

Class

**Unification of Law - Uniform Law
(Rechtsvereinheitlichung)**

Summer term 2016

Time schedule of the class

21.04.2016 Basics of unification of law: notion, purposes, history

28.04.2016 Institutions and methods of unification of law

05.05.2016 Holiday

12.05.2016 Uniform sales law (CISG) I

19.05.2016 Uniform sales law (CISG) II

26.05.2016 Uniform law in other parts of the law of obligations

02.06.2016 Uniform credit security law

09.06.2016 Uniform transport law I + II

16.06.2016 Seminar

23.06.2016 Uniform information technology (IT) law

30.06.2016 lecture postponed

07.07.2016 Approximation of laws in the EU

14.07.2016 Unification of the law of civil procedure

21.07.2016 Unification of insolvency law

Reasons and difficulties for harmonization/unification of law in the field of civil procedure

- **Locus regit actum, but often transnational dimension.** „*Judicial conflict EU-USA*“ as catalyst of harmonization of law
- Procedural law serves the protection of **substantive rights** and interests: derived interest for unification of procedural law
- Relationship with **human rights protection**: “minimum standards” v. “best practices”
- Effective judicial protection as an element of **economic attractiveness** of a state
- **Regional specifics**: Anglo-American approach, EU, others

Legal sources of uniform law in civil procedure

- **International level**

- Cross-border civil procedure: most important Hague Conference on PIL
- *UNCITRAL Model Law on International Commercial Arbitration 1985*
- UNCITRAL Legislative guide on procedural law - missing
- **ALI/Unidroit Principles of Transnational Civil Procedure 2004 + accompanying Rules of Transnational Civil Procedure**

- **EU law**

- Primary EU law
- EU cross-border civil procedure law (Brussels I/Ia Regulation 2012, European Enforcement Order (EEO) Regulation 2004, European Payment Order Regulation 2006 etc.). Particular technique of EEU Regulation („indirect“ unification for recognition)
- Some procedural EU directives without cross-border dimension (e.g. intellectual property: „enforcement directive“)
- Some procedural provisions in substantive EU directives/regulations, e.g. consumer protection
- **From „Principles of European civil procedure“ (1992) towards European Rules of Civil Procedure? (ELI Unidroit project)**

**Regulation (EC) No 805/2004 of the European Parliament and of the Council
of 21 April 2004
creating a European Enforcement Order for uncontested claims**

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Articles 61(c) and the second indent of Article 67(5) thereof, ...

Whereas:

(1) The Community has set itself the objective of maintaining and developing an **area of freedom, security and justice, in which the free movement of persons is ensured**. To this end, the Community is to adopt, inter alia, measures in the field of **judicial cooperation in civil matters** that are necessary for the proper functioning of the internal market.

(4) On 30 November 2000, the Council adopted a programme of measures for implementation of the principle of mutual recognition of decisions in civil and commercial matters. This programme includes in its first stage the abolition of exequatur, that is to say, the creation of a European Enforcement Order for uncontested claims.

Schriften des Augsburg Center for
Global Economic Law and Regulation



Arbeiten zum Internationalen Wirtschaftsrecht
und zur Wirtschaftsregulierung

Daniel Waterstraat

ALI/UNIDROIT Principles and Rules of Transnational Civil Procedure

Ein Instrument zur Lösung des deutsch-
amerikanischen Justizkonflikts bei
grenzüberschreitenden Beweisaufnahmen?



Nomos

„Principles of European Civil Procedure“ (1992)

Soft law, „first try“, not very systematic, very general

Art.1. Conciliation

Art.2 Commencement of the Proceeding

Art.3 Subject Matter of Litigation

Art.4 Discovery

Art.5 Evidence

Art.6 Technology and Proof

Art.7 Discontinuance

Art.8 Default

Art.9 Costs

Art.10 Provisional Remedies

Art.11 Order for Payment (Mahnverfahren)

Art.12 Enforcement of decisions for payment

Art.13 Astreinte

Art.14 General provisions: time-limits etc.

Compare structure of PECP with German Civil Code

PECP

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German Code of Civil Procedure

Book 1 General regulations

Chapter 1 Courts

Title 1 Substantive jurisdiction of the courts; regulations as to value, §§ 1 – 11

Title 2 Venue, §§ 12 – 37

Title 3 Agreement as to the jurisdiction of the courts, § 38 - 40

Title 4 Disqualification and recusal of court personnel, § 41 –

Chapter 2 Parties, §§ 50 –

Title 1 – 2 ...

Title 3 Involvement of third parties in the legal dispute

Title 4 Attorneys of record and counsel

Title 5 Costs of the proceedings

Title 6 Provision of security

Chapter 3 Proceedings

Title 1 Hearing for oral argument, §§ 128 –

Title 2 Procedure for the Service of Records or Documents, §§ 166 –

Title 3 Summonses, hearings, and periods

Title 4 Consequences of failure to take action; instruction on available legal remedies; restoration of the status quo ante

Title 5 Interruption and suspension of the proceedings

Book 2: Procedural rules for proceedings before the courts of first instance (regional courts/Landgerichte – local courts/Amtsgerichte)

Title 1 Proceedings until a judgment is entered, §§ 253 –

Title 2 Judgment, §§ 300 –

Title 3 Default judgment, §§ 330 -

Title 5 General regulations on taking evidence, §§ 355 –

Book 3 Appellate remedies, §§ 511 –

Book 7 Summary proceedings for a payment order

Book 8 Compulsory enforcement

Book 10 Arbitration proceedings, §§ 1025 –

Book 11 Judicial collaboration within the European Union, §§ 1067 - 1109

Examples for PECP provisions

Art.5 Evidence

Any person duly summoned in accordance with the law of a Member State to give evidence before a court of that State shall be under a duty to appear before the court and give evidence.

Art.6 Technology and Proof

Where a written record of any declaration or of any other oral proceedings subsequent to the beginning of the proceedings is required by law, the court may, on the request of a party or of its own motion, order that the record be replaced by a record made by mechanical means provided that all necessary measures are taken to guarantee the authenticity and preservation of the recording.

ALI/Unidroit Principles of Transnational Civil Procedure (PTCP) 2004

Soft law, „standards of adjudication in transnational commercial disputes and suggestions to legislators.

Art.1 Independence, Impartiality, and Qualifications of the Court and Its Judges

Art.2 Jurisdiction Over Parties (*only international!*)

Art.3 Procedural Equality of the Parties = procedural maxim

Art.4 Right to Engage a Lawyer

Art.5 Due Notice and Right to Be Heard

Art.6 Languages

Art.7 Prompt Rendition of Justice

Art.8 Provisional and Protective Measures

Art.9 Structure of the Proceedings

Art.10 Party Initiative and Scope of the Proceeding

Art.11 Obligations of the Parties and Lawyers

Art.12 Multiple Claims and Parties; Intervention

Art.13 Amicus curiae submission

Art.14 Court Responsibility for Direction of the Proceeding

Art.15 Dismissal and Default Judgment

Art.16 Access to Information and Evidence: *discovery!*

Art.17 Sanctions: *contempt of court*

Art.18 Evidentiary Privileges and Immunities

Art.19 Oral and Written Presentations

Art.20 Public Proceedings

Art.21 Burden and Standard of Proof

Art.22 Responsibility for Determinations of Fact and Law

Art.23 Decision and Reasoned Explanation

Art.24 Settlement

Art.25 Costs

Art.26 Immediate Enforceability of Judgments

Art.27 Appeal

Art.28 Lis Pendens and Res Judicata

Art.29 Effective Enforcement

Art.30 Recognition

Art.31 International Judicial Cooperation

Examples for comparison

1. Basic principles of court organization: ALI-UnidroitP Art.1 (independence and qualification of judges)
2. Procedural maxims: ALI-UnidroitP: Art.3 (equal treatment), Art.5 (right to be heard), Art.7 and 15 (prompt rendition of justice), Art.10 (party disposition), Art.11 (good faith) [see also Art.17: contempt of court], Art.21 (evidence: role of parties and court), Art.19 (oral/written procedure), Art.20 (participation of the public)
3. (International) jurisdiction: ALI-UnidroitP: Art.2 – *cf. Art.3 EPCP?*
4. Service: ALI-UnidroitP: Art.5 – *cf. Art.2 EPCP*
5. Evidence: ALI-UnidroitP: Art.16 – 18, 21, 22 (elements of pretrial discovery; burden of proof) – *cf. Art.4 – 6 EPCP*
6. Amicus curiae: ALI-UnidroitP: Art.13
7. Lis pendens and res judicata: Art.28 ALI-UnidroitP – *cf. Art.2.2.2 EPCP (lis pendens)*



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STUDY LXXVIA - TRANSNATIONAL CIVIL PROCEDURE - FORMULATION OF REGIONAL RULES

Last Updated: Friday, 23 May 2014 14:35 | |

STUDY LXXVIA - TRANSNATIONAL CIVIL PROCEDURE - FORMULATION OF REGIONAL RULES

ELI – UNIDROIT Transnational Principles of Civil Procedure

The ALI / UNIDROIT Principles of Transnational Civil Procedure, prepared by a joint American Law Institute / UNIDROIT Study Group and adopted in 2004 by the Governing Council of UNIDROIT, aim at reconciling the differences among various national rules of civil procedure, taking into account the peculiarities of transnational disputes as compared to purely domestic ones. They are accompanied by a set of "Rules of Transnational Civil Procedure", which were not formally adopted by either UNIDROIT or ALI, but constitute "the Reporters' model implementation of the Principles, providing greater detail and illustrating concrete fulfilment of the Principles". The Rules may be considered either for adoption "or for further adaptation in various legal systems," and along with the Principles can be considered as "a model for reform in domestic legislation".

With the aim of resuming work on the development of the "Rules", UNIDROIT decided to focus on regional implementation and on adapting the Principles to the peculiarities of specific legal systems. In this respect, a joint project on the development of European rules of civil procedure was started within the framework of the institutional co-operation with the newly founded European Law Institute (ELI) the main task of which is to initiate, conduct and facilitate research, make recommendations and provide practical guidance in the field of European legal development.

Recent years have seen the emergence of a growing body of rules at European level in the field of procedural law, in the wake of the enlargement of the EU competences towards judicial co-operation. The joint ELI / UNIDROIT project could serve as a useful tool to avoid a fragmentary and haphazard growth of European civil procedural law, while at the same time supporting the promotion of the ALI / UNIDROIT Principles. From the point of view of UNIDROIT it may further represent a first attempt towards the development of other regional projects adapting the ALI / UNIDROIT Principles to the specificities of regional legal cultures, leading the way to the drafting of other regional rules.

The first joint ELI-UNIDROIT Workshop entitled "From Transnational Principles to European Rules of Civil Procedure", in cooperation with the American Law Institute, was held in Vienna on 18 and 19 October 2013. In line with the specific nature of the endeavour, participation of leading academics but also practicing lawyers, judges and members of European institutions was considered to be a key element in the success of the Workshop.

Steering Committee ELI-UNIDROIT Joint Project (Rome, 12 – 13 May 2014)

On 12 – 13 May 2014, at the seat of UNIDROIT in Rome, the Steering Committee of the project on the drafting of Principles of Transnational Civil Procedure for Europe, a joint project with the European Law Institute, held its first meeting.



SEARCH...





2015 ELI Council Elections



Latest News

Friday, 19. June 2015

Vacancy at the ELI Secretariat in Vienna

A full-time Officer position is vacant at the Secretariat of the European Law Institute (ELI) starting in July 2015.

Tuesday, 12. May 2015

Special Interest Groups: join us in scrutinising the European legal landscape!

On 13 February 2015, the ELI Council decided to launch a Call for Interest for ELI members in Special

Friday, 24. April 2015

ELI-UNIDROIT Joint Meeting and JURI Committee Presentation

On 16 April, the European Law Institute (ELI) hosted an ELI-UNIDROIT Joint Meeting



Working groups for European Rules of Civil Procedure

1. Evidence, provisional remedies, service
2. Lis pendens, res judicata, duties of parties and attorneys, access to information etc.
3. **Others:**
 - pleadings
 - case management
 - costs, funding of litigation
 - jurisdiction
 - pre-trial discovery (*could also come under access to information*)
 - sanctions including default judgments
 - effects of judgments (*broader than res judicata*)
 - types of claim
 - means of recourse
 - [enforcement]

Procedural maxims

ALI-UnidroitP (PTCP)

Example: equality of parties

3. Procedural Equality of the Parties

3.1 The court should ensure equal treatment and reasonable opportunity for litigants to assert or defend their rights.

3.2 The right to equal treatment includes avoidance of any kind of illegitimate discrimination, particularly on the basis of nationality or residence. The court should take into account difficulties that might be encountered by a foreign party in participating in litigation.

3.3 A person should not be required to provide security for costs, or security for liability for pursuing provisional measures, solely because the person is not a national or resident of the forum state.

3.4 Whenever possible, venue rules should not impose an unreasonable burden of access to court on a person who is not a habitual resident of the forum.

UNCITRAL Model Act Int. Comm. Arbitration 1985

Article 18. Equal treatment of parties
The parties shall be treated with equality and each party shall be given a full opportunity of presenting his case.

Compare also EU primary and secondary law

Commencement of proceeding/service

ALI-UnidroitP (PTCP) 2004

5. Due Notice and Right to Be Heard

5.1 At the commencement of a proceeding, notice, provided by **means that are reasonably likely to be effective**, should be directed to parties other than the plaintiff. The notice should be accompanied by a copy of the complaint or otherwise include the allegations of the complaint and specification of the relief sought by plaintiff. A party against whom relief is sought should be informed of the procedure for response and the possibility of default judgment for failure to make timely response.

10. Party Initiative and Scope of the Proceeding

10.2 The **time of lodging the complaint** with the court determines compliance with **statutes of limitation, lis pendens**, and other requirements of timeliness.

UNCITRAL MA 1985

Article 21. Commencement of arbitral proceedings

Unless otherwise agreed by the parties, the arbitral proceedings in respect of a particular dispute commence on the date on which a request for that dispute to be referred to arbitration **is received** by the respondent.

EPCP 1992

Art.2 Commencement of the Proceedings

2.11. Formal requirements

2.1.1. Mode of beginning civil proceedings

2.1.1.1. Whatever the mode by which civil proceedings are begun, the initiating document (“writ”) shall be authenticated in such manner as to leave not doubt to its official nature ...

2.1.1.2. Member States shall endeavour to adapt their civil procedure as to provide for the general use of modes of beginning civil proceedings through the court ...

(International) jurisdiction: *Compare also with Brussels Ia Regulation*

ALI-Unidroit Principles of TCP

2. Jurisdiction Over Parties

2.1 Jurisdiction over a party may be exercised:

2.1.1 By consent of the parties to submit the dispute to the tribunal;

2.1.2 When there is a substantial connection between the forum state and the party or the transaction or occurrence in dispute. A substantial connection exists when a significant part of the transaction or occurrence occurred in the forum state, when an individual defendant is a habitual resident of the forum state or a jural entity has received its charter of organization or has its principal place of business therein, or when property to which the dispute relates is located in the forum state.

2.2 Jurisdiction may also be exercised, when no other forum is reasonably available, on the basis of:

2.2.1 Presence or nationality of the defendant in the forum state; or

2.2.2 Presence in the forum state of the defendant's property, whether or not the dispute relates to the property, but the court's authority should be limited to the property or its value.

Rules of Transnational Civil Procedure

4. Jurisdiction Over Parties

4.2 Jurisdiction may be established over another person as follows:

4.2.1 By consent of that person to the jurisdiction of the court; or

4.2.2 Over an individual who is a habitual resident of the forum;

4.2.3. Over a jural entity that has received its charter of organization from the forum state or maintains its principal place of business or administrative headquarters in the state; or

4.2.4. Over a person that has:

4.2.4.1 Provided goods or services in the forum state, or agreed to do so, when the proceeding concerns such goods or services; or

4.2.4.2 Committed tortious conduct in the forum state, or conduct having direct effect in the forum state, when the proceeding concerns such conduct.

4.3 Jurisdiction may be exercised over a person who claims an interest (of ownership, lien, security, or otherwise) in property located in the forum state with respect to that interest.

4.4 Jurisdiction may be exercised, when no other forum is reasonably available, on the basis of:

4.4.1 Presence or nationality of the defendant in the forum state; or

4.4.2 Presence in the forum state of the defendant's property, whether or not the dispute relates to the property, but the court's authority is limited to the property or its value.

Unification of civil procedure – overview

summary: diverse specific uniform provisions (e.g. EU; Hague Conference of PIL) – UNCITRAL ML Int. Commercial Arbitration – PECP 1992 – ALI/Unidroit PTCP 2004 – ELI/Unidroit Project ERCP (ongoing)

Which topics in civil procedure should have priority in approximation of law?

Which are the main problems/challenges?

Is there a suitable national or international model?

Which steps should be followed?