

# THE TENDENCIES OF GLOBALIZATION AND REGIONALIZATION OF CIVIL PROCEDURAL LAW IN THE COUNTRIES COMPRISING THE COMMUNITY OF INDEPENDENT STATES

**Victor Terekhov**

Master of Law (LL.M)

PhD Student of Vilnius University

Department of Private Law

Olandų gatvė 51/510, LT-01207 Vilnius

Tel. (+370 6) 720 71 67

E-mail: victor@law-faculty.net

*The article deals with the current situation in the field of Civil Procedure approximation in the Community of Independent States (CIS) countries and the perspectives of further regional and worldwide harmonization and unification of this branch there. As the comparative object, the law of the European Union is taken, the Member States of which managed to achieve a certain progress in the field of development of common Civil Procedure.*

*Straipsnyje gvildenama dabartinė civilinio proceso teisės suartėjimo padėtis Nepriklausomų Valstybių Sandraugos (NVS) šalyse ir tolesnės šios šakos regioninės ir bendros pasaulinės derinimo ir vienodinimo perspektyvos tose šalyse. Palyginti naudojama tų Europos Sąjungos šalių teisė, kurios pasiekė tam tikrą bendrojo civilinio proceso plėtros pažangą.*

## Introduction

The aim of the current paper is to explore the tendencies of civil procedure convergence within one particular area – that of Community of Independent States (post-USSR) countries, comprising such states as Russia, Belarus, Ukraine, Kazakhstan and some others. The relevant international instruments concluded by these states, as well as non-binding documents and relevant supranational institutions that are able to influence the globalization/regionalization processes will be studied. We will try to explore whether the processes that take part in the CIS correspond to the requirements of objective reality and whether everything needed to cope with the current trends in civil procedure worldwide is done in the region. In doing so we will turn to the methods of comparative research (choosing the EU as a comparative object due to its large experience in supranational lawmaking), doctrinal study of relevant legal and paralegal provisions and historical inquiry (while trying to show what steps the evolution of CIS law has followed). The research is relevant both for the representatives of CIS and EU nations as it reveals weak and strong sides of current civil procedure approximation programs and proposes solutions of general value. Right now there are quite few researches on the subject (among them those of G. Danilenko, B. Lapin, R. Petrov) and they deal primarily with institution-building and regional integration in general. Yet there are no special works on procedural convergence in CIS, especially taking into account new tendencies in the neighboring organization – the EU (all existing works seem outdated). This implies that the present research is not only topical, but quite original and novel as well.

## 1. Globalization and Regionalization in Procedural Law

Modern world-order is characterized by intensification of economic, political and cultural ties between states, by the growth of their mutual influence and interdependence<sup>1</sup>. National originality ceases to be an absolute value, especially when it comes to the necessity of mutual solution of common problems<sup>2</sup>. As regards legal sphere, states have to seek for the paths to approximate their national legal orders, to adapt them to working with each other, to adopt some general bases<sup>3</sup>.

Such approximation is present on both global plane (*globalization*) and on the level of particular communities that are distinguished by geographical, economic and socio-historical grounds (*regionalization*). Herewith regionalization may be regarded both as a stage of globalization and as a kind of response towards it, drawn by the desire of the representatives of the region to protect mutually accepted values. In academic literature the abovementioned processes are described within the terms “unification”, “harmonization”, “internationalization”, etc. All of them may be grouped within a single concept of “approximation”<sup>4</sup>. It must be added that the given terms may express a conscious policy of the states in the legal field or the changes that take place spontaneously<sup>5</sup>.

For quite long approximation took place mainly within the branches of substantive law, while in the procedural law states were willing to maintain their national historical identity and full freedom of action of the sovereign power<sup>6</sup>. Indeed, procedural law has close ties with state sovereignty as the courts decide cases according to national procedures, while they may under some circumstances apply foreign substantive law<sup>7</sup>. However in recent times Civil Procedure is becoming one of the most important branches of the national legal system and cannot remain isolated from the global trends. The necessity of improvement of judicial systems with regard to their ability to interact effectively with external ones is becoming more and more evident<sup>8</sup>.

Among the preconditions for the approximation of national procedural norms the following are mentioned: (1) the needs of economic cooperation (that must be supplemented by adequate guarantees of legal protection<sup>9</sup>); (2) the interests of private parties that actively pursue their activities within more than one jurisdiction; (3) the necessity to smooth the excessive competition between procedural systems; (4) the desire to increase ‘mutual trust’ (in the absence of which one state would not recognize

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<sup>1</sup> ХЛЕСТОВА, И. О. Актуальные вопросы признания и приведения в исполнение иностранных арбитражных решений в Российской Федерации. *Международный коммерческий арбитраж: современные проблемы и решения*. Москва, 2007, с. 475.

<sup>2</sup> *Современное международное частное право в России и Евросоюзе* (кн. 1). Под ред. М. М. БОГУСЛАВСКОГО, А. Г. ЛИСИЦЫНА-СВЕТЛАНОВА, А. ТРУНКА. Москва, 2013, с. 180.

<sup>3</sup> ДРОБЯЗКО, С. Г. Юридическая природа гармонизации законодательства в процессе его совершенствования. Режим доступа: <[http://elib.bsu.by/bitstream/123456789/33502/1/14\\_Дробязко.pdf](http://elib.bsu.by/bitstream/123456789/33502/1/14_Дробязко.pdf)>.

<sup>4</sup> ТЕРЕХОВ, В. В. Гармонизация гражданского процессуального права в Евразийском регионе: постановка проблемы. *Правотворчество и правоприменение в условиях инновационного развития общества*. Гродно, 2014, с. 453.

<sup>5</sup> DUTILLEUL, C. Harmonisation Internationale du Droit Privé. *Revue Générale de Droit*, 1993, Vol. 24, p. 232–234.

<sup>6</sup> КОВАЛЬКОВА, Е. Ю. К вопросу о сближении и гармонизации законодательств. *Внешнеторговое право*, 2011, № 2, с. 28–29.

<sup>7</sup> VAN RHEE, C. H. Civil Procedure: A European *ius commune*?, *European Review of Private Law*, 2000, Vol. 8(4), p. 598–599.

<sup>8</sup> *СНГ: реформа гражданского процессуального права*: Материалы международной конференции. Под ред. М. М. БОГУСЛАВСКОГО, А. ТРУНКА. Москва, 2002, с. 3.

<sup>9</sup> VAN RHEE, C. H. Harmonisation of Civil Procedure: an Historical and Comparative Perspective. In KRAMER, X. E.; van RHEE, C. H. (eds.) *Civil Litigation in a Globalising World*. The Hague: Springer, 2012, p. 50.

and execute foreign judicial acts<sup>10</sup>) and (5) an inextricable link between substantive and procedural law (the former, as known, is already being gradually harmonized<sup>11</sup>). All these arguments are, undoubtedly, important and essential, however even without them it is clear that the approximation of procedural law exists objectively and it is impossible to reverse it. At the same time it is quite feasible to adapt to the requirements of time and use them for the benefit, to rebuild qualitatively the national Civil Procedure.

## 2. Regional harmonization and unification of civil procedure

It is presently impossible to speak of a large-scale approximation of procedural law on the worldwide level as the differences between states and their legal systems are too strong and mutual contacts are not sufficiently developed to implement so ambitious projects. Quite different is the situation on a regional level where there are firm mutual contacts between states, which are geographically, politically and economically rather close to each other and which need to further improve this closeness<sup>12</sup>. Moreover, their initial predisposition to interaction allows carrying out reforms with the most chances of success<sup>13</sup>.

Traditionally, European Union (EU) is brought as an example of region that achieved the most sufficient progress in bringing together the procedural systems of its Member States<sup>14</sup>. Countries that constitute this entity have moved from international treaty-based cooperation in the field of Civil Procedure to the establishing of an array of supranational legislation with direct effect (Regulations) that touches upon quite serious questions of Transnational Civil Procedure: recognition and enforcement of judgments, service of documents and taking of evidence. Moreover, some Regulations even introduced autonomous supranational procedures, such as the Enforcement Order, order for payment procedure and small-claim procedure, which are carried out in practice by the national courts of the Member States<sup>15</sup>.

At the same time, there is no need to idealize the EU experience. The existing acts are applied only in cross-border cases (when the parties are located in different Member States at the time of filing a suit<sup>16</sup>), and that sufficiently reduces their potential impact and leads to parallel existence of two systems (national and European) with different sets of rules. Another problem is a 'casual' character of all such acts and the absence of a single codified document that contained basic principles, objectives and sources of Civil Procedure and that could have influence on the very basis of national procedural systems<sup>17</sup>. It can be admitted that EU Member States are actually only at the very beginning and the process of further approximation may take many years<sup>18</sup>.

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<sup>10</sup> WELLER, M. The ELI-UNIDROIT Project: From Transnational Principles to European Rules of Civil Procedure – First Exploratory Workshop. Mode of access: <<http://conflictoflaws.net/2013/the-eli-unidroit-project-from-transnational-principles-to-european-rules-of-civil-procedure-1st-exploratory-workshop>>.

<sup>11</sup> GLENN, P. Globalization and Dispute Resolution. *Civil Justice Quarterly*, 2000, Vol. 19, p. 148.

<sup>12</sup> KERAMEUS, K. Procedural Harmonization in Europe. *American Journal of Comparative Law*, 1995, Vol. 43(3), p. 402.

<sup>13</sup> STORME, M. Procedural Law and the Reform of Justice: from Regional to Universal Harmonisation. *Uniform Law Review*, 2001, Vol. 6, p. 767.

<sup>14</sup> GILLES, P. Civil Justice Systems and Civil Procedures in a Changing World: Main Problems, Fundamental Reforms and Perspectives – A European View. *Russian Law Journal*, 2014, Vol. 2(1), p. 52.

<sup>15</sup> MIEDZIŃSKA, I. Judicial Cooperation in Civil Matters in the European Union. *The Interaction of National Legal Systems: Convergence or Divergence?*, Vilnius, 25–26 April 2013, p. 207.

<sup>16</sup> HESS, B. Procedural Harmonisation in a European Context. In KRAMER, X. E.; van RHEE, C. H. (eds.) *Civil Litigation in a Globalising World*. The Hague: Springer, 2012, p. 162.

<sup>17</sup> BOLT, J. Review Essay – Procedural Laws in Europe. Towards Harmonisation (Marcel Storme ed. 2003). *German Law Journal*, 2005, Vol. 6(4), p. 818.

<sup>18</sup> ELMER, M. Brief Considerations on the Harmonisation of Civil Procedure in Europe and Worldwide. *Uniform Law Review*, 2003, Vol. 8, p. 461.

### 3. The current state of approximation of procedural law in the CIS region

The current article addresses the issue of approximation of Civil Procedure in the region that has been up till now out of the interest of scholars dealing with globalization and regionalization of Civil Procedure. That region constitutes the space that was formerly known as the USSR and that now unites countries within the so-called Commonwealth of Independent States (hereinafter – CIS). As was noted above, among the members of this union are such states as Russia, Belarus, Kazakhstan, Ukraine, etc. The Commonwealth is an international organization that pursues the goals of cooperation and resolution of disputes between its members<sup>19</sup>. We have already noted that approximation efforts are especially necessary within one region, where there are sufficient connections between its representatives. It is precisely true about the CIS states that are economically dependent on each other<sup>20</sup>.

In contrast to the EU that is gradually expanding, the CIS reduces the number of its members: thus, in 2009 the Commonwealth was left by Georgia and in 2014 preparation for withdrawal was initiated by Ukraine. Throughout the period of organization's existence no single state joined it. Paying attention to this situation some predict the inevitable dissolution of the CIS in the foreseeable future<sup>21</sup>. It is noted that the Commonwealth has served well and accomplished its historical mission, but subsequent formation of an effective mechanism to govern the relations between states on its basis is hardly possible<sup>22</sup>.

In reality the dissolution of the CIS is not likely to take place. However, it is impossible not to notice that in parallel to CIS on the post-soviet plane there are other integration initiatives: Customs Union (between Russia, Belarus and Kazakhstan), Eurasian Economic Community (EurAsEC), Common Economic Space (the same states). Some of the countries also take part in the Shanghai Cooperation Organization (SCO) – a union with the participation of China. Such diversity of forms of association indicates the lack of common understanding of the format of future cooperation in the region, as well as of its actual borders and a particular composition. A conclusion may be made that integration processes in the post-soviet area have not reached such intensity as in the European Union.

It may be argued that political circles give priority to the Eurasian Economic Community – a union that is being formed on the basis of Customs Union of Russia, Belarus and Kazakhstan and that is going to be transformed subsequently into the Eurasian (Economic) Union. In other words, the process of post-soviet states' integration is following the same steps as the EU in its time; the only difference is in the pace and the number of participants. In the present article we will further use the term 'CIS states' in order to denote the post-soviet nations without any prejudice to the fact that they may actually seek subsequent development within other integration community than the Commonwealth of Independent States.

Despite that the current state of integration of the named states is far behind that of EU Member States, there are essential prerequisites for the effective development of mutual cooperation. Firstly, there is no problem of dualism of legal families in the CIS region as well as of contradiction between adversarial and inquisitorial models of Civil Procedure. All of the states in the region belong to the civil law family and they have had historically a mixed model of procedure (that has grown out of

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<sup>19</sup> Устав СНГ от 22 января 1993 г. (принят в г. Минске). Режим доступа: <<http://www.cis.minsk.by/page.php?id=180>>.

<sup>20</sup> DRAGNEVA, R.; KORT, J. The Legal Regime for Free Trade in the Commonwealth of Independent States. *International and Comparative Law Quarterly*, 2007, Vol. 56(2), p. 233.

<sup>21</sup> *Современное международное частное право в России и Евросоюзе* (кн. 1). Под ред. М. М. БОГУСЛАВСКОГО, А. Г. ЛИСИЦЫНА-СВЕТЛАНОВА, А. ТРУНКА. Москва, 2013, с. 82.

<sup>22</sup> МАЛЬКО, А. В.; ЕЛИСТРАТОВА, В. В. Об использовании правового опыта межгосударственной интеграции при создании Евразийского Экономического Союза. *Евразийский юридический журнал*, 2014, № 2, с. 40–43.

socialist system of judiciary). Secondly, there are no linguistic barriers. While in the EU each of the languages of the Member States has the status of an official one (and there are 24 official languages for 28 states), in the CIS region the role of international means of communication may be easily played by Russian language, which is not just understandable for the citizens of these states, but is mentioned as an ‘official’ in some of their constitutions.

Thirdly (and most importantly), the CIS states have long been parts of a single state (USSR), which meant that they had common legislation and doctrine of law. It seems that the CIS states are not entirely unaware of the concepts of harmonization and unification as the Soviet Union was pursuing quite an effective policy of common legal area building. That was true for the Civil Procedure as well, since on the Union (federal) level there were adopted ‘Fundamentals of Civil Litigation’<sup>23</sup> and the Soviet Republics to a greater or lesser extent (more often – to the greater) transposed their contents into their legislation. In comparison with the EU where the discussion on the possibility of adoption of ‘European Code of Civil Procedure’ raised at the end of 1980s by prof. M. Storme<sup>24</sup> did not lead to the actual enactment even of a model legal act, the situation in the USSR seemed obviously more advantageous.

At the same time it must be observed that Soviet codifications were not an ideal of lawmaking. Firstly, they had a strong ‘socialist spirit’ and included many of the provisions that are not common for modern democratic procedure (e.g. on the status of public attorney (*prokuror*), on the supervisory instance (*nadzor*)<sup>25</sup>). Secondly, the mentioned legislative homogeneity was forcefully imposed ‘from the top’ and the opinions or the needs of particular republics (members of the Federation) were the last things the central government worried about. Thus, there was quite little possibility for the local law-making not copying the pattern proposed by the Union but bringing something original. It was this last fact that caused the start by all of the former republics after the dissolution of the USSR of active reforms in the procedural sphere. The reform makers did not have in mind the necessity to maintain a certain level of similarity with the legislation of other newly established states. Thereby, the new codes of Civil Procedure introduced by Azerbaijan and Georgia had been developed in cooperation with the Council of Europe and the German Society for Technical Cooperation (GTZ) correspondingly, which caused their significant departure from the socialist tradition<sup>26</sup>, while in Russia and Belarus many of the old provisions were taken as a basis for the development of new Codes. At the beginning of 2000-s the adoption of the new procedural Codes by the former soviet states was almost over and consequently the inevitable discrepancies in the mode of legal regulation of certain issues appeared.

At the same time, most of the CIS states show common tendencies of development (which is especially true for Russia, Kazakhstan and Belarus). Here the same (or similar) models of court organization may be found; the sources of Civil Procedure are understood in a similar way, in a similar way the work with evidence is organized. Even the trial procedures are almost identical (including the existence of common small-claims procedures<sup>27</sup>). During the last years judicial cooperation between

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<sup>23</sup> Основы гражданского судопроизводства СССР и союзных республик (утв. ВС СССР 08.12.1961 г.). *Свод законов СССР*, 1990, т. 10, с. 133.

<sup>24</sup> JUENGER, F. Some Comments on European Procedural Harmonization. *American Journal of Comparative Law*, 1997, Vol. 45(4), p. 932.

<sup>25</sup> КОМАРОВ, В. Актуальные проблемы реформы гражданского процессуального и арбитражного процессуального законодательства Украины. *СНГ: реформа гражданского процессуального права*. Москва, 2002, с. 85–86.

<sup>26</sup> Постановление Межпарламентская Ассамблея государств-участников СНГ от 16 июня 2003 г. № 21-6 „О концепции и структуре модельного Кодекса гражданского судопроизводства для государств – участников СНГ“. Режим доступа: <<http://pravo.levonevsky.org/bazaby/mdogov/megd0988.htm>>.

<sup>27</sup> VOET, S.; GIDI, A. Civil Procedure in Cross-cultural Dialogue: Eurasia Context. *Russian Law Journal*, 2014, Vol. 2(1), p. 132, p. 125–135.

the mentioned states and other CIS Members only continues to expand, which cannot but mean the necessity of further improvement of its legal regulation and the elaboration of common standards of justice.

## 4. The modes of existing and potential judicial cooperation within the borders of CIS region

### 4.1. *International treaty-based cooperation*

The most popular way to implement joint initiatives within the CIS as an international organization is still an *international treaty*. Actually the whole organization is based on a number of such treaties as there is no such thing as *supranational legislation* with direct effect there. The fact is that many newly established countries had a fear that the CIS would represent a ‘covert USSR’ and that giving too much power to this organization would result in once again becoming subjected to outside direction and control<sup>28</sup>. In essence, the CIS presents a kind of negotiations platform that allows the republics of former USSR to come to civilized ways of solution of the problems and controversies that arise between them<sup>29</sup>. Despite these brave ideas there is a doubt that the CIS constitutes an organization of economic and legal integration as during the first years of its existence it appeared to be a forum where newly established states resolved the questions of former USSR property division. When that task was complete, many of them decided that their subsequent participation in an integrationist initiative was superfluous. The very structure of the CIS gives possibility to rather protect what is left from the mighty soviet empire than to develop actively and progressively.

Art. 20 CIS Statute directly established that the ‘Member States shall cooperate in the field of law, in particular, by means of multilateral and bilateral treaties on legal aid and facilitate the approximation of national legislations’<sup>30</sup>. The enumerated treaties on legal aid are indeed quite a common form of interstate cooperation, wherein they usually include among their provisions a significant portion of purely procedural norms. Such treaties may be both bilateral and multilateral.

Thus, among the first such acts a bilateral agreement between Russia and Azerbaijan of 22 December 1992 may be mentioned. It had as its objective provision of legal aid in civil, matrimonial and criminal cases (the agreement has 80 articles in total<sup>31</sup>). The concept of ‘legal aid’ given in it is rather broad and includes the implementation of various procedural activities that are provided for by the legislation of requested party, *inter alia*, interrogation of the parties, witnesses and experts, holding examinations, judicial inspections, transfer of movable evidence, service of documents and recognition and enforcement of judgments in civil and commercial cases<sup>32</sup>. In essence, one such agreement may deal with a number of different procedural issues at the same time, while in the EU, for example, such questions are contained in separate Regulations. The Agreements on legal aid include non-procedural issues as well, such as mutual recognition of different powers of attorney, contracts and so on.

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<sup>28</sup> PETROV, R. Regional Integration in the Post-USSR Area: Legal and Institutional Aspects. *Law and Business Review of the Americas*, 2004, Vol. 10(3), p. 632–633.

<sup>29</sup> KHODAKOV, A. The Commonwealth of Independent States as a Legal Phenomenon. *Emory International Law Review*, 1993, Vol. 7(1), p. 31.

<sup>30</sup> Устав СНГ от 22 января 1993 г. (принят в г. Минске). Режим доступа: <<http://www.cis.minsk.by/page.php?id=180>>.

<sup>31</sup> Договор между Российской Федерацией и Азербайджанской Республикой „О правовой помощи и правовых отношениях по гражданским, семейным и уголовным делам“ от 22 декабря 1992 г. Режим доступа: <[http://www.usynovite.ru/documents/international/dogovor\\_ad](http://www.usynovite.ru/documents/international/dogovor_ad)>.

<sup>32</sup> *Ibid.*, art. 3.

At the same time it would be not entirely correct to regard such treaties as an instrument of harmonization or unification of the national law of the Member States. In most cases such documents provide explicit references to the national law of contracting parties and themselves contain only conflict of law rules. Moreover they include provisions on the granting of most-favored nation status to citizens and companies of the contracting parties, which also means application to the relevant situations of the existing national law (without any subsequent changes in it). The treaties do not form any sort of 'alternative' block of procedural norms that would exist in parallel or 'above' the provisions of national legislation. The conclusion is that treaties do not contain any demands to change municipal law; they only fix the agreement of the states to cope with existing differences and treat each other in a respectful manner.

No less interesting is the fact that according to the legal aid agreements the corresponding judicial bodies (courts) must interact through the ministries of justice of their states, while in the EU, for example, the latest Regulations (e.g. on the taking of evidence) provide for the direct transfer of requests between the courts of the Member States<sup>33</sup>.

As for the multilateral treaties, the following may be mentioned within the CIS system: Minsk Convention on the legal assistance and legal relations in civil, matrimonial and criminal cases<sup>34</sup>, Kiev Agreement on the settlement of disputes relating to the performance of economic activity<sup>35</sup> and Moscow Agreement on the mutual enforcement of judgments adopted by commercial courts<sup>36</sup>. The first of the treaties bears a more general character, while the other two are devoted to particular fields of cooperation. The issues covered by the acts include jurisdictional competence, recognition and enforcement of judgments, service of documents and taking of evidence. In terms of judgments' recognition there is a clear misbalance: while judgments of arbitration (commercial) courts benefit from a simplified and liberal regime of cross-border execution, the same is not true of the decisions adopted by the courts of general jurisdiction that still have to overpass the *exequatur* procedure.

Minsk Convention was partly revised in 2002, when Chisinau Convention<sup>37</sup> was adopted. For the participants of Chisinau Convention the Minsk Convention of 1993 ceased to apply. Meanwhile, Russia, for example, has not ratified this act despite signing it. The situation with international treaties in the CIS is thus similar to that once being common for the EU. Firstly, not all of the CIS Members participate in all of the treaty initiatives. Secondly, participation in a treaty does not deprive the state of the right to stipulate various exceptions and objections. Thirdly, the states may delay the ratification and/or implementation of the acts into the national legislation.

In the CIS region the situation is also complicated by the lack of any obligatory treaties so that states are completely independent in their decision whether to take part in this or that agreement or not. While it is good in terms of protecting their sovereign rights, it does little to help bringing together their legal systems. Any legal initiative may be blocked simply by means of ignoring it<sup>38</sup>. There is also

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<sup>33</sup> EU Council Regulation No. 1206/2001 of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters. OJ L 174, 27.06.2001, p. 1–24, art. 2.

<sup>34</sup> Конвенция о правовой помощи и правовых отношениях по гражданским, семейным и уголовным делам. Минск, 22 января 1993 г. Режим доступа: <[http://www.usynovite.ru/documents/international/konvencija\\_minsk](http://www.usynovite.ru/documents/international/konvencija_minsk)>.

<sup>35</sup> Соглашение о порядке разрешения споров, связанных с осуществлением хозяйственной деятельности. Киев, 20 марта 1992 г. Режим доступа: <[http://lawrussia.ru/texts/legal\\_178/doc17a332x894.htm](http://lawrussia.ru/texts/legal_178/doc17a332x894.htm)>.

<sup>36</sup> Соглашение о порядке взаимного исполнения решений арбитражных, хозяйственных и экономических судов на территориях государств участников Содружества. Москва, 6 марта 1998 г. Режим доступа: <[http://search.ligazakon.ua/l\\_doc2.nsf/link1/MU98114.html](http://search.ligazakon.ua/l_doc2.nsf/link1/MU98114.html)>.

<sup>37</sup> Конвенция о правовой помощи и правовых отношениях по гражданским, семейным и уголовным делам. Кишинев, 7 октября 2002 г. Режим доступа: <[http://www.usynovite.ru/documents/international/konvencija\\_kish](http://www.usynovite.ru/documents/international/konvencija_kish)>.

<sup>38</sup> DRAGNEVA, R.; KORT, J. The Legal Regime for Free Trade in the Commonwealth of Independent States. *International and Comparative Law Quarterly*, 2007, Vol. 56(2), p. 243.

no treaty that can be called a “constitution” of the Union. Despite it has a Charter, this document is actually very brief and only contains some declarative provisions.

We may conclude that the system that exists in the Western neighbor of the CIS – the European Union – is far more advanced as it is devoid of many of the problems associated with the necessity of international treaty making<sup>39</sup>. Such problems include the necessity to take into account the opinions of all Member States, which makes the conclusion and the amendment of treaty texts quite a difficult process, which also means that many treaties become outdated as time goes by. The states may also stipulate reservations to the treaty texts or opt out of some provisions. The other problem is with the interpretation of treaty texts: unless there is some special body responsible for that, the issue is left exclusively to the states parties, which results in sufficient implementation differences. For that reasons the supranational law of the EU seems to be a more advanced form of procedural convergence and the CIS states shall pay attention to building something similar, rather than multiply the number of concluded treaties. This shall not mean that in adopting supranational law the provisions of some well-known and qualitative international instruments (such as, for example, Hague conventions of civil procedure<sup>40</sup>) should not be taken into account. On the other hand only the most relevant provisions should be taken from there. Hereby, the EU adopted a Regulation on the service of documents (in the presence of the Hague Convention on the issue), aiming at a more decentralized (and quicker) possibilities for the transmission of documents than those the international treaty could offer<sup>41</sup>.

#### **4.2. Model legislation (soft-law)**

Another common model of legal approximation within the CIS is the adoption of model legal acts (codes). These acts bear a sample and advisory character and are addressed to the highest legislative authorities of the Member States. According to some authors, the development of model laws is a way of virtual unification of the legislation of CIS states. They bring as an example the Model Civil Code that is actively used by the Member States. The act is not legally binding in itself, but present an authoritative information source due to the participation in its development of many highly qualified lawyers and academics from different CIS countries. In other words, model acts constitute a means of harmonization based on international best practice and possessing the status of non-binding samples<sup>42</sup>.

Within the CIS the competence to adopt advisory acts in the sphere of common interests is given to the Interparliamentary Assembly<sup>43</sup>. In the area of Civil Procedure the initiative of this organ consisted in an attempt to develop a Model Code of Civil Litigation, however in practice everything resulted only in holding several scientific conferences and drafting of an exemplary structure of the planned act<sup>44</sup>.

It is to note that the authors regard as a great achievement the fact that the mentioned Model Code would presumably include more than 1000 items, that would give possibility to settle all of the

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<sup>39</sup> ЛИТВИНСКИЙ, Д. В. Новый „формат“ Брюссельских правил, регулирующих признание и исполнение судебных решений между государствами ЕС. *Российский ежегодник гражданского и арбитражного процесса*, 2004, № 3, с. 350.

<sup>40</sup> See e.g. Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters, 8 *I.L.M.* 37, 1969.

<sup>41</sup> VEBRAITĖ, V. *Introduction to European Civil Procedure*. Vilnius, 2014, p. 35.

<sup>42</sup> ZVEREV, A. Afterword: EBRD Support for CIS Model Laws. *Review of Central and East European Law*, 2011, Vol. 36, с. 501.

<sup>43</sup> DRAGNEVA, R. Is Soft Beautiful – Another Perspective on Law, Institutions, and Integration in the CIS. *Review of Central and East European Law*, 2004, Vol. 29(3), p. 300.

<sup>44</sup> Концептуальный проект структуры модельного кодекса гражданского судопроизводства для стран СНГ. *СНГ: реформа гражданского процессуального права*. Москва, 2002, с. 213–248.

main parts of Civil Procedure – from goals, objectives and principles to the execution of judgments<sup>45</sup>. Definitely, such a thorough regulation could significantly facilitate for the CIS Member States the development of their own procedural norms. But we must not forget that the act is designed as a ‘model’ one, meaning that it has no legal force of its own. The states are free to transpose its contents into their national legislation wholly or in part, or to neglect it entirely. The more legal material there is in a Code – the more potential discrepancies between the states will arise.

Moreover, it is not quite wise to impose on the states a particular vision of the model (type) of Civil Procedure. We may agree that such questions as the principles of the branch, its glossary (common meanings of legal terms used), the questions of international jurisdiction, basic questions concerning evidence and representation (especially in the context of the standards for the provision of legal aid), applications to the courts (their approximate structure), service of documents and the contents of the protocols might be included within the Code<sup>46</sup>.

At the same time, questions on the structure of the judiciary seem superfluous as well as the proposal to prescribe in detail the ‘special part’ of Civil Procedure (including, inter alia, the cases of special proceedings that do not even have a ‘private’ nature). It all clearly contradicts a thesis expressed in Western legal doctrine, according to which harmonization and unification of Civil Procedure shall not touch upon the matters of court structure and competence<sup>47</sup>. Moreover it is wise to presume that the approximation is virtually not necessary in the areas, where the existing differences in legal regulation do not cause any problems in practice<sup>48</sup>.

The most important problem of model legislation is the impossibility to control its implementation by the states. Difficulties may arise as well with the interpretation of its provisions, as it is unclear what organ is competent to clarify their meaning. In essence, model acts may be used only as ‘samples’ for the national legislator. On that occasion, they may be considered only a secondary means of approximation, though quite useful in pursuing any common reforms.

### **4.3. Approximation within the EurAsEC**

As was already stated, EurAsEC constitutes another integration union that exists in the post-soviet area. Unlike the CIS that only seeks facilitation of mutual cooperation between its Members, this organization intends to acquire the most possible approximation of its participants’ economies and thus it consistently working on the establishment of Customs Union and Common Economic Space<sup>49</sup>.

This community has a more developed institutional structure. Thus, it comprises Intergovernmental Council, Integration Committee, and Commission of the Customs Union, each having competence to issue legal acts that have supranational character. However the status of these acts and their interrelation with the norms of national legislation remains unresolved: Constitutions of the Member States speak only about the priority of the International Law, not specifying what is the level of acts adopted by the organs of international organization<sup>50</sup>.

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<sup>45</sup> ЛАПИН, Б. Н. О проблемах реформирования гражданского судопроизводства в странах Содружества Независимых Государств. *Правоведение*, 2000, № 4, с. 144–145.

<sup>46</sup> LAPIN, B. A Draft Model Code of Civil Procedure for the CIS: Principal Conceptual Bases. *Review of Central and East European Law*, 2000, Vol. 26(4), p. 482.

<sup>47</sup> STORME, M. Procedural Law and the Reform of Justice: from Regional to Universal Harmonisation. *Uniform Law Review*, 2001, Vol. 6, p. 776.

<sup>48</sup> KERAMEUS, K. Procedural Harmonization in Europe. *American Journal of Comparative Law*, 1995, Vol. 43(3), p. 402–403.

<sup>49</sup> *Договор об учреждении ЕвразЭС*. Астана, 10 октября 2000 г. Режим доступа: <<http://www.evrazes.com/docs/view/3>>, ст. 2.

<sup>50</sup> ДАНИЛОВ, Н. А. Проблемы гармонизации национальных законодательств государств-участников Евразийского экономического сообщества. *Проблемный анализ и государственно-управленческое проектирование*, 2011, № 1, с. 116.

The scholars agree that the EurAsEC may adopt the model of the EU for its harmonization initiatives that consists in determining several areas that would be regulated on the supranational level. At the same time, the same scholars believe that such areas need to be directly connected with the goals and objectives of the organization (for the EurAsEC such goals are intensive economic and trade cooperation), thus Civil Procedure remains outside the scope of possible harmonization. At the same time, such a view ignores the thesis according to which approximation of Civil and Procedural law present logical steps on the way to the Common Market<sup>51</sup>, which is precisely the goal that the EurAsEC Member States are seeking to achieve.

#### **4.4. The role of the courts in Civil Procedure harmonization in the CIS region**

One of the main peculiarities of the European Union as a supranational legal order is the existence within its institutional structure of its own judicial body – the Court of Justice. This organ is designed to promote the values of the EU by contributing actively to the advancement of European integration and the gradual harmonization of national law of the Member States<sup>52</sup>. Overall, the Court is quite an active player and very often takes the initiative to formulate these or those principles that are not directly listed in the texts of foundation treaties<sup>53</sup>.

If we address the situation in the post-soviet region we may find that both the CIS and the EurAsEC have their own judicial organs. Thus, within the CIS there is Economic Court, the aim of which is to ensure uniform application of the agreements adopted in the Commonwealth and various obligations and contracts based upon them<sup>54</sup>. The Court resolves disputes that arise in the context of performing of obligations of economic nature, it may interpret the provisions of the agreements and other acts of the Commonwealth in such matters and decide other cases that are explicitly assigned to it by the Member States<sup>55</sup>. As we can see, the competence of the Court is quite limited and it does not have the possibility to become as authoritative as the European Court of Justice. In fact it is mainly busy with the cases arising from interstate disputes concerning the interpretation of particular provisions of the agreements. Unlike the ECJ, this Court is not given the competence to give preliminary rulings that in the EU helped even the private parties to indirectly question the validity of some acts of secondary law. It is no surprise, since the CIS structure does not know the concept of ‘secondary law’ and the treaties that the Court interprets are part of international law where there is no room for private individuals.

The efficiency of the Economic Court is further undermined by the status of its decisions, which are not legally binding (Member States execute them voluntarily)<sup>56</sup>. Another problem is that not all of the CIS Member States participate in the Agreement on the status of the Economic Court, which binds only several of the post-soviet republics (this issue directly flows from the problem of the optionality of treaty-participation, discussed in the previous section).

There are reasoned proposals to broaden the competence of the Court so that it could hear not only economic cases, but also those connected with the validity of legal acts of the CIS, territorial disputes,

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<sup>51</sup> COLLINS, H. European Private Law and the Cultural Identity of States. *European Review of Private Law*, 1995, Vol. 3, p. 353.

<sup>52</sup> БЕЗБАХ, В. В.; БЕЛИКОВА, К. М. Европейский Суд Правосудия: общая характеристика и значение принципов, закрепляемых им в области правового регулирования отношений в сфере гражданского и торгового оборота. *Адвокат*, 2012, № 2, с. 71–72.

<sup>53</sup> *Judicial Activism at the European Court of Justice*. Eds. M. DAWSON, B. de WITTE and E. MUIR. Cheltenham, 2013, p. 9–10.

<sup>54</sup> МАЛАШКО, А. П. К вопросу о компетенции Экономического Суда СНГ в условиях реализации положений Договора о зоне свободной торговли от 18 октября 2011 г. *Евразийский юридический журнал*, 2014, № 2, с. 37.

<sup>55</sup> *Устав СНГ* от 22 января 1993 г., ст. 32.

<sup>56</sup> PETROV, R. *Op. cit.*, p. 635.

human rights matters and also disputes between CIS and its staff as well as cases involving purely private individuals<sup>57</sup>. The Court itself may be reorganized into the 'Court of Justice of CIS'. These proposals are unlikely to be implemented paying attention to the fact that further integration is realized through other mechanisms and not the CIS.

Likewise, the Court of EurAsEC has a wider competence. Within the Community it resolves the question of interpretation of foundation instruments as well as legislation of EurAsEC and it also considers interstate disputes of economic character. What is more important – it can decide cases on the application of business entities within the area of Customs Union that are connected with the challenge of Commission's decisions or actions. This competence to a certain extent brings the Court close to the ECJ, however some significant differences remain: most of the cases in EurAsEC Court are concerned with the challenging of the tariffs and duties, established by the Commission, being thus matters of Tax Law. With the inevitable expansion of integration and transformation of the Customs Union into the Eurasian Economic Union it would be quite wise to provide the Court of this entity with the competence to decide cases on the application by private individuals, including the possibility to invoke the invalidity of supranational organs' decisions due to their contradiction to the founding treaties and violation of the rights of the applicant. Finally, the strengthening of the role of judicial law making could help to overcome potential gaps in the legal regulation of interstate cooperation.

#### ***4.5. Possibility of CIS joining the worldwide processes of procedural approximation***

In his article on the unification and harmonization of Private International Law in Latin American countries Alejandro Garro asserts that their interests would be more satisfied in case they participated in the integration processes taking place on the global and not only on the regional level<sup>58</sup>. The increase of regionalist tendencies is thus seen as a sort of isolationism. From our point of view, successful regional integration does not mean (and shall not mean!) the closure of participating states from the world outside. Moreover, it would be efficient only in case it is based on the principles and norms of international law and also – on the experience of other regions that have already undergone corresponding stages of approximation. As for the CIS region, it has, like Latin America, a common political, economic and social basis that is different from that in the countries of Western Europe<sup>59</sup>.

We believe that the process of approximation should consist of two steps: at the beginning the CIS states shall come to an agreement on the system of common supranational Civil Procedure and build up this system, trying to achieve not only declaratory acts, but the effective implementation of that body of law within national legal systems. Then, this region may enter into the dialogue with the EU (and/or other regional players), wherein there are regional organizations of integration that should act as contracting parties, otherwise a danger remains that instead of one most perfect mode of legal regulation we would get several imperfect ones; in each of them states would seek their own benefit and would not understand the vantage of long-term cooperation in the mutual interest of all of the participants of the Union. The similar position was expressed by French author Collart Dutilleul, who considered regional legislative approximation as a first stage (*première étape*), while second stage (*seconde étape*) was associated by him with international (global) harmonization and unification<sup>60</sup>.

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<sup>57</sup> DANILENKO, G. The Economic Court of the Commonwealth of Independent States. *New York University Journal of International Law and Politics*, 1998–1999, Vol. 31, p. 914–915.

<sup>58</sup> GARRO, A. Unification and Harmonization of Private Law in Latin America. *American Journal of Comparative Law*, 1992, Vol. 40(3), p. 589.

<sup>59</sup> *Ibid.*, p. 597.

<sup>60</sup> DUTILLEUL, C. *Op. cit.*, p. 233.

## Conclusion

We may eventually conclude that the current efforts taken in the CIS region in the field of civil procedure approximation are yet insufficient. The desire of the states to cooperate in judicial sphere is clearly seen from the number of international instruments that are adopted by now; and the need for such cooperation is evident from growing interrelation and interdependence of the regional players. Still the recent reforms within the states take them rather apart than together, and the absence of a common plan for Civil Procedure approximation means we can hardly expect swift harmonization. The possible solution for the region could be found in advancing supranational lawmaking, including the potential adoption of Law on Civil Procedure. Such an act may summarize all the positive national experience and introduce new progressive norms. It should touch upon national systems and do not only deal with cross-border cases. On that occasion it requires compromise and careful work on its contents in order to suit better the interests of the Member States.

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## CIVILINIO PROCESO TEISĖS GLOBALIZACIJOS IR REGIONALIZACIJOS KRYPTYS NEPRIKLAUSOMŲ VALSTYBIŲ SANDRAUGOS ŠALYSE

**Victor Terekhov**

S u m m a r y

Civilinis procesas ilgą laiką buvo daugiausia nacionalinės teisės šaka, kurią kiekviena valstybė plėtojo savarankiškai. Tačiau šiuolaikinės globalizacijos kryptys skatina valstybes suderinti savo teisėtvarką taip, kad galėtų veiksmingai veikti kartu ir nelikti atskirtos (izoliuotos). Nacionalinė specifika nebėra nustatantysis veiksnys, kur kas svarbiau tai, kiek nacionalinių šalių teisės sistemos yra suderinamos ir gebančios dirbti drauge. Ypač tai aktualu šalims, kurios palaiko ilgalaikius ir glaudžius ekonominius, politinius ir kultūrinius ryšius. Civiliniam procesui reikia suartėti ne mažiau nei materialinei teisei, nes būtent per teismą asmenys siekia apsaugoti savo teises, įskaitant ir tarpvalstybinius teisinius santykius. Didžiausią pažangą, kuriant bendrąją *viršnacionalinę teisę*, pasiekė ES šalys, tačiau ir čia pastebimi įstatymų apribojimai. Dėl artimiausio ES Rytų kaimyno – NVS regiono pažymėtina, kad čia, nepaisant palankių prielaidų (ideologijos ir teisės doktrinos bendrumo ir kalbos), dėl skirtingų politinių ir ekonominių priešasčių integracijos plėtra itin lėta. Straipsnyje daroma išvada, kad posovietinės erdvės šalims reikėtų atsisakyti reguliavimo, grindžiamo tarptautinėmis sutartimis ir modeliais, ir pereiti prie *viršnacionalinių* įstatymų modelio, juo labiau kad tai padaryti leidžia naujo integracinio susivienijimo – Europos ir Azijos ekonominės bendrijos – struktūra.

*Įteikta 2014 m. spalio 2 d.*

*Priimta publikuoti 2015 m. sausio 28 d.*