

Procedural Law (ALI/ELI)

"From Transnational Principles to European Model Rules of Civil Procedure" (European Law Institut/UNIDROIT)

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Outline

- A. General remarks on the ELI/UNIDROIT & ALI/UNIDROIT Projects
- B. Significant differences of the two projects
- C. Methodology of the ELI/UNIDROIT project – procedural convergence in Europe?
- D. (Some) Key questions
 - 1. Structure of the proceedings
 - 2. Principles governing civil proceedings
 - 3. Access to information and evidence



Case Study

A. General Remarks on ELI/UNIDROIT & ALI/UNIDROIT Projects

Overarching objective:

Efficient civil proceedings which promote the enforcement of substantive rights based on effective fact-finding while adequately balancing fundamental rights of parties and third-parties

- 2003/04: American Law Institute (ALI) and UNIDROIT adopt „Principles of Transnational Civil Procedure“
 - to bridge the gap between US civil procedure and (European) continental traditions
 - Scope of application: lawsuits involving transnational commercial transactions
 - system of general principles accompanied by detailed rules
 - => Impulse for national legislatures, but primarily of academic interest

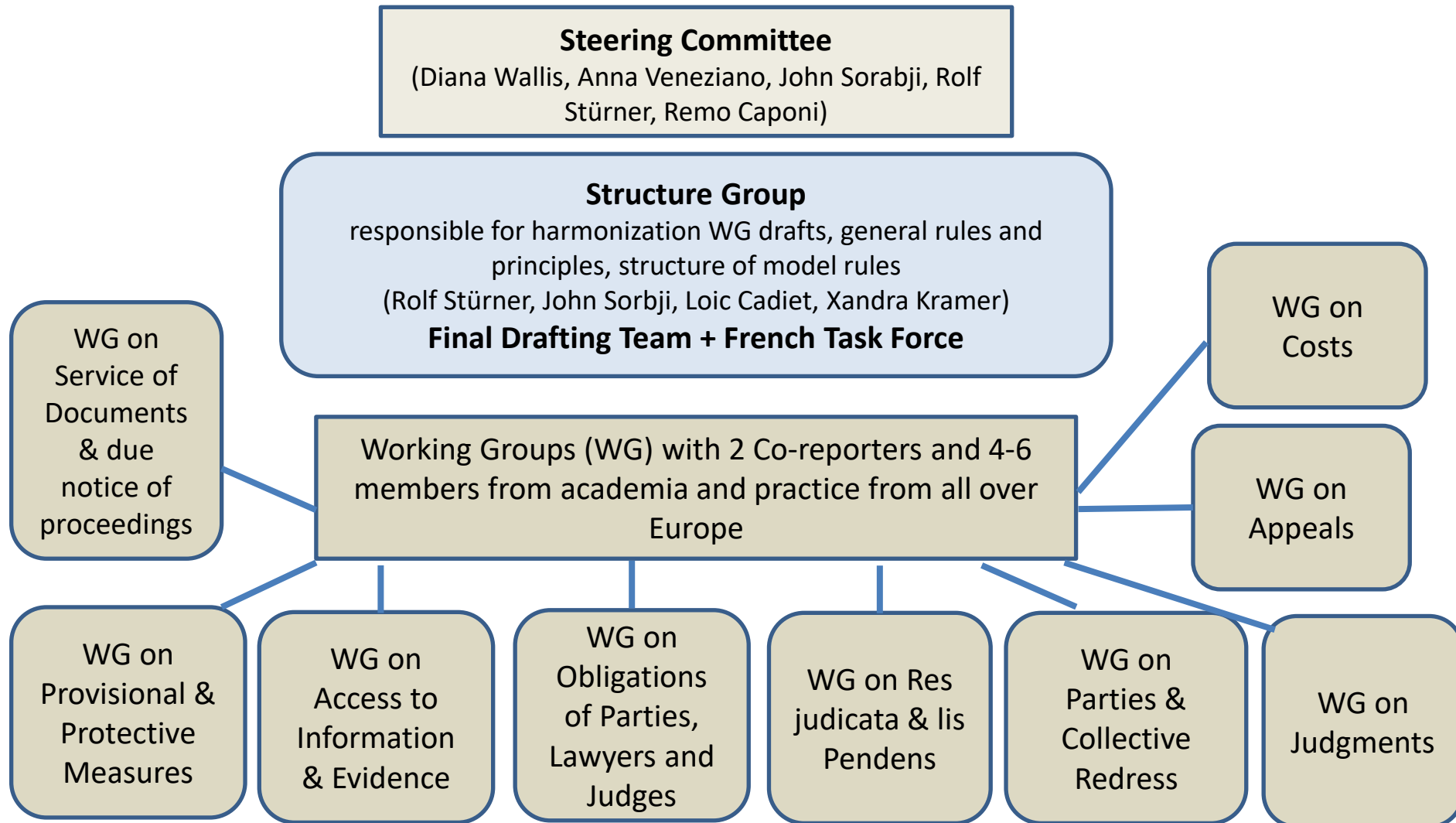


A. General Remarks on ELI/UNIDROIT & ALI/UNIDROIT Projects

- 2011: Foundation of European Law Institute (Vienna)
 - following the lead of the American Law Institute
 - objectives: improvement of quality of European law and
 - guidance and research in the field of European legal development
- 2013: exploratory Workshop ELI/UNIDROIT => adapting „ALI/UNIDROIT Principles“ in the European context?
 - harmonization of European civil procedure?
 - starting point: „Principles“, but more detailed model rules necessary
 - Model Rules for national legislatures, legislative processes at EU level
- 2014-2019: Working Groups & plenary meetings
- 2019/2020: final drafting team & structure group harmonize drafts
- 2020 adoption of ERCP by ELI and UNIDROIT



Organisation of ELI/UNIDROIT Project



Significant differences

- ALI/UNIDROIT: 35 Principles with short comments
 - primarily for transnational commercial cases
- ELI/UNIDROIT: 245 Rules with short comments
 - Scope of application:
 - all civil proceedings (commercial and non-commercial)
 - domestic & cross-border proceedings
 - not: family proceedings, insolvency proceedings, arbitration
 - no rules on jurisdiction and enforcement
 - not a complete Civil Procedure Code
 - not a blueprint for EU legislation
 - Background: increasing dense network on European rules on cross-border proceedings and sometimes special rules for domestic proceedings
 - Major challenges: diversity of procedural systems in Europe (English/Continental/East-European); language problems

Structure of the ALI Principles & the Model Rules

ALI/UNIDROIT Principles 2004

- P 1: Independence, impartiality, qualification of the court and judges
- P 2: Jurisdiction of parties
- P 3: Procedural equality of parties
- P 4: Right to engage a lawyer
- P 5: Due notice and right to be heard
- P 6: Languages
- P 7: Prompt rendition of justice
- P 8: Provision and protective measures
- P 9: Structure of the proceedings
- P 10: Party initiative and scope of proceedings
- P 11: Obligation of the parties and lawyers
- P 12: Multiple claims and parties
- P 13: Amicus curia submission
- P 14: Court responsibility for direction of proceedings
- P 15: Dismissal and default judgment
- P 16: Access to information & evidence
- P 17: Sanctions
- P 18: Evidentiary privileges and immunities
- P 19: Oral and written presentations
- P 20: Public proceedings
- P 21: Burden and standard of proof
- P 22: Responsibility and determination of fact and law
- P 23: Decision and Reasoned explanation
- P 24: Settlement

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ELI//UNIDROIT MODEL RULES 2020

- Preamble
- Part I General Provisions
- Part II Parties
- Part III Case Management
- Part IV Commencement of Proceedings
- Part V Proceedings preparatory to the final hearing
- Part VI Service and due notice of proceedings
- Part VII Access to information and evidence
- Part VIII Judgments, res judicata, lis pendens
- Part IX Means of Review
- Part X Provisional and protective measures
- Part XI Collective Redress
- Part XII Costs

= 245 Rules

Principles v. Rules

ALI Principles APPEAL

27.1. Appellate review should be available on substantially the same terms as other judgments under the law of the forum. Appellate review should be concluded expeditiously

27.2. The scope of appellate review should ordinarily be limited to claims and defenses addressed in the first-instance proceeding.

27.3. The appellate court may in the interest of justice consider new facts and evidence.

ELI/UNIDROIT Model Rules

Part IX Means of review

Rule 153 Right of appeal or to seek recourse

Rule 154 Waiver of right to appeal or to seek recourse

Rule 155 Notice of appeal - general

Rule 156 Time limits for appeals

Rule 157 Contents of notice of and reasons for appeal – first appeal

Rule 158 Contents of the notice and reasons for appeal – second appeal

Rule 159 Response to the notice of appeal – general

Rule 160 Contents of respondent's reply

Rule 161 Derivate appeals

Rule 162 Provisional enforcement

Rule 163 Withdrawal

Rule 164 Representation in an Appeal Court

Section 3 Rules 166-171 First Appeals

Section 4 Rules 172-177 Second Appeals

Section 5 Rules 178-180 Review of procedural error

Section 6 Rules 181-183 Extraordinary Recourse

Principles v. Rules

ALI Principles

Court responsibility for Direction of the Proceeding

14.1. Commencing as early as practicable, the court should actively manage the proceedings, exercising discretion to achieve disposition of the dispute fairly, efficiently, and with reasonable speed. Consideration should be given to the transnational character of the dispute.

14.2. To the extent reasonably practicable, the court should manage the proceeding in consultation with the parties.

14.3. The court should determine the order in which issues are to be resolved and fix a timetable for all stages of the proceeding....

ELI/UNIDROIT Model Rules

Case management powers of the court are mentioned in several parts of the ERCP

Part III Case Management

Rule 47: Careful conduct of litigation by the Parties

Rule 48: Court control of the proceedings

Rule 49: Means of case management

Rule 50: Case management orders

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Part VII Access to Information and Evidence

Rule 92: Management and presentation of evidence

Rules 100-110 Access to evidence orders

Part XI Collective Proceedings

Rule 218: Case management powers

Rule 219: Advertisements

Rule 220: Communication –Secure Electronic Platform

C. Methodology of the ELI/UNIDROIT project – procedural convergence in Europe?

- > 40 academics & practitioners from 25 countries
- great diversity of represented legal traditions => no uniform methodology
- assessment of existing European rules
- common European fundamental procedural rights
- importance of comparative approaches in Working Groups
 - => identification of fields with clear tendency of convergence
 - ✓ **Structure of proceedings (main hearing model)**
 - ✓ **Human & constitutional rights (e.g. right to be heard; equality of parties)**
 - ✓ **Means of evidence**
 - ✓ **Parties' duty to cooperate**
 - => areas with still very heterogeneous concepts in national civil procedure
 - **Prioritizing of amicable settlements**
 - **Co-operatin between parties and court**
 - **Proportionality of the use of personal and material resources**
 - **Sanctions against non-complying parties**
- Necessity of new concepts, innovative steps
(e.g. **collective proceedings, electronic communication**)

D. (Some) Key questions

1) Structure of the proceedings

Based on modern English, German, Spanish concepts

„Main hearing model“

Written introductory phase
(pleadings)

Preparatory stage
(clarifying applicable law, factual basis, availability of evidence)

Main hearing:
presentation of evidence,
concluding arguments

2) Principles governing the proceedings

- ✓ Co-operation of parties, lawyers and court (Rules 2, 3)
- ✓ General case management duty of the court (Rule 4)
- ✓ Proportionality (Rules 5-8)
 - Nature, importance, complexity of the case
 - Sanctions for breach of rules must be proportionate
 - Costs
- ✓ Settlement

Rule 9 (1): Parties must co-operate in seeking to resolve their dispute consensually, both before and after proceedings begin.

Access to information & evidence: Case Study

Facts:

Farmer F buys farm equipment from seller S. In one of the machines – produced by a local company P – the engine catches fire during use, F is seriously injured.

F has heard that several other farmers had the same problem with the same type of machine produced by P. He considers to sue P for his damages suffered because he has the suspicion that the machine has a constructional defect.

Applicable law: P is liable for damages if F can prove that there is a constructional defect for which P is responsible .



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Applicable law: P is liable under tort law for damages if F can prove that there is a constructional defect for which P is responsible

Questions for discussion:

F must prove fact to which he normally has no access (P's business sphere).

- 1) How much details must be given in a claim filed by F against P?
- 2) Should P be obliged to provide detailed information on the construction of the machine
 - a) before F files a claim against P?
 - b) at least during proceedings instituted by F?
- 3) P alleges that engineering drawings and documents with respect to the machine in dispute are confidential trade secrets not to be revealed to the court, F or the public. Should the court nevertheless order production of the documents?

Case Study: Solutions available in US & European procedural law

A. US law

- Claim forms must not give details, but only roughly describe the case against P. (,notice pleading')
 - => no pre-action search for information necessary
- all relevant evidence will be available for the claimant during pretrial-discovery (to prepare the trial), most cases settle.
- Protection of trade secrets:
 - Is it really a trade secret worthy of protection? (expert evidence – in camera)
 - If relevant, trade secrets must be revealed subject to confidentiality orders (limited access, in camera hearings even without a party)

B. England

- Pre-action protocols (annex to CPR) require parties to correspond before commencing litigation
- Claimant must provide concise details of claim (,letter of claim'), parties are expected to disclose key documents, expert evidence available
- Once litigation has started:

Rule 31.6 CPR Standard disclosure requires a party to disclose only–

- (a) the documents on which he relies; and
- (b) the documents which –
 - (i) adversely affect his own case;
 - (ii) adversely affect another party's case; or
 - (iii) support another party's case; and
- (c) the documents which he is required to disclose by a relevant practice direction.

- Trade secrets: restricting access to limited number of persons, redacting judicial decisions

Case Study: Solutions available in US & European procedural law

C. Germany

- Strictly substantiated factual pleadings
+ specification of means of evidence
=> standard reduced if facts are within the opponent's sphere, but allegations must be plausible
- no pre-action exchange of information
- During proceedings: very limited access to documents in the possession of the other party or a third party
 - Documents must be described in detail (difficult!)
 - Defendant must have relied on the documents
 - Claimant must have right to disclosure under substantive law (normally not existent in tort cases)

Principle: „a party to litigation is not required to deliver weapons into the hands of its opponent (*nemo contra se edere tenetur*) nor to contribute to an opponent's victory

- Trade secrets: exclusion of public from trial, confidentiality orders, no absolute privilege

D. France

- Substantial facts must be pleaded by both parties

Art. 6 CPC: A l'appui de leurs prétentions, les parties ont la charge d'alléguer les faits propres à les fonder.

- No pre-action exchange of information
- Court may order production of any kind of documents (Art. 10 CPC, mesure d'instructions)
=> parties must co-operate, sanctions available („astreinte“)
- No privilege for trade secrets, restricted access upon court order

Case Study: Solutions available in US & European procedural law

Comparative summary

- no uniform rules on access to information
 - => strong tendency to grant access once claimant has asserted facts in reasonable detail
 - => no fishing expeditions
 - => access to information requires statement of facts to some degree (by contrast to US litigation)
- no general obligation of parties to co-operate in all Member States
 - => strong tendency to establish such an obligation (including settlement negotiations)
- protection of trade secrets basically accepted, but varies in detail

Answers given by ELI/UNIDROIT Model Rules

(1) Party co-operation

several Rules emphasize the general obligation of parties and their lawyers to co-operate (Rules 2, 3, 9)

(2) No pretrial-discovery US-style

- Presentation of facts in pleadings must be in reasonable detail
- Access to information and evidence (Rules 25, 100; 27, 99, 110 [sanctions for non-compliance with court orders]);

Rule 25 (2) [Principle 16.1, 16.2]

(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.**

Rule 53 (2) (3)

- (2) The statement of claim should:
- (a) state the relevant facts on which the claim is based **in reasonable detail as to time, place, participants and events**;
 - (b) describe with sufficient specification the available means of evidence to be offered in support of factual allegations
- (3) If a claimant does not fully comply with the requirements of Rule 53(2), the court must invite the claimant to amend the statement of claim. If a claimant **shows good cause why it is not possible to provide details of relevant facts** or specify the means of evidence in their statement of claim but the statement of claim nevertheless demonstrates that there is **plausible dispute on the merits**, the court should give due regard to the possibility that relevant detailed facts will develop later in the course of the taking of evidence

Answers given by ELI/UNIDROIT Model Rules

(3) Pre-action access to information

Rule 101 Application for Access to Evidence

- (1) Subject to the considerations and procedure contained in these Rules, any claimant or defendant, or any prospective claimant **who intends to commence proceedings**, can apply to the court for an order securing access to relevant and non-privileged evidence held or controlled by other parties or non-parties.
- (2) An application for an order securing access to evidence may include an application for the imposition of measures to protect or preserve evidence, including an application for provisional or protective measures under Part X.

Rule 106. Time of Applications

- (1) Applications for access to evidence may be made **prior to the initiation of proceedings**, in a statement of claim, or in pending proceedings.
- (2) If an order has been made prior to the initiation of proceedings, where appropriate, the successful applicant may be required to initiate proceedings within a specified, reasonable, period of time. If the applicant fails to comply with this requirement the court may set aside the order, direct the return of any evidence supplied to the applicant further to the order, impose an appropriate sanction on the party in default, or make any other appropriate order

Answers given by ELI/UNIDROIT Model Rules

(3) Protection confidential information

Rule 103 Confidential information

(1) The court shall consider whether an application under Rule 101 for access to evidence concerns or includes confidential information, especially in relation to non- parties. In so doing, the court must have regard to all relevant rules concerning the protection of confidential information.

(2) Where necessary, in the light of the circumstances of the case, the court, amongst other things, may make an order for access to evidence containing confidential information adjusted in one or more of the following ways in order to protect the relevant interest in maintaining confidentiality

- (a) redacting relevant sensitive passages in documents;
- (b) conducting hearings in camera
- (c) restricting the persons allowed to gain access to or inspect the proposed evidence;
- (d) instructing experts to produce a summary of the information in an aggregated or otherwise non- confidential form;
- (e) writing a non- confidential version of a judicial decision in which passages containing confidential data are deleted;
- (f) limiting access to certain sources of evidence to the representatives and lawyers of the parties and to experts who are subject to a duty of confidentiality.

Answers given by ELI/UNIDROIT Model Rules

- 1) F must not allege in detail deficiencies of the construction of the machine (Rule 53 [2])
 - good cause why it is not possible to provide details
 - plausible dispute on the merits (by reference to similar cases!)
- 2) He can apply for an access to evidence court order before the beginning of the proceedings:
 - ✓ expert witness
 - ✓ inspection of P's premises
 - ✓ disclosure of all documents relevant for the construction

⇒ if evidence supports his case, he must file action against P within period set by the court
- 3) P can apply for a confidentiality order (Rule 101, 106)

e.g. restricting access to documents and premises to an expert and F's lawyer, impose duty of confidentiality (for sanctions, Rule 104)



Thank your very much for
your attention!

