
Civil litigation without frontiers: harmonization and unification of procedural law * **

Geoffrey C. Hazard, Jr.

I. Introduction

This report is in somewhat unorthodox form. The principal component of my report is the Transnational Rules of Civil Procedure, a proposed «code» of civil procedure for adjudication of transnational civil disputes. In concept the rules in this code could be adopted by any national state, whether civil law or common law or a «mixed» system, for adjudication of the defined classes of cases. The proposed code is in the tradition pioneered in the Model Code for Ibero America and furthered by Professor Storme in the project for Approximation of Judiciary Law in the European Union.¹ The text has evolved through several prior drafts and reflects consultation with colleagues in other countries, both common law and civil law.

The text of the Transnational Rules of Civil Procedure initially was a project of the American Law Institute, of which I have been Director. UNIDROIT, the International Institute for the Unification of Private Law, has joined as a cosponsor of the project, following an expert report by Professor Rölf Stürner. It is expected that UNIDROIT will organize a complementary set of advisory conferences for discussion of the proposal. UNIDROIT's sponsorship will affirm the truly international character

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1 See Marcel Storme (ed.) *Approximation of Judiciary Law in the European Union*, Kluwer, 1994, See also *Anteproyecto del Codigo Procesal Civil Modelo para Iberoamerica*, REVISTA DE PROCESSO, Vols. 52 and 53, 1988 and 1989.

of the project and thus, we trust, improve the possibilities of acceptance of the concept in the years ahead.

The present draft in similar form as presented herewith has been designated Discussion Draft No. 1 of the American Law Institute project. It is presented to the World Congress and colleagues in the field of civil procedure for discussion and criticism. At an earlier stage in drafting, suggestions and criticisms of colleagues from common law countries were obtained through a questionnaire. The questionnaire and the responses will be published after the Congress.

II. International «Harmonization» of Procedural Law

The human community of the world lives at closer quarters today than in ancient days. International trade is at an all time high and steadily increasing; 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, whereby the same or similar «rules of the game» apply no matter where the participants may find themselves. The effort to reduce differences between national legal systems is commonly referred to as «harmonization.» Another term is «approximation,» meaning that the rules of various legal systems should be reformed in the direction of approximating each other. Most endeavors at harmonization have addressed substantive law, particularly the law governing commercial and financial transactions.²

2 See, e.g., Convention on the Rights of the Child, November 20, 1989, 28 I.L.M. 1448; United States - Egypt Treaty Concerning the Reciprocal Encouragement and Protection of Investments, September 29, 1982, 21 I.L.M. 927; Convention on the Elimination of All

Harmonization of the law of procedure has made much less progress. It has been impeded by the assumption that national procedural systems are too deeply embedded in local political history and cultural tradition to permit reduction or reconciliation of differences between legal systems. There are, to be sure, some international conventions dealing with procedural law, notably The Hague Convention on the Taking of Evidence Abroad and European conventions on recognition of judgments. Effort continues on a more general convention on personal jurisdiction and recognition of judgments.³

The need for harmonization of procedural law is evident. The pioneering work of Professor Marcel Storme has demonstrated that harmonization can be approximated. All practicing lawyers know that resolution of legal disputes often depends on the identity of the forum that assumes jurisdiction of the dispute. All judges and lawyers recognize that the procedure for adjudication of disputes employed by a forum can be influential in determination of the merits—that is, the actual outcome of the litigation. From the viewpoint of clients, assuming that general principles of fairness have been observed, the outcomes are of salient importance. The fundamental objective of harmonization therefore is reduction of the risk of different outcome in adjudication that results from difference in forum and difference in procedure. Complete elimination of such differences is an impossibility, even within national systems, but their reduction is an eternal goal in administration of justice. Establishing the same rules of procedure, regardless of forum, is a means to that end.

III. Fundamental Similarities in Procedural Systems

In undertaking international harmonization of procedural law Professor Taruffo, Dr. Elisabetta Silvestri (the Associate Reporter) and I have

Forms of Discrimination Against Women, December 18, 1979, 19 I.L.M. 33; International Covenant on Civil and Political Rights, December 16, 1966, 999 U.N.T.S. 171; Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, March 16, 1965, 17 U.S.T. 1270, T.I.A.S. No. 6090, 575 U.N.T.S. 159.

³ See Catherine Kessedjian, *Hague Conference on Private International Law, International Jurisdiction and Foreign Judgments in Civil and Commercial Matters* (transl. (April 1997)).

identified both fundamental similarities among procedural systems and fundamental differences between them. Obviously, it is the fundamental differences that present the difficulties. However, it is important to keep in mind that all modern civil procedural systems have fundamental similarities. The 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
- Provision for expert testimony
- Rules for reception of evidence
- Rules governing deliberation and decision leading to judgment by the tribunal and for appellate review
- Rules of finality of judgments.

Of these, the rules of personal 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 personal jurisdiction, the United States is aberrant in having an expansive concept of «longarm» jurisdiction, although this difference is one of degree rather than one of kind. Specification of a neutral adjudicator begins with realization that all legal systems have rules to assure that a judge or other adjudicator should be disinterested as between the parties. 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. The concept of «final» judgment therefore is also generally recognized, although some legal systems permit reopening a determination more liberally than other systems. The corollary concept of mutual recognition of judgments is also generally accepted.

IV. Differences Between Procedural Systems

The differences in civil procedural systems can be considered along two divisions. Along one division there are 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, and Spain and virtually all other European countries and, in a borrowing or migration of legal systems, those of Latin America and Japan.

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

- The judge in civil law systems, rather than the advocates in common law systems, has responsibility for development of the evidence and articulation of the legal concepts that should govern decision. However, there is great variance among civil law systems in the manner and degree to which this responsibility is exercised, and 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 until an eventual final stage of analysis and decision. In contrast, common law litigation has a preliminary or pretrial 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. Reexamination 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 a lawyer, for whatever effects that may have.

These are important differences, but not worlds of difference.

The other division is between the American version of the common law system and other common law systems, and is of at least equal significance. The American system is unique in the following respects:

- Jury trial is broadly available of right in the American federal courts and in the state court systems. 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 that party's own lawyer and cannot recover that expense from a losing opponent. In most all other countries the winning party, whether plaintiff or defendant, recovers at least a substantial portion of his litigation costs.⁴
- American judges are selected by 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 there are many types of American procedures that much more closely resemble the counterparts in other countries. These are the procedures in American administrative adjudications, which are conducted by professional judges without juries.

V. Philosophy of the Transnational Rules Project

The philosophy of the project for the Transnational Rules of Civil Procedure reflects two basic principles, one substantive and the other of technique or process. The substantive principle is that all systems for adjudication of civil controversies in modern constitutional regimes are similar if not identical in certain basic respects. This thought was expressed colloquially but vividly by Professor Storme in his guidance of the Approximation project. As stated in his Introduction to the report of that project, «[n]ot only do I find, when it comes down to the nitty-

⁴ See generally A. Tomkins and T. Willing, *Taxation of Attorney's Fees: Practices in English, Alaskan and Federal Courts* (1986). See also, e.g., A. Ehrenzweig, *Reimbursement of Counsel Fees and the Great Society*, 54 Calif. L.Rev. 792 (1963); T. Rowe, *The Legal Theory of Attorney Fee Shifting: A Critical Overview*, 1982 Duke L. Rev. 651.

gritty, that the distinction between the two legal families is less than is believed, but also, as my experience in our Working-Group showed, that in the final analysis the differences are more of a formal and/or terminological nature».⁵

The other principle, that of technique or process, can be simply stated: Exposition and criticism of legal concepts is most efficient and penetrating when it is conducted by means of draft texts of proposed rules. Correlatively, legal concepts of a higher level of abstraction—jurisprudence—are an important aid in formulation and comprehension of legal rules. Of course, the close analysis of legal rules can stimulate jurisprudential reflection and appreciation of jurisprudence is an indispensable method of legal analysis. The revised project in cooperation with UNIDROIT will commence with a formulation of general principles. However, when all is said and done, law must be expressed in rules. Hence, the project for Transnational Rules of Civil Procedure will thereafter proceed through the mechanism of successive drafts of a code of rules. The Discussion Draft presented is indicative of a format that may eventually be proposed.

VI. Revisions from Prior Drafts and Future Work

Prior drafts of the Rules have been published.⁶ These drafts have elicited valuable criticism and comments from legal scholars and lawyers from both civil and common law systems.⁷ Comparison will demonstrate

5 See Marcel Storme (ed.), *Approximation of Judiciary Law in the European Union*, 55.

6 The first draft is published in 30 *Cornell International Law Journal* 89 (1995). The second draft is published in 33 *Texas Int'l L. J.* 499 (1998).

7 Cf. Gary Born, *Critical Observations on the Draft Transnational Rules of Civil Procedure*, 30 *TEX. INT'L L.J.* 387 (1998), Russell J. Weintraub, *Critique of the Hazard-Taruffo Transnational Rules of Civil Procedure*, 30 *TEX. INT'L L.J.* 413 (1998), Jacob Dolinger and Carmen Tiburcio, *The Forum Law Rule in International Litigation – Which Procedural Law Governs Proceedings to be Performed in Foreign Jurisdictions: Lex Fori or lex Diligentiae?*, 30 *TEX. INT'L L.J.* 425 (1998), Gerhard Walter and Samuel P. Baumgartner, *Utility and Feasibility of Transnational Rules of Civil Procedure: Some German and Swiss Reactions to the Hazard-Taruffo Project*, 30 *TEX. INT'L L.J.* 463 (1998), Catherine Kessedjian, *First Impression of the Transnational Rules of Civil Procedure from Paris and The Hague*, 30 *TEX. INT'L L.J.* 477 (1998), Geoffrey C. Hazard, Jr., *Transnational Rules of Civil Procedure: Preliminary Draft No. 1*, 30 *TEX. INT'L L.J.* 499 (1998), Michele

that many modifications have been adopted as a result of discussions and deliberations following those publications. The changes include, among others, of the provisions on scope and on composition of the tribunal, the incorporation of «principles of interpretation,» the sequence and scope of discovery, and specification of a settlement offer procedure. These revisions emerged from discussions at several locations with advisers from various countries, including meetings in Bologna, Italy, Vancouver, Canada, and Philadelphia, USA and also conducted through correspondence. The net effect can be described as a new text but the present draft is still a «work in progress.»

The participation of UNIDROIT marks a new phase of the project. We will reconsider the basic premises and will formulate general principles, to be elaborated through a new text. Criticism and suggestions addressed to this draft will provide useful guidance in that endeavor.

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

The American Law Institute
Transnational Rules of Civil Procedure
4025 Chestnut Street
Philadelphia, PA 19104-3099
Fax: + 1 215/243-1664
Email: transrules@ali.org

Taruffo, *Drafting Rules for Transnational Litigation*, ZZPINT'L L.J. 449 (1997). We also received written contributions from Mathew Applebaum, Steven Burbank, Antonio Gidi, Stephen Goldstein, Richard Hulbert, J. A. Jolowicz, Dianna Kempe, Mary Kay Kane, Ramon Mullerat, Hans Rudolf Steiner, Rolf Sturmer, Louise Teitz, Janet Walker, Garry Watson, Des Williams and others.

We are pleased to say that, effective January 1999, Dr. Antonio Gidi has been designated as Assistant Reporter.