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**TRANSNATIONAL CIVIL PROCEDURE -
FORMULATION OF REGIONAL RULES
ELI – UNIDROIT Rules of Transnational Civil
Procedure
Steering Committee and Co-Reporters –
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**Working Group on
Lis pendens and *Res Judicata*
Third Report**

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The members of the Working Group met in Luxemburg on 4-5 February 2016. They will meet again in Padova on 13-14 October 2016.

The members of the Working Group discussed the linguistic methodology **(1)**, a first draft on *res judicata* **(2)**, central issues relating to *lis pendens* **(3)** and the next steps to be taken **(4)**.

1. Linguistic Methodology

The members of the WG decided to have translations of the Draft Rules from the early beginning. This is why the Rules drafted by the co-reporters, which were circulated among the members of the WG before the Luxembourg meeting, contained a French and a German version. It was agreed that a translation into Italian, Polish, Spanish etc should also be provided.

2. Discussion of the Draft on *Res Judicata*

The members of the WG discussed the goals to be achieved by Rules on *Res Judicata* and the issues to be dealt with. Rules on *Res Judicata* should strive to strike a balance between different sometimes contradicting policies: on the one hand party disposition, predictability, legal certainty, rights of defence and on the other hand concentration of proceedings in order to conserve the

resources of the adjudicative system (procedural economy principle), efficiency, consistency, uniformity, coherence, procedural fairness, preventing abuse of process and, finally, speediness. All these policies require that the door should not be open to re-discuss each and every issue in successive proceedings.

Issues to be dealt with:

- Scope of the proceeding;
- Kinds of judgment becoming *res judicata*;
- Persons bound by *res judicata*;
- Material scope of *res judicata*;
- Powers and duties of the court with regard to *res judicata* issues;
- Possibility challenging *res judicata*.

The members of the Working Group discussed a first set of Draft rules on Res judicata.

3. *Lis Pendens*

Draft Rules

1. In applying the rules of *lis pendens*, the scope of the proceeding is determined by the claims in the parties' pleadings, including amendments.

Discussion:

EU law: Core theory. The ECJ has opted for a broad concept of *Lis pendens*.

Shall we concentrate on cross-border cases? If we state a large concept of *lis pendens* in domestic cases, this will lead to a large principle of concentration for claimant and defendant. In Switzerland, the case-law of the ECJ on *lis pendens* is extended to domestic cases. On the contrary, the *Kernpunkt Theorie* has not been followed by France, Germany, Italy and Poland in domestic cases.

If two law-suits are brought before the same court, it would be in Germany an issue of *Geschäftsverteilung* and not of *lis pendens*. In Austria and Switzerland, it would be *lis pendens*. Possible consolidation (*jonction d'instance*).

Lis pendens is a central issue in international cases because it can lead to winning the case whereas in domestic cases, the solutions should normally be the same before the courts.

Several issues and sources:

- Provisions in ALI/UNIDROIT Principles and Rules: See ALI/UNIDROIT Rule 4.6.3 (on *lis pendens*. Very brief) and ALI/UNIDROIT Principle 2.6.
- Brussels I bis Regulation: Definition of the moment of pendency; pendency in third States (more flexible approach). We should investigate why some Member States stick to a narrow approach of *lis pendens* in domestic cases.
- Brussels II bis, Art. 15: transfer of proceedings to a court better placed to hear the case.
- Succession Regulation: a law-suit is filed at one place and then, both parties agree to transfer the case to another court. What to do? Is this possible?
- See also on the website of the Hague Conference the Draft convention on judgments.
- Look at the national systems.

- Look also at related actions and draft one or two rules on them. However, if we go for the *Kernpunkt Theorie*, we have less related actions.
- Define what “same proceedings” are. Shall we stick to the ECJ-Case-law or should we deviate?
- Later on, we will have to decide whether we need rules for *lis pendens* in relation to third States.

In Italy, there is a rule on mandatory consolidation by the court first seized. The court second seized shall decline jurisdiction. But what about exclusive jurisdiction? Marco will send us the English version of this provision of the Italian CPC.

Basic ideas to be expressed:

- Principle of priority;
- Take into consideration rules on *lis pendens* in the EU-Regulations;
- Safeguard necessary to prevent abuse of litigation;
- Insist upon the necessary cooperation between courts.

Art. 32 of Brussels I regulation could be kept as it is. We should investigate whether Art. 32 leads to difficulties in the Member States. Art. 32 contains a rule which should only be used for the issue of *lis pendens*, not for statute limitation.

4. Next steps to be taken

- Meeting of the reporters and the Steering Committee : 21-22 April 2016, Rome
- Next meeting of the Working Group: **13-14 October 2016 in Padova**
- Revise Draft rules on *Res Judicata* and Comments.
- *Lis pendens*: **First step:** Draft *lis pendens* rules.
Second step: Compare them with the ones on *res judicata* and concentration of proceedings. Basic idea: RJ when the judgment is no longer appealable; LP in the other cases.
Third step: Make the whole set of rules comprehensive and consistent.
- **Homework to be done for 30 June 2016:**
 - 1.** Send to the reporters the English translation of your national provisions on setting aside *res judicata* (motion for revision) in order to improve and extend Rule 8.
 - 2.** Send to the reporters the English version of your national provisions on *lis pendens*. Investigate whether Art. 32 of the Brussels I bis Regulation leads to difficulties in your Member State. Case-law on what is “same proceeding” in your jurisdiction. Short information on why in your jurisdiction the case law did not (or did) extend the broad concept of *lis pendens* formulated by the ECJ to domestic cases.
- **For 1 September 2016:**
 - 3.** Translate our revised Rules on *Res judicata* in the national language of the members of the Working Group. They will be sent to all members of the Working Group as soon as they are ready.