



ELI

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**TRANSNATIONAL CIVIL PROCEDURE -
FORMULATION OF REGIONAL RULES
ELI – UNIDROIT Rules of Transnational Civil
Procedure
Steering Committee and Co-Reporters –
Joint Meeting
Rome, 21-22 April 2016**

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English only

WORKING GROUP ON “ACCESS TO INFORMATION AND EVIDENCE”

Reporters: Neil Andrews – Fernando Gascón
Members: Frédérique Ferrand – Laura Ervo – Viktória Harsági – Michael Stürner

**REPORT FOR THE STEERING COMMITTEE MEETING
TO BE HELD IN ROME ON 21 AND 22 APRIL 2016**

1. Working Group Activities

The members of the Working Group on “Access to Information and Evidence” have held three important meetings since the last meeting of the Steering Committee with the Reporters of the Working Groups (Brussels, April 2015):

- a) Meeting in Istanbul (May 2015)
- b) Meeting in Trier (November 2015)
- c) Meeting in Madrid (April 2016)

All meetings were attended by the two Co-Reporters of the Working Group, Neil Andrews and Fernando Gascón, and by all other members of the Group, Frédérique Ferrand, Laura Ervo, Viktória Harsági and Michael Stürner.

Apart from official meetings, members of the Working Group are in permanent contact via e-mail, discussing and exchanging documents and opinions on the drafts and comments. Members of the Working Group have shown great involvement and commitment in the implementation of the Project.

2. Goals achieved

The draft set of rules was initially divided into five Parts. During the last meeting it has been decided to merge former Parts I to III into a single new Part I, with the heading of “General issues of evidence”, divided in three sections (the former pre-existing three parts): the WG has arrived to

the conclusion that it is a better systematic approach. As a consequence, former Part IV and V will be from now on Parts II and III.

The general structure of the draft set of rules is currently looking as follows

PART I: GENERAL ISSUES OF EVIDENCE

SECTION I: FUNDAMENTAL ELEMENTS OF EVIDENCE

SECTION II: PARTIES' RESPONSIBILITIES AND RIGHTS CONCERNING EVIDENCE AND ACCESS TO INFORMATION

SECTION III: THE COURT'S POWERS AND RESPONSIBILITIES CONCERNING EVIDENCE

PART II: ACCESS TO EVIDENCE

PART III: TYPES OF EVIDENCE

SECTION I: COMMON PROVISIONS

SECTION II: DOCUMENTS

SECTION III: TESTIMONY

SECTION IV: PARTIES' STATEMENTS

SECTION V: EXPERTISE

SECTION VI: INSPECTION

Part I of the set of draft rules (rules 1 to 19) has been carefully studied and reviewed, although fine-tuning of the rules and of the comments is always convenient and will be kept.

Part II has been recently considered as a whole by the Working Group (rules 20 to 31). The main goal of the Working Group at this point is tackling the most relevant issue of getting hold of evidence held or controlled by another party or by a non-party, prior to litigation or after the commencement of proceedings. The draft rules intend, in this point, to present European means to put into practice what the ALI/UNIDROIT Principle 16 had already suggested as the best regulation for the problem in a transnational context.

Discussions had first the focus in determining what should be the scope of this access: not really evidence, but rather "sources" of evidence, i.e., documents (in a wide sense), objects and information which the requesting party could later formally adduce as evidence.

The WG is concerned with preventing any possible abuse of the mechanisms for access to evidence, which could allow them to serve as a legal basis for so-called "fishing expeditions". Therefore, the main discussions referred to the requirements and other controls (including proportionality) necessary to grant a judicial order for access to evidence.

The problem of confidentiality has a major relevance in this context: therefore, draft rules on respect to confidentiality and on sanctions for breach of confidentiality have also been considered.

The analysis has been completed with a discussion on more technical procedural issues, such as the procedure to apply for an order to access evidence, implementation and enforcement of such an order and sanctions and responses to non-compliance.

Part III of the draft set of rules will deal with “Types of evidence”. This is the part that is currently being tackled; therefore no provisional results can be presented yet. The Working Group has decided to divide this part of the draft into six sections.

Section I will deal with “Common provisions”, including the way to elicit evidence and the issue of new technologies and the impact of the use thereof on the types of evidence.

Section II will deal with documents.

Section III will deal with testimony.

Section IV will deal with parties’ statements.

Section V will deal with expertise.

Section VI will deal with inspection.

The Working Group is still discussing on the most suitable systematic location of the issue of privileges: the core of it should belong to Section I, although some of the generally acknowledged heads of privilege should be mentioned under the relevant type of affected evidence.

The WG also decided that no detailed regulation was convenient for each type of evidence in the context of the ELI/UNIDROIT project. The draft rules shall focus on the main features and on the most relevant problems, but details should be left to national legislation.

The WG has been able to discuss with care the main terms of the draft rules on documents and testimony.

Comments to the rules are still in a state of preparation. The first version of those concerning Parts I and II are almost finished and pending of review.

3. Next steps

The next meeting of the working group has been scheduled for 20 and 21 October in Budapest (organized and hosted by Viktória Harsági).

The main goal of the next meeting will be to finish discussion on Part III and to proceed to a general review of the whole draft set of rules and comments

Linguistic methodology: the draft rules will be translated into French, German and Spanish, to check that the approach has been correct.