

**TRANSNATIONAL CIVIL PROCEDURE -  
FORMULATION OF REGIONAL RULES  
ELI – UNIDROIT Rules of Transnational Civil  
Procedure  
Steering Committee and Working Groups  
Joint Meeting  
Rome, 27-28 November 2014**

UNIDROIT/ELI 2014  
Study LXXVIA – Doc. 5  
Original : English

## **REPORT**

(prepared by the UNIDROIT Secretariat)

### **Item 1 on the Draft Agenda: Welcome by the Deputy Secretary-General of UNIDROIT and the President of ELI**

1. Participants were welcomed by *Ms Anna Veneziano*, Deputy Secretary-General of UNIDROIT, on behalf of the Secretary-General of UNIDROIT Mr. José Angelo Estrella-Faria, and *Ms Diana Wallis*, President of ELI. The President of ELI, who acted as Chair of the meeting, thanked all participants for attending.<sup>1</sup>

### **Item 2 on the Draft Agenda: Adoption of the Agenda (Study LXXVIA – Misc. 1 and Misc. 2)**

2. The draft Agenda (Study LXXVIA – Misc. 1) was adopted as proposed.<sup>2</sup> No modifications were made to the Order of Business (Study LXXVIA – Misc. 2).

### **Item 3 on the Agenda: Matters arising from May 2014 minutes (document Study LXXVIA - SC I – Doc. 2)**

3. No matters were raised or comments made with respect to the Report on the meeting of the Steering Committee and Reporters of the three first Working Groups that had taken place in May, 2014 (see document Study LXXVIA - SC I – Doc. 2).

### **Item 4 on the Agenda: Reports from the meetings of the Working Groups**

#### ***(a) Working Group on Access to Information and Evidence (Study LXXVIA - Doc. 2)***

4. Two Reports were presented by the Reporters of this Working Group. *Mr Neil Andrews* presented the conclusions reached by the Group (see document Study XXXVIA – Doc. 2), while *Mr Fernando Gascón Inchausti* further illustrated the conclusions in a PowerPoint presentation for ease of reference (reproduced in Study LXXVIA – Doc. 2 Add.).

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<sup>1</sup> See Annex 3 for a List of Participants.

<sup>2</sup> See Annex 1.

5. In his presentation, Mr Andrews observed that though the time-table for the task allotted them was tight, it could be achieved. The Working Group had already met twice, the first in Cambridge in July, the second the evening before the Joint Meeting at UNIDROIT. The Working Group had arrived at the conclusion that the *ALI-UNIDROIT Principles of Transnational Civil Procedure (PTCP)* were a good starting point, indeed Principles 3.1; 5.4, 5.5 and 5.6; 6.3; 7.2; 8; 9, 9.2, 9.3.4, 9.3.6 and 9.4; 11; 13; 14; 16; 17; 18; 19.2, 19.3 and 19.4; 20.1, 20.2 and 20.3; 21; 22; 23.2; 25.1; 27.3; 28; and 31 were all relevant. The members of the Working Group were agreed that it was impossible to draft Rules without there being a structure and had arrived at “The Five Pillar Structure” which included I) the scope of the dispute and its relevance; II. the claimant's and defendant's responsibilities concerning evidence and information III. the powers and responsibilities of the Court for the gathering and assessment of the evidence; IV. equal access to information and to evidence; and V. types and subject-matter of evidence. Consumer matters would be included, but labour and family matters would not. He stressed the enthusiastic spirit of the Working Group and the fact that access to information and evidence was especially important in cross-border relations.

6. In the course of the discussion the omission of labour and family matters was questioned, as the intention at the May meeting of the Steering Committee had been that the Rules should be all-inclusive. Mr Andrews indicated that if the Rules were properly fashioned and identified general leading principles, they should be capable of being imported into any system. The intention had been not to over-reach by including all areas. The need to keep flexible was stressed by some participants, also in consideration of the fact that the needs of the different subject-matters dealt with by the Working Groups might differ. It was better to start with general Rules and not complicate matters by thinking of special procedures.

7. A question raised regarded the third pillar and the role of the Court, especially when the Court *ex officio* gathers information. It was observed that it was a very important and very delicate matter and that the Court acting *sua sponte* was controversial: the Common Law had never been comfortable with it, although Courts in England and Wales were moving away from traditional procedures. It was further observed that judges were often adverse to having to proceed with information gathering, also because it was costly.

8. A question raised concerned the sources of inspiration additional to the PTCP as the starting point for the drafting of European regional Rules. The case law of the Patent Court and the European Court of Justice, and parallel European Union instruments were mentioned. Much comparative study had been done in this field and it was not proposed that it be repeated. It was suggested that EU law was to be considered a source of inspiration, it was clear that the case law of the ECJ had a harmonising effect, and furthermore the EU Regulations took precedence over national law and could not be ignored.

9. The role of the ALI Rules of Transnational Civil Procedure and the relationship between those Rules and the PTCP was also discussed. It was pointed out that the PTCP were very general and that there was no conflict between them and the *acquis communautaire*; the Rules were more detailed and could be used as a source of inspiration.

10. The possibility of there being an overlap between the work of the different Working Groups was aired and discussed. The need for the Working Groups to co-ordinate was stressed. It was necessary to ensure consistency between the parts and the Steering Committee and Reporters of the Working Groups would have an important role to play in this respect. Furthermore, the need to consider what was actually happening in practice was also stressed.

11. It was pointed out that it was important to realise and accept that within the European Union a complex system was in place, comprising supranational regulation as well as domestic law. It should be accepted that there might be some international aspects in local litigation. On the other hand in many instances it was useful to say that a certain matter should be governed by local rules.

**(b) Working Group on Provisional and Protective Measures (Study LXXVIA - Doc. 1)**

12. Each of the two Reporters of the Working Group on Provisional and Protective Measures presented and discussed the results of the work of their Working Group.

13. *Mr Neil Andrews* indicated that the Principles of the PTCP that were most relevant in the context of provisional and protective measures were Principles 8 and 5.8. Also relevant were Principles 1.4, 1.5, 3.1 to 3.4, 4.1, 5.8, 11.1, 11.2, 11.5, 16.1, 16.2, 16.5, 17.1, 17.2, 18.1 to 18.3, and 29 to 31. There were seven main issues: (i) their scope; (ii) which types of Court should deal with this matter; (iii) the juridical nature of the preservation order; (iv) the jurisdictional basis or platform for the award of this type of relief; (v) the reach of the order; (vi) the impact of the order on non-parties; and (vii) the recognition and enforcement of orders by other jurisdictions. He indicated that it was necessary to build on Principle 8 of the PTCP. Time was of the essence, it was however possible to develop issues 1-7 within the contemplated time frame, beginning with pecuniary and non-pecuniary rights. It was necessary to identify important measures that were regularly used. The selection of the measures should be by reference to their function.

14. *Mr Gilles Cuniberti* developed on the introduction by Mr Andrews and indicated that under the functional approach there were six "meta functions" (I. to protect rights vindicated in proceedings on the merits; II. to protect evidence; III. to prepare enforcement; IV. to grant early satisfaction to the creditor; V. to prepare the trial; and VI. to assess the desirability of initiating proceedings). To the first of these must be added five functions (I. to protect pecuniary interests; II. to protect non-pecuniary interests; III. to protect the subject matter of the dispute which both parties were seeking to obtain; IV. to protect the value of rights; and V. to prevent further loss caused by infringement of litigated rights).

15. The question of the enforcement of provisional and protective measures was raised, in particular how it would be possible to freeze an injunction. It was pointed out that in many legal systems it was possible to obtain a freezing order before starting proceedings.

16. The *Observer from the ALI* drew the attention of the meeting to the fact that one most important pre-trial procedure had become problematic in the United States, i.e. to "hold", which was when the plaintiff planned to file a law suit and each side was required to put hold on documents. There was now a duty to preserve electronic information (e-mails in particular). The question was what to do about this highly sensitive information.

17. It was pointed out in the discussion that it was difficult to restrict the scope of the Rules. The decision not to look at provisional orders was surprising. What in France was known as the "*référé probatoire*" (Article 145 Code of Civil Procedure) had several functions, *inter alia* the protection of evidence before a trial on the merits. It was pointed out that it had to be made clear that the Rules were not credit related and did not have the function of speeding up the trial, even if it was admitted that in France one of the functions of the *référé*, among others, was the speeding up of the trial. It was stressed that enforcement should not be forgotten and that summary judgments should be included.

**(c) Working Group on Service of documents (Study LXXVIA - Doc. 3)**

18. Introducing the conclusions of the Working Group on Service of documents, *Ms Eva Storskrubb* illustrated the thinking and conclusions of the Working Group. Starting with the scope of the future Rules on the service of documents, the Group had arrived at the conclusion that all civil proceedings should be included, also, for example, family matters. They had discussed the cases of business-to-business and business-to-consumer and they had considered distinctions between different types of addressees. To begin with arbitration had been left aside, as had extra-judicial documents. The focus had thus far been on the cross-border context and not on the national scenario. Furthermore, the initial focus had been on documents instituting the proceedings. The Group proposed developing model rules with comments and explanations. The Group had prepared a table identifying the issues to be dealt with and had considered whether the PTCP as well as other instruments were a good starting point for an examination of those issues. Issues examined included the translation of documents (which considered the differences between

the PTCP and the EU Service Regulation<sup>3</sup>), the scope of the provisions, safeguards, methods, the project method and the progress plan for the Working Group.

19. A number of questions were raised by the meeting in connection with the Report of the Working Group, including whether the treatment of businesspersons and individuals should be the same or different, the question of the cost of the translation of documents and who has to pay, who was responsible for the service: bailiffs, postal employees, private employees or the Courts.

20. The *Observer from the European Commission* compared the Service Regulation and the PTCP on when a document has to be translated. He observed that there was no reason to impose additional translation requirements. There was no reason for which the Court of origin should not be able to find information on the linguistic knowledge of the defendant. The Hague Service Convention was 50 years old and had gaps, one being when the defendant moved during the litigation, in which case the service became a cross-border service. He further observed that electronic requirements had important cost issues.

21. It was observed that electronic service posed important challenges: it was suggested that it should apply to bankruptcy and other civil service enforcement posting on websites.

22. It was observed that very often it was difficult even to find the domicile of the defendant, and this would be a considerable difficulty if the Courts were responsible for the service of the documents.

23. The Working Group was aware that translation was a most controversial issue. Article 8 of the Service Regulation created problems as there were no criteria to evaluate language skills, it had costs and must be balanced. In consumer cases there must be translation. In the case of service by electronic means, there had to be a way to prove that the defendant had received the documents. The first step concerned the documents instituting the proceedings, enforcement of the judgment came later.

24. The possible overlapping of issues between this Working Group and others was discussed by the meeting, including what information should be provided, whether there should be a “cards on the table” approach, so that the list of evidence was clear already in the summons. It was pointed out that this should be dealt with by a Working Group dealing with pleadings. It was pointed out that a balance between the right to be heard of the defendant and the rights of the plaintiff was very difficult to achieve. It was observed that although the focus was on cross-border service, domestic rules were very important for the effectiveness of the service, that defences against defective service depended on the national systems.

25. It was pointed out that the examination of the “Methods” would cover how the documents should be transmitted. A defining of the threshold of what to do if the defendant had to be searched for could be examined. Hesitations were expressed as to the feasibility of making European Rules in this respect, as that depended on local circumstances.

#### **(d) General discussion**

26. In the course of the general discussion the question of the languages in which the Rules should be prepared was raised. The importance of parallel drafting in a number of other languages in addition to English was stressed, Italian, German and Spanish being specifically referred to. It was observed that work would to the greatest extent possible be conducted in English and French in parallel, as it might prove necessary to modify a formulation in one language if there were problems in the other language. It was suggested that including a French-speaking member among the members of the Working Groups would help solve this problem.

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<sup>3</sup> Regulation (EC) No 1393/2007 of the European Parliament and of the Council on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (service of documents).

27. The special problems of class actions were also referred to, it being suggested that a study might be devoted to them, even if they were not covered by this project.

28. What Working Groups should be created in Stage 3 of the project was also considered. A number of possible subject-areas were suggested, including: pleadings (which however might be part of *service of documents* and *obligations of parties and lawyers*), case management, costs and funding of litigation (possibly including third party funding), pre-trial discovery (which could come under *access to information*), jurisdiction (which could be divided between case management and *obligations of the parties, lawyers and judges* – it was difficult not to consider judges together with parties and lawyers) and sanctions. In connection with sanctions default judgments could also be considered. It was suggested that the effects of the judgments might be considered by preference to *res judicata*. Types of judgment were also suggested as a possible topic, including default and summary judgments. One suggestion was that the types of claim would be more interesting than the types of judgment, as the type of claim often decided what type of judgment would be possible. Enforcement was also considered as a possible topic, but was considered to be very large and complicated: it would be necessary to split the topic into two or three Groups if it were dealt with. Alternatively, means of recourse might be considered instead of enforcement. Appeals were also considered as a possible topic to be dealt with before turning to enforcement.

29. In the discussions on Stage 3 the need to consider the overall structure of the final instrument was stressed, it being observed that it was necessary to focus on how the different parts of the Rules should be assembled.

30. In the end, it was decided that the topics to be dealt with by the two Working Groups next to be set up would be decided at the meeting to be held in April 2015.

#### **Item 5 on the Agenda: Composition of the new working groups: Res Judicata; Obligations of Parties and Lawyers**

##### **(a) Working Group on Res judicata**

31. The members of the *Working Group on Res judicata* were announced to be Ms Frédérique Ferrand and Mr Burkhard Hess as Reporters, and Ms Tanja Domej, (Zurich, Switzerland), and Mr Marco De Cristofaro as members. Judge Arabadjiev was also interested in participating in the work. The Group would meet in the first quarter of 2015 to discuss the scope of the Rules, the first progress report, akin to the ones presented by the operative Working Groups at the Joint Meeting, would be presented at the 2015 event, and a more complete draft would be ready by the autumn.

32. As regarded the scope of the work, in addition to *res judicata* the Working Group would cover *lis pendens*. Furthermore, whether or not to include enforceability and other effects would be discussed. It was suggested that the Group could look at judgments generally, their drafting and the reasons given for the judgments. It was however recalled that it had been suggested that a special Group be set up to examine the reasoning of the judgments, covering different types of judgment (default judgments, summary judgments).

##### **(b) Working Group on Obligations of Parties and Lawyers**

33. The members of the Working Group were indicated as Mr Remco Van Rhee and Mr Adam Uzelac as Reporters and Mr Walter Rechberger (Vienna, Austria), Ms Elisabetta Silvestri (Pavia, Italy), Ms B. Karolczyk (Poland), Mr Magnus Strömberg (Bergen, Norway), and Mr John Sorabji as proposed members. The need to enlist the contribution of a French colleague was stressed. They would be approached to ascertain their interest in the project. The size of the Working Group was estimated to be eight members, which was larger than the others, but there was considerable interest in both South and East Europe so it was felt that the larger size of the Group was justified.

34. As to the scope of the work to be conducted, it was difficult to work on the obligations of parties and lawyers without considering also the Court and its role, for which reason it was proposed that the Working Group add judges to the scope of its activity. Sanctions would also come up and an issue was what the reaction would be if the obligations were not complied with. To some extent case management was covered by this Working Group. The question of the overlap with the other Working Groups would be discussed by the Group when it met.

35. As to sources of inspiration beyond the PTCP, the Recommendations of the Council of Europe and the principles of the European profession would be considered, as would the Rules of Procedure of the administrative courts.

### **Item 6 on the Agenda: The 2015 Event: Presentation of first project results**

36. Ms Wallis illustrated this item on the Agenda. She indicated that Mr Bray of the European Parliament had offered to host a meeting in spring 2015 in conjunction with a session of the Parliament in Brussels, to which the project could be illustrated. They had to reach agreement on the most suitable date and would consult to make this possible. In November 2015 the meeting would be a meeting similar to the present meeting. There was a possibility that the Academy of European Law (*Europäische Rechtsakademie* - ERA) in Trier would host a meeting. Again, this had to be confirmed.

37. Mr Bray stated that the Legal Affairs Committee would be delighted if the meeting could come to the Parliament to explain what it was doing. Committee Rooms and interpreters were available.

### **Item 7 on the Agenda: Funding**

38. Introducing this item on the Agenda, Ms Wallis informed the meeting of the application for funding that the ELI had lodged with the European Union. She urged participants to inform her of any other possibilities for funding.

### **Item 8 on the Agenda: Any other business**

39. The possible timetable of future work was discussed by the Steering Committee and reported to the meeting in Plenary (see the table in Annex 2 to this document).

40. No other business having been raised, the meeting closed at 12,05 hrs. In closing the meeting, Ms Wallis thanked participants for a stimulating and constructive discussion.

**ANNEX 1****Draft Agenda**

1. Welcome by the Secretary-General of UNIDROIT and the President of ELI
2. Adoption of the Agenda
3. Matters arising from May 2014 minutes (unless covered elsewhere on the agenda) (document Study LXXVIA - SC I – Doc. 2)
4. Reports from the meetings of the working groups:
  - Evidence (Study LXXVIA - Doc. 2)
  - Interim measures (Study LXXVIA - Doc. 1)
  - Service of documents (Study LXXVIA - Doc. 3)
5. Composition of the new working groups: Res Judicata; Obligations of Parties and Lawyers
6. 2015 Event: Presentation of first project results
7. Funding
8. Any other business

## ANNEX 2

**TIMETABLE FOR THE PREPARATION OF EUROPEAN RULES OF TRANSNATIONAL CIVIL PROCEDURE**

	<b>WORKING GROUP</b>	<b>MAY 2014</b>	<b>NOVEMBER 2014</b>	<b>APRIL 2015</b>	<b>NOVEMBER 2015</b>	<b>APRIL 2016</b>	<b>NOVEMBER 2016</b>
<b>STAGE 1</b>	WG on provisional and protective measures	Constitution	First progress report	First draft and second progress report	Final draft	Approval of final text	
	WG on access to information and evidence	Constitution	First progress report	First draft and second progress report	Final draft	Approval of final text	
	WG on service and due notice of proceedings	Constitution	First progress report	First draft and second progress report	Final draft	Approval of final text	
<b>STAGE 2</b>	WG on obligations of parties, lawyers and judges		Constitution	First progress report	First draft and second progress report	Final draft	Approval of final text
	WG on <i>res judicata and lis pendens</i>		Constitution	First progress report	First draft and second progress report	Final draft	Approval of final text
<b>STAGE 3</b>	WG 6			Constitution	First progress report and preliminary draft	Second progress report and final draft	Approval of final text
	WG 7			Constitution	First progress report and preliminary draft	Second progress report and final draft	Approval of final text

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