The ELI-UNIDROIT Project: From Transnational Principles to European Rules of Civil Procedure – 1st Exploratory Workshop

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On 18 and 19 October 2013, the European Law Institute (ELI) and the International Institute for the Unification of Private Law (UNIDROIT) invited to a "First Explanatory Workshop" on the joint project „European Rules of Civil Procedure". This workshop intended to develop possible answers to the fundamental questions of why and how such a project could be put on the agenda and what it could possibly entail. In addition to these general questions on conception, methodology and scope in the first part of the workshop, the second part dealt with a series of special problems and topics in civil procedure that might be considered as promising issues on the agenda. The idea was to see whether the Principles of Transnational Civil Procedure adopted in 2004 by the American Law Institute (ALI) and UNIDROIT could and/or should be adapted to the European legal context and whether European Rules of Civil Procedure could and/or should be developed.

The ALI/UNIDROIT Principles, developed from a universal perspective, were accompanied by Rules of Transnational Civil Procedure providing for a higher degree of precision and for suggestions on how the Principles could work. These Rules were never formally adopted either by ALI or by UNIDROIT but express the Reporters' views on how the Principles could be implemented, subject to adaptation under a certain legal order, as the case may be. Evidently, this structure provides for a plausible starting point for thinking about European(isation of) Rules of Civil Procedure that would have to take account of e.g. the European Convention on Human Rights as well as the European acquis of

civil procedure.

The first public session was chaired by Professor Loïc Cadiet, University of Paris 1 and President of the International Association of Procedural Law. In opening the session, Cadiet drew the attention to the fact that European Rules of Civil Procedure could potentially contribute to reinforce the mutual trust of the Member States in the respective judiciary systems of other Member States. Indeed, a set of principles, possibly accompanied by rules making certain decisions on particularly important issues, could provide for a common standard to which a judicial system could be measured. In the following, José Angelo Estrella Faria, Secretary General of UNIDROIT, and Diana Wallis, President of the ELI, addressed the audience with introductory notes. Professors Geoffrey Hazard, University of Pennsylvania Law School and former director of the ALI, and Antonio Gidi, University of Houston Law Center and Associate Reporter and Secretary to the ALI / UNIDROIT project on Principles and Rules of Transnational Civil Procedure, presented their views and experiences with elaborating and "selling" the 2004 ALI/UNIDROIT Principles. Hazard also reported from the experiences with the introduction of US Federal Rules of Civil Procedure that resulted in "one generation of discontent" and a variety of problems still unresolved – a lesson that should limit the expectations to a realistic degree when it comes to unifying rules on universal problems in civil litigation such as the judge's role, professional privileges, parallel litigation, group litigation and the like. Gidi underlined the necessity of taking certain decision on the scope such as covering only transnational litigation or including domestic litigation or covering only commercial litigation or including b-to-c litigation. His general experience is that the broader the scope the bigger the objections. Therefore, Gidi suggested excluding e.g. group litigation and other particularly contentious areas. In sum, Gidi appeared to be rather optimistic because there might be a broader consensus on core principles in the European legal cultures than there is worldwide.

In the discussion, Professor Thomas Pfeiffer, University of Heidelberg, suggested that the experiences from drafting European rules on contract law should be taken into account – both top-down and bottom-up input, both input from the national legal orders involved and from the acquis in EU law – as well as the guidance from influential rules on international arbitral proceedings such as e.g. on taking evidence or on dealing with conflict of interests.

Professor Catherine Kessedjian, University of Paris 2, agreed with the view that

model rules could considerably help building (rather than "re-" inforcing) mutual trust.

The author of these lines suggested that the parallel agenda of the European Commission on formulating minimum standards (inter alia) for civil procedure should be taken into account because the European Commission, in its Action Plan on the Stockholm Programme (Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – Delivering an area of freedom, security and justice for Europe's citizens – Action Plan Implementing the Stockholm Programme, COM/2010/0171 final), foresees at para. 4:

> *Strengthening confidence in the European judicial area: The European judicial area and the proper functioning of the single market are built on the cornerstone principle of mutual recognition. This can only function effectively on the basis of mutual trust among judges, legal professionals, businesses and citizens. Mutual trust requires minimum standards and a reinforced understanding of the different legal traditions and methods.*

And in the Annex the Commission announced for 2013 a Green paper on the minimum standards for civil procedures and necessary follow up and, for 2014, a legislative proposal aimed at improving the consistency of existing Union legislation in the field of civil procedural law.

Interestingly, in its latest „Discussion Paper 1: EU Civil Law" for the *Assises de la Justice* to be held on 21 and 22 November 2013 in Brussels, the Commission, on page 3, after underlining the necessity to reinforce mutual trust through procedural law integration, summarises its view to the future as follows:

> *The step-by-step progress being made in EU civil procedural law may call for a codification of these rules in the interests of legal certainty.*

In the second public session, Alexandra Prechal, judge of the Court of Justice of the European Union from the Netherlands, presented a series of cases connected to constitutional aspects of civil procedure. Professor Burkhard Hess, Director of the Max-Planck-Institute Luxembourg for International, European and Regulatory Procedural Law presented core concepts and trends in the European acquis of

civil procedure. He suggested thinking of a "Brussels 0-Regulation" for civil procedure containing general principles and rules parallel to the discussion about a "Rome 0-Regulation" containing similarly general provisions for the European conflicts of law rules. Hess further reminded the audience of the great influence that special fields of European procedural law such as e.g. rules on ADR, IP litigation or cartel damages litigation do and should have on the building of general rules under an acquis perspective. Hess also drew attention to the potentially growing importance of the Judicial Scoreboard for evaluating Member States' jurisdictions. Finally, Michael Shotter, European Commission, member of Commissioner Viviane Reding's Cabinet, closed the public part of the conference with a report on the agenda of the European Commission in the field of civil procedure. He once more underlined the role of the Judicial Scoreboard as a tool for verifying the legitimacy of mutual trust as the essential principle of the architecture of EU civil procedure.

In the final discussion, Diana Wallis noted that ADR may have a considerable influence on the development of civil procedure because the more ADR becomes successful the more it takes out small claims from mainstream justice and rule-building. Wallis articulated the concern of special forms of "ebay-justice" that may not be desirable in all its facets.

In the closed expert workshops following the public part of the workshop a number of issues were addressed by presentations such as the possible structure of the proceedings (Xandra Kramer, Erasmus University Rotterdam), multiple claims and parties (Ianika Tzankova, Tilburg University/BarentsKrans), access to information and evidence (Nicolò Trocker, University of Florence), due notice and proceedings (Eva Storskrubb, Senior Associate, Roschier, Stockholm), obligations of the parties and lawyers (C. H. Remco van Rhee, University of Maastricht), provisional and protective measures (Gilles Cuniberti, University of Luxembourg), costs (Neil H. Andrews, University of Cambridge), lis pendens and res iudicata (Frédérique Ferrand, University Jean Moulin Lyon 3), transparency of assets and enforcement (Miklos Kengyel, University of Pécs), followed by closing remarks by Rolf Stürner, University of Freiburg.

The workshop took place at the impressive Palace of Justice in its neo-renaissance style at Schmerlingplatz in Vienna, the building in which, inter alia, the Supreme Court of Austria resides. According to its website, "in March 1873 Emperor Franz Josef I chose the site for a Palace of Justice, and by Imperial Ruling in September

1874, he resolved to construct it in Vienna, the capital and imperial residence, ‚in permanent solicitude for the needs of the administration of justice and the population in its quest for justice'. The 1st exploratory workshop on the ELI-UNIDROIT Project on European Rules of Civil Procedure certainly furthered these aims excellently.