

**TRANSNATIONAL CIVIL PROCEDURE -  
FORMULATION OF REGIONAL RULES  
ELI – UNIDROIT Rules of Transnational Civil Procedure  
Steering Committee and Working Groups  
Joint Meeting  
Rome, 9-10 April 2018**

**UNIDROIT/ELI 2018  
Study LXXVIA – Doc. 8  
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## **REPORT**

(Prepared by the UNIDROIT Secretariat)

### **Item 1 on the Draft Agenda: Welcome by the Secretary-General *a.i.* of UNIDROIT and the former President of ELI and adoption of the Agenda**

1. Participants<sup>1</sup> were welcomed by the Secretary-General *a.i.* of UNIDROIT and the former President of ELI, Co-Chairs of the meeting. The Secretary-General *a.i.* of UNIDROIT was looking forward to the reports on the discussion on the work done by the Working Groups (WG), including the first presentation of the new WG on Appeals and the general overview of the Structure WG. She addressed a particular thank you to all co-reporters and the observers from the invited organisations. The former President of ELI expressed satisfaction at the progress achieved so far. On behalf of the participants in the project, she paid tribute to two giants of procedural law who passed away this year: Geoffrey Hazard, former Director Emeritus of The American Law Institute, and Marcel Storme, former President of the International Association of Procedural Law. She suggested that to honour them, the best thing to do was to proceed on the basis of the work they had put in place.

2. The draft Agenda (Study LXXVIA - SC VI -Misc.1) was adopted as proposed.

### **Item 2 on the Agenda: Presentation and discussion of the draft rules of the Group on ‘Judgments’**

3. One of the Co-Reporters of the Judgments WG presented the work done by the WG so far on the General Part. The WG had taken into account the input received at the last meeting in Vienna in November 2017 regarding the list of what the contents of a judgment should be (Rule 1) and had added the name and address of the parties and the term “if necessary” to the requirement of the signature of the court, in view of the fact that not all jurisdictions used this notion. The Co-Reporter presented

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<sup>1</sup> For a list of participants, see Annex 1.

some modifications made concerning the types of judgment (Rule 2), partial judgments (Rule 3) and the new title of Rule 4: “Judgments on single issues” and its French translation “*Jugement mixte*”.

4. The Co-Reporter then presented a new Rule 5, containing a non-exhaustive list of procedure requirements, such as legal capacity, representation of non-natural persons and territorial jurisdiction of the court. He asked the advice of the participants on whether this rule should include a legitimate interest of the claimant as a procedure requirement and, if so, how it should be defined.

5. The Chair gave the floor to the other Co-Reporter of the WG, who addressed the special rules which had been divided into three parts: default judgments, summary judgments and court settlements. As to the part on default judgments, the Co-Reporter stated that most of the rules were the same as those presented in Vienna, with only a few modifications which she explained. The prudent choice to limit the concept of “default judgment” to the case where the defendant fails to defend the case had been maintained. Upon the suggestion of the WG on Service, the precondition of the documents instituting proceedings being served in sufficient time to enable the defendant to arrange his or her defence was included. A second paragraph had been added to take cross-border service into account, inspired by both the Service WG and the European Regulation on Service. Although the former Rule 9 had been deleted, the WG intended to maintain the power of the parties to settle their dispute. The Co-Reporter recalled the choice by the WG to include a procedure of “setting aside” to attack the default judgment and presented the time limits in which such a recourse must be made. The deadlines of thirty days for domestic and sixty for cross-border situations were complemented by an ultimate final deadline of one year (or two for cross-border situations) when the defendant could show good reason for failing to comply.

6. The Co-Reporter continued with a presentation of the third part, on Summary Judgments. The WG had decided to maintain the term “may” in Rule 13, as discussed in Vienna, in order to give expression to the discretion given to the court to hand down a summary judgment *ex officio*. As to the prerequisites, the evidence available on which the court should base itself to determine whether the claim or the defence had no real prospect of success should be the evidence “already” available.

7. The Co-Reporter finally addressed the last part, on Court Settlements, and the difficulties related to the terminology of the subject. The exclusion of settlements reached outside civil proceedings, contrary to the recast Brussel I Regulation, was reaffirmed. The Co-Reporter then raised the issue of whether a judgment giving effect to an agreement should have *res judicata*. In contradiction with the decision of the ECJ of 2 June 1994, *Solo Kleinmotoren v. Boch*, the WG had opted for the *res judicata* effect being limited by two conditions: it not being contrary to the law and the court having the power to enter a judgment in accordance with the parties’ agreement. The Co-Reporter admitted that the addition of the possibility to order confidentiality was controversial. The necessity to coordinate with the other WGs on these different topics was also stressed.

8. During the discussion of the rules presented on Judgments, a number of issues raised regarded Rule 1, which contained a list of the contents of a judgment. A participant suggested that “or equivalent” should be added to the signature of the judge, as not all jurisdictions had this requirement. Another remark concerned the requirement of the names and addresses of the parties, which could be ambiguous in circumstances where a party should not know where the other lived. It was suggested that the requirement of the address be deleted or replaced by the address of the representative. As concerned the representatives, doubts were raised as to whether a distinction should be made between lawyers defending the parties and representatives of legal entities, such as CEOs. The Co-

Reporters replied that the WG intended to deal with lawyers but as was a non-exhaustive list, the distinction could be made in the comments. An observer further queried whether the letter (i). included only appeal or any form of remedy. The reply was that not every form of remedy needed to be specified in this rule, as the WG on Appeal was already dealing with this issue.

9. Another major discussion concerned the formulation of Rule 4 on “Judgments on single issues” and its French translation. A participant pointed out that “the potential to finally resolve the matter” suggested that the *res judicata* effect could not be granted, whereas “avec autorité de la chose jugée” left no doubt on its automaticity. To this, the Co-Reporter replied that the French version captured exactly what the WG had intended to draft. The question was raised whether the judgment on a single issue should have the potential to finally resolve the matter. The Co-Reporter explained that the WG referred to the German “*Grundurteil*”, where the claim was resolved and had *res judicata* but the matter was not finally resolved, in the sense that a judgment on the merit determining the amount was needed. A number of participants found this distinction between “matter” and “single issue” misleading and one suggested to delete the last part of the rule. The necessity of this rule with regard to the rule on partial judgment might also have to be reviewed, even though some participants supported the specificity of judgments on single issues (a partial judgment supplemented by a preparatory inquiry).

10. The Co-Reporter also asked participants whether the claimant having a legitimate interest should be maintained in the list of procedural requirements. While some participants were supportive of this notion, others replied that it was an aspect of substantive law that should be deleted. It was also pointed out that the rule did not clearly indicate the moment when the court could examine the lack of procedural requirements, nor the consequences this could lead to (premature ending of proceedings). Regarding this point, a member of the Steering Committee suggested that this requirement be maintained for the moment and that a drafting note warning that this provision should go in an earlier part of the overall structure be added.

11. As regarded the rules on default judgments, a number of linguistic points were raised concerning the French translation. The difference between “capacity” and “power” of the parties to settle a dispute was solved by the suggestion that the idea that the matter can be settled be emphasised. The fact that “service” of documents was translated into French by both “*signification*” and “*notification*” might have to be reviewed. A participant asked whether the reference to procedural requirements in Rule 9 was necessary, considering the fact that this repetition could suggest that default judgments were not judgments on the merits of the case. For constituency purposes, a Co-Reporter of the Service WG further proposed to replace the ambiguous term “proof of service” by “receipt of service” which was already used in the consolidated draft. A member of the *Res Judicata* WG questioned the brevity of the absolute deadline to bring a setting aside action. To this the Co-Reporters answered that the deadline for setting aside did not exclude an extraordinary review for other reasons being raised in the *Res Judicata* WG and that this point was to be clarified in the comments.

12. Some issues relating to summary judgments were discussed. A participant asked whether the evidence “already” available could be more clearly specified. The Co-Reporters explained it was a reference to English law and agreed to limit the rule to “the evidence according to rules of preclusion”. An important point of concern for a number of participants was the wording “summary judgment” and terms such as “early” and “accelerated” were proposed. A participant finally suggested to maintain “summary” as an autonomous definition and to clarify in the comments that it did not refer to specific

notions of national law. An observer suggested highlighting in the comments that summary judgments were an accelerated process to speed up court procedures.

13. The wording of “court settlements” was also called into question: while an observer noted that “non-judicial judgments” was the term used in European instruments, a participant insisted on the differentiation between “judgment” and “settlement”. The Co-Reporters answered that this matter needed to be further discussed within the WG. The need for specific provisions on requirements was questioned. Another participant warned against the loss of meaning of “contrary to law” in the English version and suggested “contrary to public policy” instead. Whether the possibility to ask for confidentiality in court-approved settlements should be maintained was also questioned. To this, a Co-Reporter from the Structure WG replied that a rule of publicity would be added to the overarching general principles and that business information would be part of the exceptions. Furthermore, the need to clarify the meaning of *res judicata* effect of court settlements was pointed out. The Co-Reporters took on board all point raised in the discussion and thanked participants for all the suggestions made.

### **Item 3 on the Agenda: Presentation and discussion of the draft rules of the Group on ‘Costs’**

14. The Chair gave the floor to one of the Co-Reporters of the WG on Costs. She stated that the WG had come further on its project but was not presenting rules as yet and wanted to discuss one issue on which the WG remained uncertain: third party funding. The Co-Reporter recalled the diverging views discussed in Vienna and asked participants for advice in order to determine a clearer direction. After research into national systems, the WG had come to the conclusion that even if most Member States did not have specific regulations on third party funding, there was a raising awareness and market demand in relation to this issue. The WG wondered whether a regulation on this phenomenon was really necessary and how to define it. The Co-Reporter further queried whether a broad definition which included various forms of insurance, assistance, assignment or buying claims, was preferable to a limited notion where the investor was not connected to the dispute and funded the claimant’s claim in the sole interest of receiving compensation for its funding. The choice between general or specific rules and their inclusion in the costs section were also issues touched upon. Finally, an important point for concern for the WG was transparency, disclosure of funding arrangements and privilege of confidentiality and whether it was relevant in national courts or only in arbitration.

15. In the ensuing discussion, a number of participants supported having a limited approach: a general principle of non-prohibition complemented by some limits, especially related to transparency in collective redress actions funded by a defendant’s competitor. It was noted that most of these issues were already covered by the Obligations and Collective Redress WGs. The Co-Reporter replied that the WG intended to work together with those WG. An observer suggested the inclusion of a general rule on the discretion of the Court to approve or not to approve third party funding in any given instance. A participant raised the issue of non-party costs. The Co-Reporter thanked participants and felt confident that the WG would produce a draft before the next meeting in November 2018 and would address it even earlier to the Steering Committee.

### **Item 4 on the Agenda: Presentation and discussion of the draft rules of the Group on ‘Structure’**

16. The Chair gave the floor to the WG on Structure. A Co-Reporter submitted the conclusions of the last meeting in Vienna. The first conclusion was that issues of overlapping between WGs should be

solved at the earliest stage. The Co-Reporter asked the members of WGs to contact each other as soon as a problem of overlapping emerged. The second conclusion was that along with the development of a general structure, the WG on Structure should draft more overarching general provisions and incorporate drafts, such as those prepared by the WG on Obligations of parties. The third conclusion was that the WG should be in touch with the Co-Reporters of each WG to discuss the outcome whenever necessary. The fourth conclusion was that the WG should review drafts that had been finalised by the WGs, especially on *Res judicata* and *Lis pendens*. Finally, an emphasis on the IT fitness check of the drafts was the fifth conclusion drawn by the Structure WG.

17. A member of the WG presented the current state of the outline of the consolidated draft. The consolidated draft began with a part on “General provisions”, which included a first section on “Scope and definition”. He commented that the inclusion of cross-border situations had finally been adopted, after many discussions. Family disputes, insolvency procedures as well as capacity for legal persons should not come under the scope of the rules. As to the definitions, if the rules on party, court, judgments, authentic instrument and lawyer had not been written yet, he suggested to extend the definition of “lawyer” to “representative”, noting that the issue had come up in the discussions of the WG on Judgments.

18. Regarding the substantive general principles, the WG had mainly focused on three overarching principles in the Obligations WG’s draft: cooperation, proportionality and settlement. The member of the Structure WG presented the slight wording modifications which were made in order to reach a consistent approach. The reference to the pre-action stage and to what a party should do before litigation commences was relegated to a comment under Rule 4, rather than having a specific rule on it. Another change related to the nature of the obligations of the lawyer to act in good faith and to avoid procedural abuse. As regarded the principle of proportionality, the Structure WG consolidated rules prepared by the Obligations, Evidence and Provisional and protective measures WGs but had not drafted the rule on the proportionality of the costs yet. Finally, in relation to the principle of settlement, the WG had consolidated and reduced the two rules to what was absolutely necessary, in order to be more consistent and concise. The Structure WG would be in a position to draft other general provisions on the basis of the work of the Obligations WG by November; participants were reminded of the importance of coordination at an early stage as regards the drafting style.

19. The Chair gave the floor to another member of the WG on Structure. He presented the latest version of the outline of the draft, which collected principles formulated by the WGs or present in the ALI/UNIDROIT Principles but not addressed yet by any WG. He explained that it was still a discussion paper.

20. As to the “General Provisions” part, some issues should be considered with a view to their incorporation as general principles: due notice and right to be heard, self-representation and representation by a lawyer and hearing of the parties in person, languages and translations, oral and written presentations and public proceedings, and finally modern and electronic means of communication. The member of the Structure WG presented a third section on “Proceedings” with new rules concerning the control over the commencement, termination and scope of the proceedings and over facts, evidence and applicable law. He noted that the input of the Obligations WG on the control over applicable law should be further discussed. The Structure WG thought “an explicit agreement of the parties [should] bind the court if the parties [were] free to dispose of their rights affected by the agreement and give early notice of the agreement to the court in the statement of claim or defence”.

21. The insertion of a second part on parties and a third part on court management was then suggested, containing a simplified version of the draft of the WG on Obligations. The member of the Structure WG pointed out the issue of proportionality of sanctions and suggested a more flexible coordination of different levels of sanctions with an ultimate recourse to fines only in appropriate cases.

22. A suggested fourth part related to the commencement of the proceedings. According to the original plan, Section 1 of this part shall contain general rules on early procedural duties. The member of the Structure WG questioned whether these provisions should constitute a general section or be integrated in the parts on costs and evidence. A rule on the withdrawal and admission of the claim - until now not advanced by any group - had been added.

23. In the fifth part on the preparation of the final hearing, the major problem discussed was whether the Structure WG should opt for the procedural structure preferred in the ALI/UNIDROIT Principles: a pleading phase followed by an interim phase to prepare a concentrated final hearing with the taking of evidence on the main issues. The member of the structure group explained that the WG had discussed again whether the rules should be more open to the alternative of the "piecemeal model" of Romanic tradition, which took all evidence in a series of hearings and left regularly no room for evidence taking in the final hearing. But in the end, the WG preferred a clear decision for the model of the ALI/UNIDROIT Principles that permitted much flexibility for the individual judge and her or his management of evidence taking.

24. In the ensuing discussion, an important point related to the choice between piecemeal approach and concentrated main hearing with appropriate taking of evidence. A participant asked whether a compromise between those two systems could be reached leaving the choice to the States. Another participant warned against a phenomenon more and more common in France, i.e. the absence of a hearing due to the use of IT devices. He suggested a rule stating that the parties could request a hearing in person. The reply was that the judge should have a relative freedom to take evidence into account during the preparatory phase and that the concentrated final hearing should be oral.

25. A number of participants asked for clarification of the voluntary disclosure of evidence between the parties before the commencement of proceedings. While a Co-Reporter proposed to clarify this issue in longer comments, a participant suggested drafting a separate rule dealing with obligations between the parties in the pre-action phase.

26. A further point related to whether the court could *ex-officio* raise the question of the applicable law. A participant referred to the debates at the Berlin Conference on European Private International Law in March 2018 and considered that the court should not restrict the parties' freedom to plead their case as they wanted. The answer to this was that it was only a proposal and that further discussion on this point was needed. Other issues were touched upon, such as whether it was necessary to impose an obligation to avoid procedural abuse upon the lawyer when he/she already had to act in good faith, or the French translation of the English broad term "fairness".

27. Finally, some remarks regarded the overall input of the Structure WG were made. A member of the Steering Committee stressed the importance of IT issues. As far as the formal structure was concerned, she suggested highlighting the difference between rules and general principles by calling them "underlying principles" and pointed out the necessity of a consistent numbering of the provisions. A member of the WG on Obligations mentioned how his WG had been satisfied with the communication with the Structure WG. In response to an observer, a Co-Reporter indicated that the

Structure WG planned a meeting in May and was intending to present a consolidated draft including more parts by November.

#### **Item 5 on the Agenda: Presentation and discussion of the draft rules of the Group on ‘Parties’**

28. The Chair gave the floor to one of the Co-Reporters of the WG on Parties to present the General Part. The Co-Reporter gave a presentation on the progress made by the WG so far. The first meeting had been held in Vienna in November 2016 and had discussed issues of scope of application (the exclusion of family, insolvency and enforcement proceedings). The second meeting had been held in Paris (March 2017) and had debated the structure, the level of detail of the rules and specific subjects where the European legal systems appeared to differ. The third meeting had been held in Budapest in June 2017 and had aimed at collecting the relevant national rules and materials for comparative research. A first, substantial paper had been produced during the fourth meeting in Vienna in November 2017 and the WG had met a fifth time in Leuven in January 2018 to discuss the French translation and to draft new rules for the part on collective redress. The Co-Reporter illustrated the main ideas of the draft, i.e. to take into account the various traditions of Europe; to give access to justice to all the persons who had a right at stake in a litigation; to give power to the court to reach this goal during the proceedings; and to take into account collective redress actions as a type of multiple litigation.

29. The Co-Reporter presented the modifications made since the last plenary meeting in November 2017. The former Rule 16 on public interest had been moved to an earlier stage of the draft and was now Rule 7, which was formulated in a more general way: “an authorised person” may, in the public interest, act as a main party or intervene in an action. The WG had created a Chapter Y, on injunctions in a collective interest, which was based on the European Regulation, and relied on the Structure WG to know where this section should fit. Cross-border issues had been added and the rules distinguished between the capacity to be a party and litigation capacity.

30. The Chair gave the floor to the second Co-Reporter who addressed the collective redress chapter. After a brief summary of the work done so far, the Co-Reporter mentioned new developments on collective redress achieved outside the WG: some national provisions in Slovenia and the Czech Republic for instance, a preliminary version of the European Commission’s Report on implementation of Recommendation n°2013/396 released in January 2018, as well as a Study on the State of Collective Redress in the European Union in the context of the implementation of the Commission’s Recommendation in March 2018. It was noted that those provisions did not differ from the WG’s draft.

31. The Co-Reporter recalled the approach that had been chosen and the scope of application: a non-sectorial approach and no minimum threshold for the size of the group, given that the court should decide whether collective redress was the best instrument to resolve a dispute. The three pillars of the rules were also underlined: a collective redress action for the recovery of damages; a mechanism to declare binding a mass settlement entered into by the parties of a pending collective redress action; proceedings to declare binding a collective mass settlement entered into outside a collective action.

32. After tabling new rules on cross-border situations and costs, the Co-Reporter illustrated a number of controversial issues. As to the types of collective redress action, the general rule should be an opt-in system, even though the second paragraph of Rule 8 stated an exception when rational apathy of the group members was very likely to prevent them from opting in. The WG had decided to let the parties choose between the two systems when it came to collective settlements negotiated outside litigation. The Co-Reporter thereafter addressed the issue of legal standing and illustrated the

approach opted for by the WG regarding the entities and persons that were allowed to bring collective redress actions that was broader than that in some member States.

33. Unlike provisions in most Member States, once one qualified entity had filed an action, the court might publish that action and give the opportunity to other potentially qualified claimants to apply. By this choice, the WG intended to be more flexible. The Co-Reporter further presented a list of safeguards and emphasised some issues. As to the cross-border situations, the important point concerned group members outside the forum State to which an opt-out mechanism could not be ordered. Finally, the Co-Reporter addressed the final section on Costs: third party funding should not be prohibited, the source of the funding should be disclosed, and the common-fund doctrine should be adopted.

34. In the ensuing discussion, a number of commentators asked for clarifications on the condition of admissibility to be inserted in the comments, to the effect that the claims advanced in the collective redress action were similar in law and fact but not identical. A participant wondered whether reasons other than “rational apathy” could justify the switch to the opt-out mechanism. In their replies, the Co-Reporters pointed out that the accent should be on “rational” and that the word “apathy” could be replaced. Another remark concerned the part on cross-border issues. Two observers queried whether it should be subdivided into European Union and non-European Union cross-border situations.

35. The Co-Reporters finally put some questions to the members of the WG on *Lis pendens*, in particular whether they had drafted rules that could apply to the difficult question of avoidance of torpedo actions and anti-suit injunctions. A Co-Reporter of the WG on *Lis pendens* replied that the WG had not dealt with collective redress and proposed general rules with a broad scope of application (domestic and cross-border settings). Nevertheless, two main tools of the *Lis pendens* WG could be used for this specific issue, i.e. the cooperation between judges and the possible consolidation before the court was first seized. The Co-Reporter on Parties asked whether those provisions were sufficient. The Co-Reporter on *Lis pendens* did not support the idea of deleting rules from the part on Parties, as his WG had drafted not detailed and very flexible rules on non-mandatory consolidation. Both WGs agreed that the Structure WG should discuss where this rule would fit.

#### **Item 6 on the Agenda: Presentation and discussion of the draft rules of the Group on ‘Appeals’**

36. The Chair gave the floor to a Co-Reporter of the WG on Appeals. The Co-Reporter explained that work was not very advanced yet, but he would present some of the main principles the WG had adopted. First, the Co-Reporter introduced the scope of application. Two levels of appeals should be considered against final judgment, as defined by the Judgment WG (judgments both on the merit or on procedural grounds). The Co-Reporter asked participants whether several kinds of appeal were necessary, including rules on recourse against interlocutory decisions, setting aside actions or extraordinary motions for review.

37. As to the restriction on the admissibility, the WG opted for a criterion based on the value at stake and considered three possibilities to determine it: the value in dispute in the first instance, the sum lost in the first instance or the value of the relief sought in appeal. In the case of non-monetary claims, the Co-Reporter asked whether the definition of a threshold should be at the discretion of the court of first instance but commented that the WG did not support this idea. The amount of the threshold should not be fixed by a number, but rather by a percentage of the minimum wage in the respective country. The Co-Reporter added that even if the value at stake was too low, leave to appeal should be granted for compelling reasons. According to the WG, the deadline should start with service



of the first instance court's judgment. The Co-Reporter suggested a deadline of one month to file an appeal and raised the issue of an additional deadline to provide reasons for the appeal.

38. Another part of principles concerned the scope of review. New legal arguments should always be admitted. As regarded the facts, it was thought that a full *de novo* taking of evidence would not be appropriate, but that new evidence should be taken if procedural errors had affected the proceedings in the first instance. Moreover, new facts should be admitted if they could not be alleged in the first instance.

39. The Co-Reporter further addressed the issue of provisional enforcement of the first instance court's judgment and suggested it should be provisionally enforceable even if an appeal had been lodged. The WG intended to draft a guideline regarding the stay and security issues. In the case where the appeal was admissible and the first instance's decision was found to be wrong, the Co-Reporter wondered whether the appeal court should refer the case back or decide the case itself and suggested that the latter solution was preferable. The same matters were raised regarding the second level of appeal.

40. In the ensuing discussion, a participant doubted whether the restriction on the admissibility should be based on the value, arguing that in Common Law jurisdictions access to appeal was based on the prospect of success in appeal, which required an assessment of the merits. It was also observed that in Common Law systems the development of substantive law relied on case law and the ability of the higher court to scrutinise what was ruled in lower courts. The Co-Reporter replied that the WG did not intend to restrict access to appeal purely on the value, and that the necessary development of law could be part of the compelling reasons opening up appeals. The interest of the debate between the different legal traditions and the appropriateness of a combination of both systems (a threshold and compelling reasons taking into account the merit) was pointed out by an observer.

41. A further point concerned whether new claims closely related to the claim in first instance would be admitted at the appellate level. Two participants explained that denying new claims in appeal would constitute a backsliding for the French legal system. The Co-Reporter took the remark on board for further consideration by the WG.

42. A participant wondered whether different deadlines for filing an appeal and for providing reasons of appeal were necessary. The Co-Reporter answered that they were necessary, stressing that in some jurisdictions the reasons were not handed down at the same time as the judgment. An extended deadline in cross-border situations was also suggested.

43. As to the reasons for appeal, a participant asked whether the "procedural error" referred to the court's or the parties' error. The Co-Reporter explained that the WG had not discussed this question and that he personally opted for errors by the court. Finally, the issue whether interlocutory judgments could be the object of an appeal was discussed and the participants generally agreed that not all interlocutory judgments should be challenged and that the rule should be drafted in accordance with the previous drafts of WGs on Evidence and Judgment.

#### **Item 7 on the Agenda: Presentation and discussion of the draft rules of the Group on '*Lis Pendens* and *Res Judicata*'**

44. The Chair gave the floor to the first Co-Reporter of the WG on *Lis pendens* and *Res judicata*. The Co-Reporter gave an overall picture of the work done so far and underlined that *res judicata* and *lis pendens* shared the same objective: the avoidance of irreconcilable judgments. The WG on the General Part and *Res judicata* had been drafted in six languages from the start, which led to a better

understanding of the decisions taken by the WG and the WG was intending to present the translation of the *Lis pendens* part by the next meeting. The choice not to distinguish between domestic and cross-border settings was confirmed. The Co-Reporter suggested that the WG should discuss with the Structure WG whether the three general rules should be moved to the beginning of the final consolidated draft.

45. As to the rules on *Res judicata*, the Reporter expressed her and the WG's satisfaction with the current draft, which they considered almost finalised. The addition of examples in the comments was noted and the question of whether Rule 15, on extraordinary motion for review, should be moved to the part on Appeal was raised.

46. The Chair gave the floor to the other Co-Reporter of the WG, who addressed *Lis pendens*. The Co-Reporter recalled that the ALI/UNIDROIT Principles only had one Principle covering both *Lis pendens* and *Res judicata* (Principle 28) and that the WG had had to rely mostly on a comparison between the national laws of the member States and on the case law of the ECJ. It was thought that the two major features of the Brussels Regulation (priority of the court first seized and “*Kernpunkt*” theory) should be used and complemented by the principle of consolidation. The Co-Reporter also underlined the goals of such rules, i.e. to avoid the segmentation of the dispute in parallel litigation, to reach a sound administration of justice and to promote cooperation between courts.

47. Along with the choice not to distinguish between domestic and international situations, the main innovation of the draft was the principle of consolidation. The consolidation should be applied by at least one party. The WG excluded *ex-officio* consolidation but considered that the criterion of sound administration of justice should guide the court when deciding whether or not to consolidate the proceedings. The Co-Reporter finally mentioned that if consolidation was not possible at the court first seized, the court second seized might consolidate the proceedings, as appropriate.

48. In the ensuing discussion, an important point for concern for a number of participants was a comment under Rule 11 on the scope of application of the *res judicata* effect. They wondered why the incidental and necessary legal issues covered by *res judicata* could be contained in both “the operative part of the judgment and its reasons”. Participants pointed out that incidental and necessary issues were hardly ever mentioned in the operative part. The Co-Reporters replied that the purpose of the comment was to grant *res judicata* effect to any necessary decisions on legal issues on the merit (duly debated by the parties) wherever they were presented in the judgment, even though in theory they should be in the operative part. It was suggested that this misleading distinction be deleted.

49. Some issues relating to cross-border settings were also discussed. A participant worried that the European approach would not be appropriate in a situation where a Third-State did not have a recognition and enforcement system. An observer wondered whether further reflection on this topic was necessary. The Co-Reporters suggested that the rules on *lis pendens* should distinguish between European Union and non-European Union situations.

#### **Item 8 on the Agenda: Concluding remarks and way forward**

50. The Co-Chairs concluded the session remarking on the great progress achieved by the Working Groups so far, but also stressing that the “Structure Group” still had a lot of work to do in collaboration with the Steering Committee. The Co-Chairs indicated that a report would be submitted to the Governing Council of UNIDROIT in May.

## LIST OF PARTICIPANTS

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