their reasoning concerning substantial issues.
- (2) The court **must not base its decisions on issues** that parties have not had an opportunity to address.

Obligation for the court, option for the parties?

No obligation for the parties?

**Rule 22. Concentration of Legal and Factual Issues**

- (1) **Parties must** bring all the **legal** and factual **elements** in support of, or in objection to, a claim for relief that arise out of the same cause of action in one single proceeding.

Apparent contradiction in Rules 22 and 26?

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<h2>What is new?</h2> <p>Comparison with some traditional assumptions of procedural law (in Eastern Europe)</p>	Frontloading	Need to submit all facts and evidence in the earliest stage „Cards on the table approach” – concentration of the proceedings Common obligation to plan the taking of evidence process
	Transparency	Obligation to engage in open discussion about law, facts and evidence (open justice) Obligation of the court to discuss its views regarding legal basis of the dispute Obligation of the parties to disclose all available evidence (even adverse evidence); no more <i>nemo contra se edere debetur</i>
	More (and less) party autonomy	More: active engagement of parties in discussions on legal issues, possibility to agree on applicable legal rules; towards a „contractualization” of procedure? Less: limitation of ability to abuse their dispositions and manipulate with a view to delay the proceedings
	Judicial case management	Judicial duty to be an active (but not authoritarian) factor in the process Duty to actively manage the proceeding Duty to address legal issues with the parties (and ultimately determine issues of law); no more <i>da mihi factum dabo tibi ius</i> Duty to organize fact-finding process; Right to take evidence <i>ex officio</i>
	Lawyers' special duties	Lawyers have a separate professional obligation to contribute to swift and accurate fact-finding (and presentation of legal arguments)

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## Old and new approach to civil litigation

From an aimless wondering towards a common undertaking

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Thank you! Hvala!

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