

DIRECTORATE-GENERAL FOR INTERNAL POLICIES

**POLICY DEPARTMENT** **C**

CITIZENS' RIGHTS AND CONSTITUTIONAL AFFAIRS



**THE EUROPEAN LAW INSTITUTE/UNIDROIT  
CIVIL PROCEDURE PROJECTS  
AS A SOFT LAW TOOL TO RESOLVE  
CONFLICTS OF LAW**

In-depth Analysis for the JURI committee





**DIRECTORATE GENERAL FOR INTERNAL POLICIES**

**POLICY DEPARTMENT C: CITIZENS' RIGHTS AND  
CONSTITUTIONAL AFFAIRS**

**LEGAL AFFAIRS**

# **The European Law Institute/UNIDROIT Civil Procedure Projects as a Soft Law Tool to Resolve Conflicts of Law**

**IN-DEPTH ANALYSIS**

## **Abstract**

Upon request by the JURI Committee this paper describes recent efforts for a progressive unification of the rules of private international law and more specifically the European Law Institute/UNIDROITs Project for a text establishing "Principles of Transnational Civil Procedure", a regional, "European" set of procedures that would transcend national jurisdictional rules and facilitate the resolution of disputes arising from transnational commercial transactions. It is a rolling programme of Rules designed to produce soft-law.

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## **LIST OF ABBREVIATIONS**

<b>ALI</b>	American Law Institute
<b>AISBL/IVZW/IVOG</b>	Association internationale sans but lucratif/ Internationale vereniging zonder winstoogmerk / Internationale Vereinigung ohne Gewinnerzielungsabsicht
<b>ELI</b>	European Law Institute
<b>HCCH</b>	Hague Conference on Private International Law/ Conférence de La Haye de droit international privé
<b>PTCP</b>	Principles of Transnational Civil Procedure
<b>RTCP</b>	Rules of Transnational Civil Procedure
<b>TFEU</b>	Treaty on the Functioning of the European Union
<b>UNCITRAL</b>	United Nations Commission on International Trade Law
<b>UNIDROIT</b>	International Institute for the Unification of Private Law/ Institut international pour l'unification du droit privé

## EXECUTIVE SUMMARY

### KEY FINDINGS

- Efforts by of a unification of the rules of private international law have been endeavoured since the early 20ies of last century. Today, the UN, the EU and different independent non-profit organisation are working on setting some common minimum standards of civil procedure law.
- Over the last couple of years, working groups have been drafting European civil procedure Rules within the flexible framework of the *Principles of Transnational Civil Procedure* which was a collaboration between UNIDROIT (Rome) and the American Law Institute (Philadelphia).
- Shared ideas, carefully formulated, can have a substantial influence, even if they do not immediately regulate people's lives.
- The ongoing UNIDROIT/EUROPEAN LAW INSTITUTE civil procedure project intends to comprise a coherent set of soft-law Rules.
- The current European Law Institute/UNIDROIT series of Rules have two main aims: first, to produce a set of commonly acceptable rules, pitched at a level where they provide practical guidance, and to do so within the context of Europe.
- If such Rules are to have impact and influence, they must combine practicality, originality, and accessibility.
- The ELI/UNIDROIT European regional project has the ambition to become an important contribution to the European procedural culture.
- The ELI/UNIDROIT civil procedure project will be the most comprehensive and up-to-date reflection of European civil procedural practice and aspiration. They intend to be influential in Europe and elsewhere.
- In the future, such principles may be used as a basis for an EU directive.

## 1. INTRODUCTION

This In-Depth-Analysis is based on a contribution by **Neil H. Andrews**, Professor of Civil Justice and Private Law at the University of Cambridge and Deputy Chair of the Faculty Board, which he made at a workshop of the Legal Affairs committee of the EP, on 15 June 2016 in Brussels: "Common minimum standards of Civil Procedure in the EU: the way forward".<sup>1</sup>

Any legal order in the world has its own rules relating to matters of private law. Private law is concerned with all legal relationships between private entities and thus includes, for example, family law and the law of contracts and obligations. These laws differ from

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<sup>1</sup> <http://www.europarl.europa.eu/committees/en/juri/events-workshops.html?id=20160615CHE00181>

country to country. When parties enter into a contract that has connections with more than one State, the question of which set of legal rules governs the transaction necessarily arises.

International Organisations like the Hague Conference on Private International Law (HCCH) the European Law Institute (ELI), the United Nations Commission on International Trade Law (UNCITRAL), the International Institute for the Unification of Private Law (UNIDROIT) or the American Institute of Law (ALI) have as their purpose to work for the progressive **unification of the rules of private international law.**

The **ALI** (based in Philadelphia, USA) and UNIDROIT (based in Rome, Italy) are preeminent organizations working toward the clarification and advancement of the procedural rules of law. Recognizing the need for a 'universal' set of procedures that would transcend national jurisdictional rules and facilitate the resolution of disputes arising from transnational commercial transactions, the ALI was organized in 1923 following a study conducted by a group of prominent American judges, lawyers, and law professors. Their recommendation that a lawyers' organization be formed to improve the law and its administration led to the creation of ALI.

**UNIDROIT** was founded in 1926 as a specialized agency of the League of Nations. Today it exists as an independent intergovernmental organization on the basis of a multilateral agreement, the UNIDROIT Statute which has as a mandate to study needs and methods for modernizing, harmonizing, and coordinating private laws between states and groups of states and to prepare legislative texts for consideration by governments.

**ELI** is an independent non-profit organisation established to initiate, conduct and facilitate research, make recommendations and provide practical guidance in the field of European legal development. Its mission is the quest for better law-making in Europe and the enhancement of European legal integration. ELI is recognised since 2 June 2011 as an International Non-Profit Association (AISBL/IVZW/IVoG) under Belgian law.

As to the **European Union**, recent years have seen the emergence of a growing body of legally binding rules at European level in the field of procedural law, in the wake of the growing EU competences towards judicial co-operation.

The recent Committee on Legal Affairs document on "Establishing common minimum standards for civil procedure in the European Union – the legal basis" (Rapporteur: Emil Radev<sup>2</sup>) proposes that – in line with the European Commission's past initiatives and the outcome of the joint projects of ELI and UNIDROIT– the time was ripe for a legislative proposal setting out common minimum standards of civil procedure law. Within the current Treaty framework, the legal basis for the harmonisation of cross-border civil procedure is provided in Title V TFEU, on the Area of Freedom, Security and Justice. Specifically, Article 67(4) TFEU gives the EU competence to facilitate access to justice, particularly through the principle of mutual recognition of judicial and extrajudicial decisions in civil matters. In civil procedural law, the pertinent standards are not found in EU instruments, but have mainly been developed by the case law of the CJEU. Here, several principles can be detected: first, Union law provides for procedural guarantees such as the principle of access to justice, to a fair trial and also that of mutual trust. These principles are derived from human rights law

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<sup>2</sup> PE 572.853 of 21 December 2015

which entails a growing constitutionalisation of procedural laws at EU level (reinforced by the EU Charter of Fundamental Rights).<sup>3</sup>

How is the situation on international (non EU) level?

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<sup>3</sup> Burkhard Hess, *Harmonized Rules and Minimum Standards in the European Law of Civil Procedure*; EP 556.971, p.9

## 2. THE PATH TO THE UNIDROIT/ELI PROJECT

Already in 2004, the American Law Institute (ALI) and UNIDROIT published their "Principles of Transnational Civil Procedure (PTCP)".<sup>4</sup> The ALI/UNIDROIT Principles of Transnational Civil Procedure, prepared by a joint ALI/UNIDROIT Study Group and adopted by the Governing Council of UNIDROIT, aim at reconciling the differences among various national rules of civil procedure, taking into account the peculiarities of transnational disputes as compared to purely domestic ones.<sup>5</sup> Translations into Spanish, French,<sup>6</sup> Arabic, Chinese, Russian, and Japanese are available.

These PTCP are standards for adjudication of transnational commercial disputes. They may be equally appropriate for the resolution of most other kinds of civil disputes and may be the basis for future initiatives in reforming civil procedure. They are accompanied by a set of "Rules of Transnational Civil Procedure (RCTP)", which were not formally adopted, but constitute "the Reporters' model implementation of the Principles, providing greater detail and illustrating concrete fulfilment of the Principles"<sup>7</sup>. The PTCP consist of 31 principles which address, inter alia, such issues as the independence and impartiality of the court (principle 1), jurisdiction (principle 2), procedural equality (principle 3), right to engage a lawyer (principle 4), right to be heard (principle 5), language regime (principle 6), speed of proceedings (principle 7), and a number of more detailed principles on the course of proceedings (principles 8-23).<sup>8</sup> The RCTP consist of 39 Rules which are more detailed than the PTCP and are framed in a way which allows for their direct judicial application

Likewise, the HCCH has in 2015 adopted and published its "Hague Principles on Choice of Law in International Commercial Contracts"<sup>9</sup> on the determination of the law applicable to a contract. They do not constitute a formally binding instrument such as the HCCH Conventions (that the participating States are obliged to directly apply or incorporate into their domestic law). The "principles" are a non-binding set of soft-law provisions, which States or private parties are encouraged to use. They can guide parties and law practitioners when setting up a contract and avoid lengthy ex-post law disputes about the applicable law or, ultimately, the competent court. They can even serve as a blue-print for the legislator in promulgating a law (as it happened in the case of Paraguay in 2015 when they served as a model for its "Law Applicable to International Contracts").

With the aim of resuming work on the development of its "Rules", UNIDROIT decided to focus on **regional implementation** and on **adapting the Principles to the peculiarities of specific legal systems**. In this respect, a joint project on the development of **European rules of civil procedure was started** within the framework of the institutional co-operation with ELI.

All recent texts, principles and soft law, along with the European Convention on Human Rights and the Charter of Fundamental Rights of the European Union, the wider acquis of binding EU law, the common procedural traditions in the European countries, the

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<sup>4</sup> <http://www.unidroit.org/instruments/transnational-civil-procedure>; the official text is available in eBook format from Cambridge University Press, Cambridge, May 2007;

<http://www.unidroit.org/english/principles/civilprocedure/ali-unidroitprinciples-e.pdf>

<sup>5</sup> ALI /UNIDROIT, Principles of Transnational Civil Procedure Cambridge University Press, May 2007, 242 pages

<sup>6</sup> Frédérique Ferrand, Lyon

<sup>7</sup> <http://www.unidroit.org/about-unidroit/work-programme?id=1625#a13>

<sup>8</sup> Rafał Mańko, Europeanisation of civil procedure, PE 559.499, European Parliament 2015

<sup>9</sup> <https://www.hcch.net/en/instruments/conventions/full-text/?cid=135#intro>

Commission on European contract law<sup>10</sup> (Ole Lando and Matthias Storme) work, amongst other European sources, formed the starting point of ELI's and UNIDROIT's **current project to develop European Rules of Civil Procedure.**

A joint project on the development of **European rules of civil procedure** was started in October 2013.

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<sup>10</sup> The work of the Commission on European Contract law was continued and supplemented by the "Study group on a European Civil Code" which is a network of academics, from across the EU, conducting comparative law research in private law in the various legal jurisdictions of the Member States, <http://www.sgecc.net/>

### **3. THE JOINT ELI / UNIDROIT PROJECT "FROM TRANSNATIONAL PRINCIPLES TO EUROPEAN RULES OF CIVIL PROCEDURE"**

The ALI/UNIDROIT project and others have shown that shared ideas, carefully formulated, can have a substantial influence, even if they do not immediately regulate people's lives. The ELI-UNIDROIT project, limited within the context of Europe, commenced in October 2013 with an initial exploratory workshop in Vienna<sup>11</sup>. It aimed at producing an initial analysis of a range of different aspects of civil procedure – from due notice and service of process, to collective redress, and *res judicata* and the costs of litigation.

In May 2014, the Steering Committee of the project held its first meeting, three working groups, constituted of experts drawn from across Europe, were established with the following topics to be examined, up to now separate projects:

- access to information and evidence<sup>12</sup>
- interim and protective measures and
- service of documents and due notice of proceedings.

In 2015, two further working groups were set up, focussing on:

- *lis pendens* and *res judicata* and
- obligations of the parties and lawyers.

On 16 April 2015, a meeting of the ELI/Unidroit project group was held, during which progress reports of the working groups on 'access to information and evidence', 'service of documents', as well as 'provisional and protective measures' were discussed, as well as the first reports of the working groups on '*res judicata at lis pendens*' and 'obligations of the parties and lawyers'. Following the meeting, the ELI/UNIDROIT project was presented at a hearing of the Legal Affairs Committee at the European Parliament in Brussels.<sup>13</sup>

In 2016, further working groups have been established

- Costs
- Parties and joinder
- Judgements
- Structure of the proceeding.

Each working group consists of up to eight members and is led by two co-reporters. Each, apart from that concerning structure of the proceedings, is to produce a set of procedural rules

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<sup>11</sup> Matthias Weller -The ELI-UNIDROIT Project: From Transnational Principles to European Rules of Civil Procedure – 1st Exploratory Workshop, *Conflict of Laws*, 22 October 2013, <http://conflictoflaws.net/2013/the-eli-unidroit-project-from-transnational-principles-to-european-rules-of-civil-procedure-1st-exploratory-workshop/>

<sup>12</sup> an example of a draft text with Rules is laid out in the Annex

<sup>13</sup> [http://www.europeanlawinstitute.eu/home/news-contd/article/eli-unidroit-joint-meeting-and-juri-committee-presentation/?tx\\_ttnews%5BbackPid%5D=180991&cHash=e22b106c2c6ca8ee70225cc29593b7a0](http://www.europeanlawinstitute.eu/home/news-contd/article/eli-unidroit-joint-meeting-and-juri-committee-presentation/?tx_ttnews%5BbackPid%5D=180991&cHash=e22b106c2c6ca8ee70225cc29593b7a0)

for their respective area. Once the working groups have finished their work, the “structure of the proceedings” working group will ensure that the drafts produced are transformed into a coherent whole: a draft **set of European Rules of Procedure** would then provide a source of inspiration for European legislators at both EU level and at national level both within and outside the European Union, in other words, the intention is to piece together those into one single “jigsaw” of soft law.<sup>14</sup>

The endeavour is to serve as a useful tool to avoid a fragmentary and haphazard growth of European civil procedural law, while at the same time supporting the promotion of the 2004 ALI / UNIDROIT “global” Principles. From the point of view of UNIDROIT it may further represent a first attempt towards the **development of other regional projects adapting** the 2004 ALI / UNIDROIT Principles to the specificities of other regional legal cultures, leading the way to the drafting of further regional rules.

They are a rolling programme of Rules, with Comment, designed to produce soft-law, drawing on the talents of a group of procedural experts. A balance has been struck between academicians and practitioners. Over-detailed prescription of every imaginable eventuality is not aimed at.

### 3.1 The European dimension

The European dimension is ensured in four ways: the various working groups are drawn from Europe exclusively, all national legal systems which underpin and from which inspiration is being drawn are European, the project is being prepared both in English and in some other European languages and finally the working groups are sensitive to the EU *acquis*, although not constrained by that body of law.

The drafts which have so far been produced are succinct. This places them at the ‘rules’ end of the spectrum of norms rather than at the ‘broad principle’ end. This is not to deny, however, that the rules include many principles which are clearly identifiable as drawn from the UNIDROIT/ALI inheritance.<sup>15</sup> The Rules are shorter than national procedural codes. This will render them more accessible and increase their influence.

The methodology of the working groups has been to identify UNIDROIT/ALI principles which demanded inclusion within the relevant topic. For example, the Evidence project found an abundance of such principles (which will be acknowledged in the final product but which is omitted here, for reasons of economy). By contrast, the Provisional and Protective Relief and *Res Judicata/Lis Pendens* projects have found only one or two ‘foundational’ principles.

All of this explains why the various topics within this overarching project are proceeding in a co-operative manner, freed from national specificity, because shared ideas, carefully formulated, can have a substantial influence, even if they do not immediately regulate people’s lives.

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<sup>14</sup> Neil H. Andrews on 15 June 2016 in Brussels: “Common minimum standards of Civil Procedure in the EU: the way forward” workshop of the Legal affairs committee at the European Parliament

<sup>15</sup> Neil H. Andrews on 15 June 2016 in Brussels: “Common minimum standards of Civil Procedure in the EU: the way forward” workshop of the Legal affairs committee at the European Parliament

Concerning the EU and its 28 Member States and the development of Private International law, there is the one hand, **substantive European law expanding steadily**. Examples are the Regulation on the European **Small Claims Procedure**<sup>16</sup> which was established in 2007, recent developments relate to consumer and data protection. Here, European substantive law is implemented by national courts in the framework of, and by means of, their national (civil) procedures. **Procedural interventions** of the EU law-maker in these areas of law are often annexed to substantive law-making. Prominent examples include Article 7 of the Directive on Unfair Terms in Consumer Contracts<sup>17</sup> and the new Regulation on Data Protection.<sup>18</sup> One might describe the influence of Union law in this area as vertical: as national courts implement substantive EU law by virtue of their national procedures, the European law-maker may intervene in order to guarantee or to improve the uniform application of EU law by the courts of the Member States.<sup>19</sup>

The second dimension of European procedural law relates to **cross-border proceedings**. In this area of law, the Union disposes of specific competences in Articles 67 and 81 TFEU; it is empowered to set up a procedural framework for the settlement of cross-border disputes in the Area of Freedom, Security and Justice. The core activities of the EU in this respect relate to the instruments on jurisdiction, pendency and the cross-border enforcement of judgments. As far as the **free movement of judgments** is concerned, the legislative activity of the European Union operates in a horizontal way: it aims at overcoming impediments in national procedural laws to the free circulation of judgments (and other enforceable titles) in the Justice Area. These impediments may result from the differences of the national procedures. Additional impediments relate to language barriers, cultural divergences, and the lack of information about litigation risks and costs.

Under **Article 81 TFEU**, the Union is empowered to enact legislation in order to improve and guarantee effective access to justice and to eliminate obstacles to the proper functioning of civil proceedings.

**The European dimension** of the ELI/UNIDROIT project "From Transnational Principles to European Rules of Civil Procedure" **is important in four ways**: the various working groups are drawn from Europe; the national legal systems which underpin the project are all European; the project is being prepared both in English and in some other European languages; the working groups are sensitive to the European *acquis*, although not constrained by that body of law, because this is a set of soft-law Rules.

### 3.2. Characteristics and working method

The draft rules which have so far been produced are succinct<sup>20</sup> and are rather "norms" than at the 'broad principle' end. This is not to deny, however, that the rules include many principles which are clearly identifiable as drawn from the UNIDROIT/ALI inheritance. The existing output of the earlier ALI/Unidroit project seems to address the regulation of civil

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<sup>16</sup> regulation (EC) No 861/2007 of 11 July 2007 establishing a European Small Claims Procedure, O.J. L 199/1 (2007).

<sup>17</sup> Directive on Unfair Terms 93/13/EEC.

<sup>18</sup> Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), OJ 2016 L 119/1.

<sup>19</sup> Hess, *Europäisches Zivilprozessrecht* (2010), § 11, para 1 ss.

procedure at a level of intermediate detail, between the broadest constitutional principles (such as those found in the EU Charter or the ECHR) and the technicalities found in national laws.<sup>21</sup> The draft Rules will be much shorter than national procedural codes (see example in Annex). Hopefully, this will render them more accessible and hopefully increase their influence.

The Members of the ELI-UNIDROIT Project "From Transnational Principles to European Rules of Civil Procedure" met again on 21-22 November 2016 in Vienna to discuss the advanced drafts of the three initial Working Groups, 'Access to information and evidence', 'Service and due notice of proceedings', and 'Provisional and protective measures'.<sup>22</sup>

Concerning the language used and the national Legal Jargon, according to Andrews, "the terminological and technical 'baggage' of legal systems has been reduced by endeavouring to use language which is not peculiar to a particular legal system or 'family' of systems".<sup>23</sup> From time to time, "deep-set institutional differences have been encountered" in the different working groups. "It has been necessary on some of those occasions for the relevant working party to concede that there is a fundamental difference of approach within various European legal systems, rather than jettisoning one approach, or trying to produce a compromise which would be unfamiliar to all and would please and be useful to none."

Also, it must "always be born in mind that any set of rules adopted across Europe will fall to be used by courts in different Member States where the judges are educated, trained, appointed, paid, supervised, esteemed or valued, feared or respected, promoted, supported or neglected, and pensioned or finally released, in quite different ways."

Of course, it would be attractive to raise the standard of judicial administration across all relevant legal systems. But the rules must be tailored to reflect the state of play amongst the European judiciaries. It is suggested "that the project should be conducted in a realistic manner, at the same time avoiding a downward tendency towards the lowest common denominator."

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<sup>20</sup> The Rules are structured and arranged as laid out in the example in the Annex

<sup>21</sup> Rafał Mańko, Europeanization of civil procedure, PE 559.499, European Parliament 2015, p. 26

<sup>22</sup> <http://www.europeanlawinstitute.eu/news/news-contd/article/eli-unidroit-joint-meeting-of-the-steering-committee-with-working-group-reporters-members-advisers/?xttnews%5BbackPid%5D=179468&cHash=a884c629e024610ccbf04bc42d011145>

<sup>23</sup> Neil H. Andrews on 15 June 2016 in Brussels: "Common minimum standards of Civil Procedure in the EU: the way forward" workshop at the European Parliament

## 4. CONCLUSION

An ambitious endeavour has been launched in 2013 leading towards a possible uniformisation of civil procedural law adoption by the European Law Institute which, together with Unidroit, has begun drafting the "Principles of European civil procedure", allowing enough space for divergent legal cultures and traditions. The inspiration has been the *Principles of Transnational Civil Procedure* which were published under the joint auspices of UNIDROIT (based in Rome) and the American Law Institute (Philadelphia). This project was concerned with "principles" rather than "rules". An unofficial treatment of *Rules*, within the framework of the UNIDROIT/ALI *Principles*, was appended to the same 2006 publication. But the *Rules* were not officially adopted or presented as an official document.

The different working groups of the ELI/UNIDROIT project will have to strike a balance between generality and specificity of its provisions, so as to avoid creating a text which, although general and abstract enough to be acceptable for all Member States, is not specific enough to actually promote common standards that allow for an increase of mutual trust.

In the future, such principles may be used as a basis for an EU directive. A number of challenges will need to be addressed. Once adopted as a soft-law instrument, the 'European Rules of Civil Procedure' could form the basis for the development of a horizontal EU directive, codifying the fundamental principles of civil procedure which, within the realm of the ECHR and the EU Charter, can be considered as striking a fair balance between the rights and interests of both claimants and defendants. The main issue would be to detect the appropriate level of detail. A set of binding, medium-level detailed EU principles of civil procedure in the form of a directive could strike the balance between, on the one hand, the need for flexibility and taking into account the divergence of national civil procedures, and, on the other hand, the growing need for increasing mutual trust in judiciaries of fellow Member States, on the basis of a commonly acceptable balance of fundamental rights of litigants.

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## **ANNEX<sup>24</sup>**

### **Example: Working group EVIDENCE AND ACCESS TO INFORMATION**

The Rules presented here are samples of work-in-progress, they remain copyright EUROPEAN LAW INSTITUTE and UNIDROIT 2017.

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The general structure of the draft set of rules is currently looking as follows

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#### **SECTION B PARTIES' RESPONSIBILITIES AND RIGHTS CONCERNING EVIDENCE AND ACCESS TO INFORMATION**

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#### **SECTION C PARTY STATEMENTS**

#### **SECTION D EXPERTISE**

#### **SECTION E JUDICIAL INSPECTION**

#### **SECTION F TECHNOLOGY**

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<sup>24</sup> The Rules and Comment presented here remain copyright EUROPEAN LAW INSTITUTE and UNIDROIT 2016.

## **PART I - GENERAL ISSUES OF EVIDENCE**

### **SECTION A**

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- Rule 1: Scope of the Dispute
- Rule 2: Burden of Proof
- Rule 3: Standard of Proof
- Rule 4: Matters Not Requiring Positive Evidence
- Rule 5: Relevance
- Rule 6: Illegally Obtained Evidence
- Rule 7: Equality, Fairness and Proportionality

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## **PART I GENERAL ISSUES OF EVIDENCE**

### **SECTION A**

#### **FUNDAMENTAL ELEMENTS OF EVIDENCE**

##### **RULE 1**

##### **SCOPE OF THE DISPUTE**

The scope of the dispute is determined by the claims and defences of the parties in the pleadings, including amendments.<sup>25</sup>

##### **RULE 2**

##### **BURDEN OF PROOF**

In general, each party has the burden to prove all the material facts which form the basis of that party's case.<sup>26</sup>

Substantive law determines the burden of proof.

##### **RULE 3**

##### **STANDARD OF PROOF**

A contested fact is proven when the court is reasonably convinced of its truth.<sup>27</sup>

##### **RULE 4**

##### **MATTERS NOT REQUIRING POSITIVE EVIDENCE**

- (i) The following do not require positive evidence:
  - a. admitted facts;
  - b. uncontested facts; or
  - c. facts which are notorious to the court.
- (ii) Facts can be presumed on the basis of other proven facts.
- (iii) When a party has possession or control of evidence concerning a relevant fact and that party, without justification, fails to produce that evidence, the court may consider that relevant fact to be proven.<sup>28</sup>

##### **RULE 5**

##### **RELEVANCE**

- (i) In general, any relevant evidence is admissible. The court, whether of its own motion or on application by a party, shall exclude evidence which is irrelevant.
- (ii) Matters alleged in the parties' pleadings determine relevance.

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<sup>25</sup> Substantially based on UNIDROIT/ALI Principle 10.3.

<sup>26</sup> Substantially based on UNIDROIT/ALI Principle 21.1.

<sup>27</sup> Substantially based on UNIDROIT/ALI Principle 21.2.

<sup>28</sup> Substantially based on UNIDROIT/ALI Principle 21.3.

## **RULE 6 ILLEGALLY OBTAINED EVIDENCE**

In general, illegally obtained evidence should be excluded from the proceedings. However, in exceptional cases, the court may admit such evidence if it is the only way to establish the facts, taking into account the behaviour of the other party and the degree of infringement of that party's rights.

## **RULE 7 EQUALITY, FAIRNESS AND PROPORTIONALITY**

The court must ensure:

- (a) that the parties, and prospective parties, enjoy equal treatment and reasonable opportunity to gain access to, and to present, evidence;<sup>29</sup>
- (b) that these rules operate fairly;
- (c) that these rules operate in a manner which is proportionate to the importance and complexity of the issues.

## **SECTION B PARTIES' RESPONSIBILITIES AND RIGHTS CONCERNING EVIDENCE AND ACCESS TO INFORMATION**

### **RULE 8 PRIVILEGES**

[This Rule has yet to be discussed]

### **RULE 9 PRESENTATION OF EVIDENCE AND CONTRADICTION**

- (i) Each party has the right to offer relevant evidence supporting their contentions of fact and law.<sup>30</sup>
- (ii) Each party should have a fair opportunity and reasonably adequate time to respond to contentions of fact and law and to evidence presented by another party.<sup>31</sup>

### **RULE 10 ADMISSION BY FAILURE TO CHALLENGE**

A party's unjustified failure to make a timely response to an opposing party's contention may be taken by the court, after warning the party, as a sufficient basis for considering that contention to be admitted or accepted.<sup>32</sup>

### **RULE 11 EARLY PARTY IDENTIFICATION OF EVIDENCE**

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<sup>29</sup> Substantially based on UNIDROIT/ALI Principle 3.1.

<sup>30</sup> Substantially based on UNIDROIT/ALI Principle 5.4.

<sup>31</sup> Substantially based on UNIDROIT/ALI Principle 5.5.

<sup>32</sup> Substantially based on UNIDROIT/ALI Principle 11.4.

During the pleading phase, the parties must identify the evidence which they propose to produce to support their respective factual allegations.<sup>33</sup>

#### **RULE 12 NOTIFICATION OF EVIDENCE**

(i) In general, documentary or tangible evidence must be made available to the other party.

(ii) Witness evidence may be proposed to the court only if notice is given to all other parties of the relevant witness' identity and the subject-matter of the proposed evidence.

#### **RULE 13 ADDITIONAL EVIDENCE AFTER AMENDMENT OF THE CONTENTIONS**

The court may, while affording the parties opportunity to respond, permit or invite a party to clarify or amend his contentions of fact and to offer additional evidence accordingly.<sup>34</sup>

#### **RULE 14 LATE PRESENTATION OF EVIDENCE**

Once a party has presented evidence during the relevant phase of the proceedings, further evidence will be admissible only if that party shows good reason for not having produced it during that earlier phase.

### **SECTION C**

#### **THE COURT'S POWERS AND RESPONSIBILITIES CONCERNING EVIDENCE**

#### **RULE 15 CONCENTRATED FINAL HEARING**

(i) During the final phase evidence not already received by the court should be presented in a concentrated final hearing at which the parties should also make their concluding arguments.<sup>35</sup>

(ii) The final hearing must be held before the judges who are to give judgment.

#### **RULE 16 THE COURT'S MANAGEMENT OF EVIDENCE**

(i) During the early stages of the procedure the court, after discussion with the parties, should address the admissibility, production and exchange of evidence. When necessary, the court will order the taking of evidence.<sup>36</sup>

(ii) The court, after discussion with the parties, may make decisions concerning the sequence and timing of producing evidence, as well as, where appropriate, the form in which evidence will be produced.<sup>37</sup>

#### **RULE 17**

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<sup>33</sup> Substantially based on UNIDROIT/ALI Principle 9.2 and 11.3.

<sup>34</sup> Substantially based on UNIDROIT/ALI Principle 22.2.1.

<sup>35</sup> Substantially based on UNIDROIT/ALI Principle 9.4.

<sup>36</sup> Substantially based on UNIDROIT/ALI Principle 9.3.4 and 9.3.6.

<sup>37</sup> Substantially based on UNIDROIT/ALI Principle 14.1, 14.2 and 14.3.

## **COURT INDICATING NEED FOR FURTHER EVIDENCE**

- (i) The court may, while affording the parties opportunity to respond, suggest what evidence not previously proposed by a party should be relevant and useful. If a party accepts that suggestion the court will order the taking of that evidence.
- (ii) Exceptionally, the court may, while affording the parties opportunity to respond, order the taking of evidence not previously proposed by a party.<sup>38</sup>

## **RULE 18 CONDUCT OF HEARINGS**

- (i) The court should hear and receive all evidence directly<sup>39</sup> unless, exceptionally, the court has authorised evidence to be taken at another location.<sup>40</sup>
- (ii) The general rule is that oral hearings, including hearings in which evidence is presented and in which judgment is pronounced, should be open to the public. However, following consultation with the parties, the court may order that hearings or portions thereof be kept confidential in the interest of justice, public safety, or privacy. In the interest of justice, public safety, or privacy, if the proceedings are public, the judge may order part of them to be conducted in private.
- (iii) Any hearing where evidence is taken must be video recorded. The video recording must be kept under the court's direction. A party demanding such a record must pay the expense thereof.
- (iv) Court files and records should be public or otherwise accessible to persons with a legal interest or making a responsible inquiry, according to forum law.
- (v) Information obtained under these Rules but not presented in an open hearing must be maintained in confidence in accordance with forum law. In appropriate cases, the court may enter suitable protective orders to safeguard legitimate interests, such as trade or business or national-security secrets or information whose disclosure might cause undue injury or embarrassment. To facilitate administration of this Rule, the court may examine evidence in camera.
- (vi) Hearings can involve use of technology, such as videoconferencing, etc.

## **RULE 19 EVALUATION OF EVIDENCE AND JUDGMENT**

- (i) The court shall take into account all relevant facts and evidence when making its final decision.<sup>41</sup>
- (ii) The court should make free evaluation of the evidence.<sup>42</sup>
- (iii) The court may, while affording the parties opportunity to respond, rely upon an interpretation of the facts or of the evidence that has not been advanced by a party.<sup>43</sup>
- (iv) Final judgment should be accompanied, whether immediately or within a reasonable time, by a reasoned explanation of the essential evidential, factual, and legal basis of the decision.<sup>44</sup>

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<sup>38</sup> Substantially based on UNIDROIT/ALI Principle 22.2.2.

<sup>39</sup> Substantially based on UNIDROIT/ALI Principle 22.3.

<sup>40</sup> Substantially based on UNIDROIT/ALI Principle 22.3.

<sup>41</sup> Substantially based on UNIDROIT/ALI Principle 22.1.

<sup>42</sup> Substantially based on UNIDROIT/ALI Principle 16.6.

<sup>43</sup> Substantially based on UNIDROIT/ALI Principle 22.2.3.

<sup>44</sup> Substantially based on UNIDROIT/ALI Principle 23.2.

## **PART II ACCESS TO EVIDENCE ORDERS**

### **RULE 20 SANCTIONS CONCERNING EVIDENCE**

- (i) The court, whether on its own motion or on application by a party, may impose sanctions in these circumstances:
  - (a) a person has unjustifiably failed to attend to give evidence or to answer proper questions, or to produce a document or other item of evidence;
  - (b) a person has otherwise obstructed the fair application of the rules concerning evidence.<sup>45</sup>
- (ii) Appropriate sanctions against parties might include: drawing adverse inferences; dismissing claims, defences, or allegations in whole or in part; staying the proceeding; and awarding costs in addition to those permitted under ordinary cost rules.
- (iii) Appropriate sanctions against parties and non-parties might include pecuniary sanctions, such as fines and *astreintes*.
- (iv) Appropriate sanctions against lawyers might include an award of costs.<sup>46</sup>
- (v) In any particular case, the court should ensure that sanctions are reasonable and proportionate to the seriousness of the default or non-compliance, the harm caused, the extent of participation and the degree to which the conduct was deliberate.<sup>47</sup>

### **RULE 21 GENERAL FRAMEWORK**

When making orders under the Rules in this Part the court will give effect to the following principles:

- (i) in general, the court and each party should have access to all forms of relevant and non-privileged evidence;
- (ii) in response to a party's application, the court should order disclosure of relevant, non-privileged, and reasonably identified evidence held or controlled by another party or, if necessary, by a non-party, even if such disclosure might be adverse to that person<sup>48</sup>.

### **RULE 22 ORDERS FOR ACCESS TO EVIDENCE**

- (i) Subject to the considerations and procedure contained in Rules 21 to 27, any claimant or defendant, or any prospective claimant who intends to sue, can request the court to make an order for access to evidence held or controlled by the other party or by non-parties.
- (ii) An order under (i) shall not be granted ex officio by the court, without prejudice to the provisions laid down in special rules.

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<sup>45</sup> Substantially based on UNIDROIT/ALI Principle 17.1.

<sup>46</sup> Substantially based on UNIDROIT/ALI Principle 17.3.

<sup>47</sup> Substantially based on UNIDROIT/ALI Principle 17.2.

<sup>48</sup> Substantially based on UNIDROIT/ALI Principles 16.1 and 16.2.

- (iii) Material or information supplied under this rule only becomes evidence when it is formally introduced as such into the proceedings.

### **RULE 23 RELEVANT FACTORS**

- (i) The party or prospective party seeking an order for access to evidence must satisfy the court:
  - a) that the requested evidence is necessary for the development or proposed development of issues in dispute in pending proceedings or in proceedings which are contemplated; and
  - b) that the applicant cannot otherwise gain access to this evidence without the court's assistance.
- (ii) Furthermore, the party or prospective party making a request under Rule 21 must submit with its request prima facie evidence of the merits of its claim or defence. If the order is requested prior to the initiation of proceedings, the applicant must indicate with sufficient precision all elements which are necessary to allow the court to identify the claim which the applicant intends to make.

### **RULE 24 PRECISION AND PROPORTIONALITY**

- (i) The applicant shall identify, as accurately as possible in the light of the circumstances of the case, the specific sources of evidence to which access is sought or, alternatively, closely defined categories of evidence by reference to its nature, content, or date. The court shall refuse in any case to make an order in respect of a request which involves a vague, speculative, or unjustifiably wide-ranging search for information.
- (ii) The applicant must justify that the requested measures are proportionate and reasonable. For this purpose the court will weigh the legitimate interests of all parties and all interested non-parties.
- (iii) The persons from whom a measure of access to sources of evidence is requested may apply to the court for the making of a different but no less effective form or method of gaining access to evidence on the basis that this alternative will be less burdensome.

### **RULE 25 CONFIDENTIAL INFORMATION**

- (i) The court shall consider whether the proposed request concerns or includes confidential information, especially in relation to non-parties. For this purpose, the court shall have regard to all relevant rules for the protection of confidential information.
- (ii) Where necessary, in the light of the circumstances of the case, the court may make an order for access to evidence containing confidential information adjusted in one or more of the following ways in order to protect the relevant interest in maintaining confidentiality:
  - (1) redacting sensitive passages in documents;

- (2) conducting hearings in camera;
- (3) restricting the persons allowed to gain access to or inspect the proposed evidence;
- (4) instructing experts to produce summaries of the information in an aggregated or otherwise non-confidential form;
- (5) writing a non-confidential version of a judicial decision in which passages containing confidential data are deleted;
- (6) limiting access to certain sources of evidence to the representatives and lawyers of the parties and to experts who are subject to a duty of confidentiality.

## **RULE 26**

### **BREACHES OF CONFIDENTIALITY**

If a person breaches any duty of confidentiality the aggrieved party may request the court to impose on the party in breach one or more of the following consequences, proportionate to the relevance of the breach and considering especially if it occurred before proceedings on the merits were commenced:

- (a) wholly or partially dismissing the party in breach's claims, if the main proceedings are still pending;
- (b) declaring the party in breach liable for damages and ordering payment of such compensation;
- (c) ordering the party in breach to pay the costs of the procedure conducted under these Rules, whatever the outcome of it might be.;
- (d) the court may impose on the party in breach (and/or on his representatives) a fine (or fines) ranging [from XXX to YYY euros].

## **RULE 27**

### **ACCESS TO EVIDENCE HELD BY OFFICIAL BODIES**

Government and other public agencies shall comply with an order made under these rules, except in the case of information protected on grounds of public interest. In support of such a refusal, it will be necessary for the court to receive a reasoned explanation of the basis for claiming such special protection.

## **RULE 28**

### **TIMING OF APPLICATIONS**

- (i) Requests for access to evidence may be made (a) prior to the initiation of the proceedings, or (b) in the document instituting the proceedings, or (c) during the pendency of the proceedings
- (ii) If an order has been made at stage (i)(a) above, where appropriate, the successful applicant might also be required to initiate proceedings within a specified reasonable period of time. If the applicant fails to comply with this requirement the court with provide accordingly.
- (iii) The court, at the request of an aggrieved person, may take steps to ensure that all relevant responses to the order are reversed, including in particular requiring return of all documents, records, and objects and, furthermore, ensuring that the data and information collected by or made available to the applicant cannot be

used in any other process by that person or any other person to whom the information has been disclosed.

## **RULE 29 THE PROCESS FOR GRANTING ACCESS ORDERS**

- (i) In general, the court shall determine an application for an order for access to evidence only after an adversarial hearing, at which all parties (and those to be subject to the proposed order) shall have the opportunity to resist the proposed order and to make representations concerning its scope and proposed implementation.
- (ii) Ex parte applications may be accepted by the court in case of urgent necessity the court. If the application is granted the person affected by the order can ask the court to celebrate a hearing in the terms provided for in (i).
- (iii) The application may also include a request for measures to protect or preserve evidence.

## **RULE 30 COSTS AND SECURITY**

- (i) The applicant shall bear the cost of any expense incurred in the implementation of an order for access to evidence. Where appropriate the court may require that the applicant make immediate payment in respect of said costs and expenses.
- (ii) On request of the opponent the court can order the applicant to provide security for any predictable expense to be incurred in the implementation of an order for access to evidence. If security is required by the court, it will be necessary for the applicant to provide this before seeking to implement the order.
- (iii) At the end of the main proceedings the court may decide on the costs differently.

## **RULE 31 IMPLEMENTATION AND ENFORCEMENT**

The court is responsible for prescribing all necessary and practical steps to ensure that its order under these Rules is effectively and fairly implemented, including issuing directions concerning the appropriate place and manner in which the order is carried out. In particular, the court can direct that the applicant may be assisted by an expert

## **RULE 32 NON-COMPLIANCE WITH ACCESS ORDERS**

If a person who is subject to and aware of an order made under these Rules, destroys or conceals the relevant evidence, or otherwise renders it impossible to carry out the order successfully, the applicant may request the court to impose, consistent with a requirement of proportionality, any or more of the following consequences:

- (a) declaring as admitted the facts which form the subject-matter of the relevant order for access to sources of evidence;
- (b) treating the defendant or prospective defendant as having impliedly conceded the basis or any relevant part of the claim which has been made or which was proposed by the applicant;

- (c) dismissing or declaring invalid, wholly or partially, defences or counterclaims made by the relevant respondent to the order;
- (d) imposing on the relevant respondent to the order (and in accordance with the relevant court's established disciplinary powers) a penalty of between XXX and YYY Euros (or their national equivalent sums) per day of delay in implementing the order.
- (e) This Rule will operate without prejudice to any other sanctions or disciplinary procedural measures available to the court, including measures according to rule 19.

## **PART III**

### **TYPES OF EVIDENCE**

#### **SECTION A DOCUMENTS**

##### **RULE 33 DOCUMENTARY AND ELECTRONIC EVIDENCE**

- (i) The parties may offer in evidence any relevant document.
- (ii) Document means a writing, communication, picture, drawing, programme or data of any kind, whether recorded or maintained on paper or by electronic, audio, visual or any other means.
- (iii) Documents that a party maintains in electronic form shall ordinarily be submitted or produced in electronic form, unless the court decides otherwise.

##### **RULE 34 AUTHENTIC INSTRUMENTS**

- (i) An authentic instrument is a document recording a legal act or fact, the authenticity of which is certified by a public authority.
- (ii) Electronically recorded authentic instruments will have the same probative value as those recorded in paper.

##### **RULE 35 DOCUMENTS: LANGUAGE AND TRANSLATION**

- (i) At request of a party or the court, any document should be produced or translated into a language of the court. Translation must be provided when a document is not written in a language in which the proceeding is conducted.<sup>49</sup>
- (ii) Translation of lengthy or voluminous documents may be limited to portions, as agreed by the parties or ordered by the court.<sup>50</sup>

Translation of lengthy documents may be limited to relevant portions, as agreed by the parties or ordered by the court.<sup>51</sup>

#### **SECTION B TESTIMONY (FACTUAL WITNESS EVIDENCE)**

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<sup>49</sup> Substantially based on UNIDROIT/ALI Principle 6.1.

<sup>50</sup> Substantially based on UNIDROIT/ALI Principle 6.3.

<sup>51</sup> Substantially based on UNIDROIT/ALI Principle 8.3.

## **RULE 36**

### **FACTUAL WITNESSES**

- (i) Subject to considerations of relevance, admissibility, case management and privileges, a party has the right to present the testimony of any factual witness.
- (ii) If a factual witness whose testimony satisfies the requirements of Rule 35(i) refuses to give evidence, in whole or in part, he can be ordered to do so by the court.
- (iii) The process of eliciting the testimony of witnesses should proceed as customary in the forum. A party should have the right to conduct supplemental questioning directly to a witness who has first been questioned by the judge or by another party.

## **RULE 37**

### **TESTIMONY**

- (i) Ordinarily, testimony parties and witnesses should be received orally. But the court may, upon consultation with the parties, require that initial testimony of witnesses be in writing, which should be supplied to the parties in advance of the hearing.<sup>52</sup> Oral testimony may be limited to supplemental questioning following written presentation of a witness's principal testimony.<sup>53</sup>
- (ii) Each witness shall appear in person unless the court allows the use of videoconference or similar technology with respect to a particular witness (generally on technology and hearings, see Rule 46).
- (iii) A person giving testimony may be questioned first by the court or the party seeking the testimony. A party should have the right to conduct supplemental questioning directly to witness, who has first been questioned by the judge or by another party.<sup>54</sup>
- (iv) The court and the parties may challenge a witness's credibility.

## **RULE 38**

### **WITNESSES: LANGUAGE AND TRANSLATION**

- (i) With the consent of the court and the parties a witness may give evidence in a language other than the official language of proceedings.
- (ii) Translation should be provided when a witness is not competent in the official language(s) in which the proceeding is being or may be conducted.<sup>55</sup>

## **RULE 39**

### **WITNESS STATEMENTS**

With permission of the court, a party may present a written statement of sworn testimony of any person, containing statements in their own words about relevant facts. The court, in its discretion, may consider such statements as if they were made by oral testimony before the court. Whenever appropriate, a party may move for an order of the court requiring the personal appearance of the author of such a statement. Examination of that witness may begin with supplemental questioning by the court or opposing party.

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<sup>52</sup> Substantially based on UNIDROIT/ALI Principle 19.3.

<sup>53</sup> Substantially based on UNIDROIT/ALI Principle 19.4.

<sup>54</sup> Substantially based on UNIDROIT/ALI Principle 16.4.

<sup>55</sup> Substantially based on UNIDROIT/ALI Principle 6.3.

## **SECTION C**

### **PARTY STATEMENTS**

#### **RULE 40 COMPETENCE AND COMPELLABILITY OF PARTIES**

[This Rule has yet to be discussed]

### **SECTION D EXPERTISE**

#### **RULE 41 APPOINTMENT OF EXPERTS**

[This Rule has yet to be discussed]

#### **RULE 42 PARTY-APPOINTED EXPERTS**

[This Rule has yet to be discussed]

#### **RULE 43 DUTIES OF EXPERTS**

[This Rule has yet to be discussed]

#### **RULE 44 EXPERT REPORTS AND ORAL EVIDENCE**

[This Rule has yet to be discussed]

## **SECTION E JUDICIAL INSPECTION**

### **RULE 45 JUDICIAL INSPECTION IN GENERAL**

- (i) Generally, the court and each party should have access to relevant and nonprivileged evidence, derived from inspection of things, entry upon land, or, under appropriate circumstances, from physical or mental examination of a person.<sup>56</sup>
- (ii) The court may, at the request of a party or on its own motion, inspect or require the inspection by court-appointed expert or a party-appointed expert, as it deems appropriate.
- (iii) The court shall, in consultation with the parties, determine the timing and arrangement for the inspection.
- (iv) The parties and their representatives shall have the right to attend any inspection with the exception of examination of persons.

### **RULE 46 NON-PARTIES AND JUDICIAL INSPECTION**

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<sup>56</sup> Substantially based on UNIDROIT/ALI Principle 16.1.

- (i) The court may order persons who are not parties to the proceeding to produce things for inspection by the court or a party.
- (ii) The court shall require a party seeking an order directed to a third person to provide compensation for the costs of compliance.
- (iii) An order directed to a third person may be enforced by means authorised against such person by forum law, including imposition of cost sanctions, a monetary penalty, astreintes, contempt of court, or seizure of documents or other things. If the third party is not subject to the court's jurisdiction, any party may seek assistance of a court that has such jurisdiction to enforce the order.

## **SECTION F TECHNOLOGY**

### **RULE 47 EVIDENCE AND TECHNOLOGY**

The court may make use of technology, such as teleconferencing, videoconferencing, etc, when taking evidence, conducting hearings, communicating with parties, or rendering decisions or issuing orders under these Rules.

Text.

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## DIRECTORATE-GENERAL FOR INTERNAL POLICIES

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