2001

Introduction to the Principles and Rules of Transnational Civil Procedure

Geoffrey C. Hazard Jr.
University of Pennsylvania Law School, ghazard@law.upenn.edu

Michele Taruffo

Rolf Sturner

Anthony Gidi

Follow this and additional works at: http://scholarship.law.upenn.edu/faculty_scholarship

Part of the Civil Procedure Commons, Conflict of Laws Commons, International Business Commons, International Law Commons, International Relations Commons, International Trade Law Commons, Jurisprudence Commons, Legal Studies Commons, and the Transnational Law Commons

Recommended Citation

Hazard, Geoffrey C. Jr.; Taruffo, Michele; Sturner, Rolf; and Gidi, Anthony, "Introduction to the Principles and Rules of Transnational Civil Procedure" (2001). Faculty Scholarship. Paper 1076.
http://scholarship.law.upenn.edu/faculty_scholarship/1076

This Article is brought to you for free and open access by Penn Law: Legal Scholarship Repository. It has been accepted for inclusion in Faculty Scholarship by an authorized administrator of Penn Law: Legal Scholarship Repository. For more information, please contact PennlawIR@law.upenn.edu.
INTRODUCTION TO THE PRINCIPLES AND RULES
OF TRANSNATIONAL CIVIL PROCEDURE

GEOFFREY C. HAZARD, JR.*
MICHELE TARUFFO**
ROLF STÜRNER***
ANTONIO GIDI****

I. INTERNATIONAL “HARMONIZATION” OF PROCEDURAL LAW

The human community of the world lives in closer quarters today than in earlier times. International trade is at an all-time high and is increasing steadily; international investment and monetary flows increase apace; businesses from the developed countries establish themselves all over the globe directly or through subsidiaries; business people travel abroad as a matter of routine; ordinary citizens in increasing numbers live temporarily or permanently outside their native countries. As a consequence, there are positive and productive interactions among citizens of different nations in the form of increased commerce and wider possibilities for personal experience and development. There are also inevitable negative interactions, however, including increased social friction, legal controversy, and litigation.

In dealing with these negative consequences, the costs and distress resulting from legal conflict can be mitigated by reducing differences in legal systems, so that the same or similar “rules of the game” apply no matter where the participants may find themselves. The effort to reduce differences among national legal systems is commonly referred to as “harmoniza-

* Trustee Professor of Law, University of Pennsylvania, Co-Reporter for the American Law Institute/UNIDROIT project for Principles and Rules of Transnational Civil Procedure.
** Professor of Law, University of Pavia, Italy, Co-Reporter for the American Law Institute project for Principles and Rules of Transnational Civil Procedure.
*** Professor of Law, University of Freiburg, Germany, Co-Reporter for the UNIDROIT project for Principles and Rules of Transnational Civil Procedure.
**** Lecturer-in-Law, University of Pennsylvania, Assistant Reporter for the American Law Institute project for Principles and Rules of Transnational Civil Procedure and Secretary to the UNIDROIT Working Group.
tion.” Another method for reducing differences is “approximation,” meaning the process of reforming the rules of various legal systems so that they approximate each other. Most endeavors at harmonization have addressed substantive law, particularly the law governing commercial and financial transactions. There is now in place a profusion of treaties and conventions governing these subjects as well as similar arrangements addressing personal rights such as those of employees, children, and married women.¹

Harmonization of procedural law has made much less progress. It has been impeded by the assumption that national procedural systems are too different from each other and too deeply embedded in local political history and cultural tradition to permit reduction or reconciliation of differences among legal systems. There are, to be sure, some international conventions dealing with procedural law, notably the Hague Convention on the Taking of Evidence Abroad, the evolving Hague Convention on Jurisdiction and Judgments, and the European conventions on recognition of judgments.²

Thus far, the international conventions on procedural law have addressed the bases of personal jurisdiction and the mechanics for service of process to commence a lawsuit on


one end of the litigation process and recognition of judgments on the other end of the process.

However, the pioneering work of Professor Marcel Storme has demonstrated that harmonization is possible in such procedural matters as the formulation of claims, the development of evidence, and the decision procedure. This project to develop transnational rules for civil procedure has drawn extensively on the work of Professor Storme.

International arbitration often is a substitute for adjudication in national courts. However, the international conventions on arbitration have the same limited scope as the conventions dealing with international litigation in judicial forums. Thus, the international conventions on arbitration address aspects of the commencement of an arbitration proceeding and the recognition to be accorded an arbitration award but say little or nothing about the procedure in an international arbitration proceeding as such. Instead, the typical stipulation concerning hearing procedure in international arbitration is that the procedural ground rules shall be as determined by the neutral arbitrator.

This project endeavors to draft procedural rules that a country could adopt for adjudication of disputes arising from international transactions. The project is inspired by the desire to unite many diverse jurisdictions under one system of procedural rules as was accomplished in the United States a half-century ago with the enactment of the Federal Rules of Civil Procedure. The Federal Rules established a single procedure to be employed in courts sitting in forty-eight different, semi-sovereign states, each of which with its own procedural law, its own procedural culture, and its own bar. The Federal

---


Rules thereby accomplished what many thoughtful observers thought impossible—a single system of procedure for four dozen different legal communities. Experience with the Federal Rules proves that it has been possible to establish a single procedure for litigation in Louisiana (civil law system), Virginia (common law pleading in 1938), and California (code pleading). The project to establish Transnational Rules conjectures that a procedure for litigation in transactions across national boundaries is also worth the attempt.

II. \textbf{Fundamental Similarities in Procedural Systems}

In undertaking international harmonization of procedural law, the Reporters have come to identify both fundamental similarities and fundamental differences among procedural systems. Obviously, it is the fundamental differences that present the difficulties. However, it is important to keep in mind that all modern systems of civil procedure have fundamental similarities. These similarities result from the fact that a procedural system must respond to several inherent requirements. Recognition of these requirements makes easier the task of identifying functional similarities in diverse legal systems and, at the same time, puts into sharper perspective the ways in which procedural systems differ from one another.

The fundamental similarities among procedural systems can be summarized as follows:

- Standards governing assertion of personal jurisdiction and subject-matter jurisdiction,
- Specifications for a neutral adjudicator,
- Procedure for notice to defendant,
- Rules for formulation of claims,
- Explication of applicable substantive law,
- Establishment of facts through proof,
- Provision for expert testimony,
- Rules for deliberation, decision, and appellate review, and
- Rules of finality of judgments.

Of these, the rules of jurisdiction, notice, and recognition of judgments are sufficiently similar from one country to another that they have been susceptible to substantial resolution through international conventions. Concerning jurisdiction, the United States is aberrant in that it has an expansive con-
cept of “long-arm” jurisdiction, although this difference is one of degree rather than one of kind, and that it perpetuates jurisdiction based on simple presence of the person (“tag” jurisdiction). Specification of a neutral adjudicator begins with realization that all legal systems have rules to assure that a judge or other adjudicator is disinterested. Accordingly, in transnational litigation, reliance generally can be placed on the local rules expressing that principle. Similarly, an adjudicative system by definition requires a principle of finality. Therefore, the concept of “final” judgment generally is recognized, although some legal systems permit the reopening of a determination more liberally than other systems do. The corollary concept of mutual recognition of judgments is also universally accepted.

III. DIFFERENCES AMONG PROCEDURAL SYSTEMS

The differences in procedural systems are, along one division, differences between the common law systems and the civil law systems. The common law systems all derive from England and include Canada, Australia, New Zealand, South Africa, India, and the United States, as well as Israel, Singapore, and Bermuda. The civil law systems originated on the European continent and include those derived from Roman law (the law of the Roman Empire codified in the Justinian Code) and canon law (the law of the Roman Catholic Church, itself substantially derived from Roman law). The civil law systems include those of France, Germany, Italy, Spain, and virtually all other European countries, as well as those of Latin America, Japan, and China, whose legal systems are derived from the European model.

The significant differences between common law and civil law systems are as follows:

- The judge in civil law systems, rather than the advocates as in common law systems, has responsibility for development of the evidence and articulation of the legal concepts that should govern a decision. However, there is great variance among civil law systems in the manner and degree to which this responsibility is exercised, and there is, no doubt, variance among the judges in any given system.
Civil law litigation in many systems proceeds through a series of short hearing sessions—sometimes less than an hour each—for reception of evidence, which is then consigned to the case file pending a final stage of analysis and decision. In contrast, common law litigation has a preliminary or pre-trial stage (sometimes more than one), and then a trial at which all the evidence is received consecutively.

A civil law judgment in the court of first instance (i.e., trial court) is generally subject to more searching reexamination in the court of second instance (i.e., appellate court) than a common law judgment. Re-examination in the civil law systems extends to facts as well as law.

The judges in civil law systems serve a professional lifetime as judge, whereas the judges in common law systems are almost entirely selected from the ranks of the bar. Thus, civil law judges lack the experience of having been lawyers.

These are important differences, but they are not irreconcilable.

The American version of the common law system has differences from other common law systems that are of at least equal significance. The American system is unique in the following respects:

- Jury trial is a broadly available right in the American federal and state courts. No other country routinely uses juries in civil cases.
- American rules of discovery give wide latitude for exploration of potentially relevant evidence.
- The American adversary system generally affords the advocates far greater latitude in presentation of a case than is customary in other common law systems. In part, this is because of the use of juries.
- The American system operates through a unique cost rule. Each party, including a winning party, ordinarily pays its own lawyer and cannot recover that expense from a losing opponent. In most other countries, the winning party, whether plain-
tiff or defendant, recovers at least a substantial portion of litigation costs.\(^7\)

- American judges are selected through a variety of ways in which political affiliation plays an important part. In most other common law countries, judges are selected on the basis of professional standards.

However, it should also be recognized that the procedures in American administrative adjudications, which are conducted by professional judges without juries, much more closely resemble their counterparts in other countries.

### IV. Rules for Formulation of Claims (Pleading)

The rules governing formulation of claims are substantially similar in most legal systems. The pleading requirement in most common law systems requires that the claimant state the claim with reasonable particularity as to facts concerning persons, places, times, and sequences of events involved in the relevant transaction. This pleading rule is essentially similar to the Code Pleading requirement that governed in most American states prior to adoption of the Federal Rules of Civil Procedure in 1938.\(^8\) The attempt in the Federal Rules of Civil Procedure to eliminate disputes over pleading through the technique of “notice pleading” has been largely unsuccessful because it simply postpones disputes concerning the legal sufficiency of a claim until later stages in the litigation. The Transnational Rules require that pleading be in detail with particulars as to the basis of claim and that the particulars reveal a set of facts that, if proved, would entitle the claimant to a judgment.

---


V. DISCOVERY

The pleading rule requiring specific allegations of fact reduces the potential scope of discovery, as it provides for tightly framed claims and defenses from the very beginning of the proceeding. Moreover, it contemplates that a party who has pleaded specific facts will be required to reveal, at a second stage of the litigation, the specific proof on which it intends to rely concerning these allegations, including documents, witnesses, and experts. The Rules require disclosure of these sources of proof prior to the plenary hearing. These requirements presuppose that a party properly may commence litigation only if the claimant has a provable case and not merely the hope or expectation of uncovering such a case through discovery from the opposing party.

The combination of strict rules of pleading and compulsory disclosure further reduces the necessity of further exchange of evidence. A party must show its cards, so to speak. Within that framework, the Rules attempt to define a limited right of document discovery and a limited right of deposition. These are regarded as improper in many civil law systems. However, in a modern legal system, there is a growing practical necessity—if one is serious about justice—to permit document discovery to some extent and, at least in some cases, deposition of key witnesses.

In most common law jurisdictions, pre-trial depositions are unusual and, in some countries, typically are employed only when the witness will be unavailable for trial. Documents are subject to discovery only when relevant to the proceeding. Relevance for this purpose is defined by reference to the pleadings in the case and, as noted above, the rules of pleading require full specification of claims and defenses. In contrast, wide-ranging pre-trial discovery is an integral part of contemporary American civil litigation, particularly in cases involving substantial stakes.

The rules for document production in the common law systems all derive from the English Judicature Acts of 1873 and

---

1875. In 1888, the standard for discovery was held in the leading Peruvian Guano decision to cover:

any document that relates to the matters in question in the action, which not only would be evidence upon any issue, but also which, it is reasonable to suppose, contains information which may — not which must — either directly or indirectly enable the party . . . either to advance his own case or to damage the case of his adversary . . . [A] document can properly be said to contain information which may enable the party requiring the affidavit either to advance his own case or to damage the case of his adversary, if it is a document which may fairly lead him to a train of inquiry, which may have either of these two consequences . . . .

Under the civil law there is no discovery as such. A party has a right only to request that the court interrogate a witness or that the court require the opposing party to produce a document. This arrangement is a corollary of the general principle in the civil law system that the court rather than the parties is in charge of the development of evidence. Moreover, a party in some civil law systems cannot be compelled to produce a document that will establish its own liability—a civil equivalent of a privilege against self-incrimination. However, in many civil law systems, a party may be compelled to produce a document when the judge concludes that the document is the only evidence concerning the point of issue. This result also can be accomplished by holding that the burden of proof as to the issue shall rest with the party in possession of the document. In any event, the standard for production under the civil law uniformly appears to be “relevance” in a fairly strict sense.

VI. PROCEDURE AT PLENARY HEARING

Another principal difference between civil law systems and common law systems concerns presentation of evidence.

10. Supreme Court of Judicature Act, 1873, 36 & 37 Vict., c.66; Supreme Court of Judicature Act, 1875, 38 & 39 Vict., c.77.
11. Compagnie Financiere et Commerciale du Pacifique v. Peruvian Guano Co. 11 QBD 55, 63 (1882) (interpreting Order XXXI, rule 12, from the 1875 Rules of Supreme Court, which required production of documents “relating to any matters in question in the action”).
As is well known, judges in civil law systems develop the evidence with suggestions from the advocates, while in common law systems, the evidence is presented by the advocates with supervision and supplementation by the judge. Furthermore, in many civil law systems, the evidence usually is taken in separate stages according to availability of witnesses, while in common law systems, it generally is taken in consecutive hearings for which the witnesses must adjust their schedules. More fundamentally, the basic conception of the plenary hearing in civil law systems is that of an inquiry by the judge that is monitored by advocates on behalf of the parties, while the conception of a trial in common law systems is that of juxtaposed presentations to the court by the parties through their advocates.

In more pragmatic terms, the effectuation of these different conceptions of the plenary hearing requires different professional skills on the part of judges and advocates. An effective judge in the civil law system must be able to frame questions and pursue them in an orderly fashion, and an effective advocate must give close attention to that questioning and be alert to suggest additional directions or extensions of the inquiry. In the common law system, the required skills are more or less the opposite. The common law advocate must be skillful at framing and pursuing questions in orderly sequence, while the judge must be attentive to pursuing further development by supplemental questions.

VII. SECOND-INSTANCE REVIEW AND FINALITY

The Transnational Rules defer to the law of the forum concerning second-instance proceedings (“appeal”). The same is true for further review in a higher court, as is available in many systems. The Rules define conditions of finality that discourage the re-opening of an adjudication that has been completed. A case fairly conducted is the best approximation of true justice that human enterprise can achieve. On that basis, an adjudication should be left at rest even when there may be some reason to think that a different result could be achieved, unless there is a showing of fraud in the proceeding or of conclusive evidence that was previously undisclosed. The Rules adopt an approach to finality based on that philosophy.
VIII. Adoption of These Rules

The Rules are designed to express basic principles of civil procedure recognized in modern societies. They seek to combine the best elements of adversary procedure, particularly that in the common law tradition, with the best elements of judge-centered procedure, particularly that in the civil law tradition. They are expressed in terminology and through concepts that can be assimilated in all legal traditions.

The procedure and legal authority for adoption of these Rules is a matter of the domestic and international law of states. Hence, these Rules may be adopted by international convention or by legal authority of a nation state for application in the courts of that state. In countries with a unitary legal system, that legal authority is vested in the national government. In federal systems, the allocation of that authority depends upon the terms of the particular federation. It might be, for example, that these Rules could be adopted for the federal courts in a federal system but only as prescribed by the state or province in the state or provincial courts. As used in the Rules, “state” refers to a sovereign state and not to a province or state within a federal system.

These Rules could be adopted for use in the first-instance courts of general competence, in a specialized court, or in a division of the court of general competence having jurisdiction over commercial disputes.

These Rules could also be approved as Models that could be adapted to various basic procedural systems.

IX. Purpose of These Rules

The objective of these Rules is to offer a system of fair procedure for litigants involved in legal disputes arising from transnational transactions. Appreciating that all litigation is unpleasant from the viewpoint of the litigants, the Rules seek to reduce the uncertainty and anxiety that particularly attend parties obliged to litigate in unfamiliar surroundings. The reduction of difference in legal systems, commonly called “harmonization” of law, is an aspect of achieving such fairness. However, a system of rules is only one aspect of fair procedure. Much more important, as a practical matter, is the independence and neutrality of judges and the competence and integrity of legal counsel. Nevertheless, rules of procedure are in-
fluential in the conduct of litigation. These Rules seek to express, so far as rules can do so, the ideal of disinterested adjudication. As such, they also can be terms of reference in matters of judicial cooperation, wherein the courts of different legal systems provide assistance to each other. By the same token, reference to the principles expressed herein can moderate the unavoidable tendency of practitioners in a legal system, both judges and lawyers, to consider their system from a parochial viewpoint.

The Rules herein, governing presentation of claims, development and presentation of legal argument, and the final determination by the tribunal (Rules 11 through 33), may be adopted or referenced in proceedings not otherwise governed by these Rules, particularly arbitration.

These Rules are proposed for adoption by states to govern litigation arising from transnational business, commercial, or financial transactions, as defined in Rule 2. The method of adoption could be treaty, convention or other international agreement, or statute or rule of court of a state or political subdivisions thereof. A court could refer to these Rules as generally recognized standards of civil justice when doing so is not inconsistent with its own organic or procedural law. It is contemplated that, when adopted, these Rules would be a special form of procedure applicable to these transactions, similar to specialized procedural rules that most states have for bankruptcy, administration of decedents’ estates, and civil claims against government agencies.

Where permissible by forum law, these Rules could also be adopted through contractual stipulation by parties to govern, with the consent of the forum, litigation arising from a contractual relationship. This form of implementation in substance is a party stipulation to waive the otherwise governing rules of procedure in favor of these Rules.

X. Revisions from Prior Drafts

Prior drafts of the Rules have been published. These drafts, together with the previous Discussion Draft No. 1 and

Preliminary Draft No. 2, have elicited valuable criticism and comments from legal scholars and lawyers from both civil and common law systems. Comparison will demonstrate that


For the previous drafts, we received written contributions from Mathew Applebaum, Stephen Burbank, Edward Cooper, Stephen Goldstein, Richard Hubert, J. A. Jolowicz, Dianna Kempe, Mary Kay Kane, Ramón Mullerat, Ernesto Penalva, Thomas Pfeiffer, Hans Rudolf Steiner, Rolf Stürner, Louise Teitz, Janet Walker, Gerhard Walter, Garry Watson, Des Williams, and others.
many modifications have been adopted as a result of discussions and deliberations following those previous publications, especially revision of the provisions on scope, composition of the tribunal, the incorporation of “principles of interpretation,” the sequence and scope of exchange of evidence, specification of a settlement-offer procedure, and provisions for special courts for transnational litigation, for amendment of pleadings, and for procedures for dealing with multiple parties or multiple claims. The net effect can be described as a new text.

Earlier drafts of the Rules were translated into German by Gerhard Walter from Bern University; into Japanese by Koichi Miki from Keio University; into French by Gabriele Mecarelli from Paris University; into Chinese by Terence Lau; into Italian by Francesca Cuomo and Valentina Riva from Pavia University; into Croatian by Eduard Kunštek; into Spanish by Evaluz Cotto from Puerto Rico University, Francisco Malaga from Pompeu Fabra University, Aníbal Quiroga León from Catholic University of Peru, Horácio Segundo Pinto from the Catholic University of Argentina, and Lorena Bachmaier from Universidad Complutense de Madrid; and into Portuguese by Associate Reporter Antonio Gidi from the University of Pennsylvania. It is hoped that there will be translations into additional languages in the future.

In addition to making numerous changes to the Rules, this new draft contains, more significantly, for the first time Fundamental Principles of Transnational Civil Procedure. The inclusion of the Principles constitutes a revision of the project suggested by the International Institute for the Unifi-
cation of Private Law (UNIDROIT), in which The American Law Institute has happily concurred. The numerous revisions of the Rules emerged from discussions at several locations with Advisers from various countries, including meetings in Bologna and Rome, Italy; Vancouver, Canada; San Francisco, Washington, and Philadelphia, United States; Vienna, Austria; Tokyo, Japan; Singapore; and Paris, France. Criticism and discussion also were conducted through correspondence.

The project was the subject of extensive commentary and much candid and helpful criticism at an October 27, 2000, meeting of French proceduralists in Paris, in which participants included Judges Guy Canivet, Jacques Lemontey, and Jean Buffet and Professors Bernard Audit, Georges Bolard, Loïc Cadet, Philippe Fouchard, Hélène Gaudemet-Tallon, Serge Guinchard, Catherine Kessedjian, Pierre Mayer, Horatia Muir-Watt, Marie-Laure Niboyet, Jacques Normand, and Claude Reymond.

It is hoped that this long process of dialogue has made the Principles and Rules more understandable and therefore more acceptable from both common law and civil law perspectives.

XI. UNIDROIT PARTNERSHIP

Since 2000, after a favorable report from Professor Rolf Stürner, UNIDROIT joined the American Law Institute (ALI) in this project. It was at UNIDROIT’s initiative that the preparation of Fundamental Principles of Transnational Civil Procedure was undertaken. The Fundamental Principles will inform the interpretation of the Rules, the more detailed body of procedural law. The project thus now encompasses both levels.

The Principles generally appeal to the civil law mentality. Common law lawyers may be less familiar with this sort of generalization and abstraction. Since the Principles and Rules are being developed simultaneously, the relation between generality and specification is illuminated more sharply. The Principles are interpretive guides to the Rules and could be adopted as principles of interpretation. They could also be adopted as guidelines in interpreting existing national codes of procedure. Correlatively, the Rules can be considered as an exemplification of the Principles.
During May 22-26, 2000, the ALI/UNIDROIT Working Group had a preliminary meeting in the UNIDROIT Headquarters in Rome. In this meeting, three proposals for Principles were extensively discussed. One was presented by Reporters Hazard, Taruffo, and Gidi, another by Reporter Rolf Stürner, and another by Neil Andrews of the Working Group. The group also extensively discussed the previous draft of the Transnational Rules. The current draft is the result of that meeting.

XII. Future Work

The Reporters are preparing Annotations that will correlate the provisions of these Rules with cognate provisions in various national-procedural systems.

This Discussion Draft is still a “work in progress.” An intensive discussion of the Principles and Rules is to be held at UNIDROIT headquarters in Rome during July 2-6, 2001. We expect to have discussions of these texts in the coming year in China, Japan, Latin America, and Europe. We expect to present a further revision to the Institute sometime in the next year or two.

Subsequent drafts will incorporate the latest revisions of these Rules. The latest version will be accessible at The American Law Institute’s website (http://www.ali.org/ali/transrules.htm).

The Reporters welcome suggestions and criticisms. Our address is as follows:

THE AMERICAN LAW INSTITUTE
4025 Chestnut Street
Philadelphia, PA 19104-3099
Telecopier: (215) 243-1636
E-mail: transrules@ali.org