

Initial report on the ELI-UNIDROIT 1st Exploratory Workshop

(18-19 October 2013, Vienna)

The workshop aimed to provide an initial analysis of different topics with a view to identifying the most promising issues and the most appropriate methodological approach for the project. It was attended by over 70 participants from different jurisdictions, representing various legal professions: lawyers; judges; and academics. Excellent contributions from the speakers provoked a lively and informed debate after each of the sessions.

Diana Wallis, President of the ELI, and José Angelo Estrella Faria, Secretary-General of UNIDROIT, opened the workshop, following which Geoffrey Hazard and Antonio Gidi, both representing the American Law Institute (ALI) discussed their experience of working on the ALI-UNIDROIT Principles. Professors Hazard and Gidi warned the ELI and UNIDROIT to be aware of the complexity of the proposed endeavour and the various reactions it is likely to provoke. They emphasised that the narrower its scope, the less social relevance it would have. The broader its scope however, the more objections it would generate. They went on to suggest that the best, most efficient rules should be selected with an open mind as to their origin from amongst a variety of different procedural systems. The project should start with a preliminary conception of its scope but not one that was too rigid. In general, both Professors were very supportive of the project.

The contributions from the chairs, speakers and participants at the expert seminars gave further food for thought and influenced the decisions made after the formal workshop closed. Immediate common goals were identified: effectiveness, efficiency and reliability of civil procedure. A small number of participants did however express their concerns regarding the potential development of common European rules. They would prefer a project that emphasised the value of European diversity and which promoted a better understanding of different legal systems. In so far as the project's potential methodology was concerned, some participants favoured a toolbox approach. Such an approach could apply to the consideration of some topics, albeit it was stressed that such an approach can take many forms including that of draft rules. When the project approached the task of drafting, it was clear that it should do so against the background of the ALI-UNIDROIT rules, while also taking account of all existing pertinent legal sources (the European Convention on Human Rights and the Charter of Fundamental Rights of the European Union; the wider *acquis* of binding EU law; common traditions in the European countries; the Storme Commission's work; recommendations of the Council of Europe, etc.). It was a general observation that civil procedure can, in certain instances, learn from developments in, for instance, the fields of contract law and arbitration. There are reasons to be optimistic about the prospects of common European rules in many areas of civil procedure. It was however also suggested that it might, at this stage, be wiser to begin with specific measures rather than to immediately prepare a general European Code of Civil Procedure. In that regard a number of specific measures were

identified as capable of forming the basis of initial, discrete work: provisional and protective measures were, for instance, viewed as being of high importance as they constitute a means to increase the effectiveness of civil proceedings in all legal systems. It was emphasised that beyond harmonising rules, attention must be paid to the application thereof, given the different enforcement regimes across Europe. The importance of the ongoing process of convergence between the common law and the continental Europe was underlined. It is not unrealistic that the civil law and common law traditions can be brought together, the best examples being Canada and Scotland. It was also suggested that the project should combine the litigation and the pre-litigation stage in a coherent manner and pay attention to the alternative dispute resolution methods. The project should also take account of e-justice, a relatively new field and therefore one that is relatively unaffected by cultural differences, providing a unique opportunity to develop common rules.

In his closing remarks Professor Rolf Stürner underlined the point that the aim of drafting a model code is realistic. In his view the project should not be limited to cross-border cases. Reaching comparative compromises is not always a recommendable approach. Sometimes choosing one national solution may simply be the more convincing approach. Furthermore, the project should not be drafted in only one language. Professor Stürner considered parallel drafting in other languages as an important means of control to ensure that the rules are not too focused on any specific jurisdiction. He warned against considering appellate procedures at the project's outset. That was something that should be looked at as the work progresses. He also recommended working with an additional consultative group which could deliver national reports based on questionnaires drawn up by the working group. It was essential that the project should involve academics, judges and practitioners.

ELI-UNIDROIT Project: Next Steps

Following the workshop, a strategic meeting took place where chairs and speakers gathered to discuss a way forward for the ELI-UNIDROIT project. It concluded as follows.

The project will commence in November 2013 with the establishment of three working groups consisting of academics, judges and practitioners. These working groups should conduct pilot studies to test the viability of the methodological approach and overall project design, whilst the goal remains to cover, as a minimum, the full range of issues addressed in the 2004 ALI-UNIDROIT Principles.

The pilot projects will cover the following topics:

- 1) Service and due notice of proceedings
- 2) Provisional and protective measures
- 3) Access to information and evidence



The working groups will aim at drafting procedural rules against the background of the 2004 ALI-UNIDROIT Principles, extensive comparative legal research, and other pertinent European legal sources. The main results should be drafted in, at least, English and French. Each working group will consist of two rapporteurs and five to seven other members. An advisory committee will be established. Its membership will be drawn from a broad group of experts, including but not limited to, speakers at, and other invitees to, the Vienna Conference, leading practitioners, judges and academics. Membership of further working groups established in future will also be drawn from this broad group. At ELI-UNIDROIT level a steering committee will be established in order to secure coherence across the work produced by the various working groups and to ensure that the groups follow a similar methodology.

Cooperation between ELI, UNIDROIT and MPI

Whilst this project will be led by ELI and UNIDROIT, it will also be carried out in a wider context that will include collaboration with the MPI Luxembourg. Indeed it is of course expected that researchers and others will move between and participate in the work of other institutions. The exact mode of this collaboration is still evolving, however it is anticipated that informal meetings between key persons (e.g. chairs) might take place as necessary and joint EU-oriented workshops and short term projects might be undertaken at any time.