The ALI (American Law Institute) and UNIDROIT (the International Institute for the Unification of Private Law) are preeminent organizations working together 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, *Principles of Transnational Civil Procedure* was launched to create a set of procedural rules and principles that would be adopted globally. This work strives to reduce uncertainty for parties that must litigate in unfamiliar surroundings and to promote fairness in judicial proceedings. As recognized standards of civil justice, the *Principles of Transnational Civil Procedure* can be used in judicial proceedings as well as in arbitration. The result is a work that significantly contributes to the promotion of a universal rule of procedural law.

The American Law Institute 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 The American Law Institute.

UNIDROIT was founded in 1926 as a specialized agency of the League of Nations. It exists as an independent intergovernmental organization on the basis of a multilateral agreement, the UNIDROIT Statute. Its purpose is to study needs and methods for modernizing, harmonizing, and coordinating private law between states and groups of states and to prepare legislative texts for consideration by governments.
ALI/UNIDROIT
Principles of Transnational Civil Procedure

As Adopted and Promulgated

By

The American Law Institute
At Washington, D.C., U.S.A.
May 2004

and By

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At Rome, Italy
April 2004
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FOREWORD

The proposals for law reform published in this volume result from a happy collaboration between the International Institute for the Unification of Private Law (UNIDROIT) and The American Law Institute (ALI).

UNIDROIT, based in Rome (Italy), was founded in 1926 as a specialized agency of the League of Nations. After World War II it continued as an independent intergovernmental organization on the basis of a multilateral agreement, the UNIDROIT Statute. Its purpose is to study needs and methods for modernizing, harmonizing, and coordinating private law between states and groups of states and to prepare legislative texts for consideration by governments. Membership is restricted to states. The currently 59 member states are drawn from the five continents and represent all varieties of different legal, economic, and political systems as well as different cultural backgrounds. The organization has over the years prepared over 70 studies and drafts. In recent years, nine Conventions plus various “soft-law” instruments such as Model Laws, Guides, and the UNIDROIT Principles of International Commercial Contracts (1994 and 2004), www.unidroit.org/english/principles/contracts/main.htm, were adopted. At present, the focus is on secured-marrows law (Convention on International Interests in Mobile Equipment (Cape Town, 2001), www.unidroit.org/english/conventions/mobile-equipment/main.htm), and capital-market law. It is envisaged to further develop the Principles of International Commercial Contracts.

ALI, based in Philadelphia, was founded in 1923 by American judges, professors, and practicing lawyers with the goal of recommending simplification of American law and the law’s improved adaptation to social conditions. The ALI is a private organization with nearly 4,000 members, selected on the basis of professional achievement and demonstrated interest in the improvement of the law. For 82 years it has been devoted to law reform, drafting and publishing Restatements of the common law, Principles
of law, proposed Statutes, and various studies. For the past decade, ALI’s agenda has included transnational work, recommending rules for coordinating insolvency disputes among the three North American Free Trade Agreement (NAFTA) nations and currently considering recommendations concerning U.S. enforcement of foreign judgments, transnational coordination of intellectual-property disputes, and the law of the World Trade Organization (WTO).

This work on *Principles of Transnational Civil Procedure* was begun in 1997 as an ALI project on Transnational Rules of Civil Procedure (later titled Principles and Rules of Transnational Civil Procedure), with Professor Geoffrey Hazard, then ALI Director, and Professor Michele Tarufo as Reporters; Professor Antonio Gidi joined the project soon thereafter, first as Assistant Reporter, then as Associate Reporter. When it became clear that cooperation with a distinguished international institution was desirable, ALI began its collaboration with UNIDROIT in 1999, and the focus of the project began to shift from Rules to Principles. For the UNIDROIT process, Professors Hazard and Rolf Stürner were the Reporters and Professor Gidi was Secretary. In the ALI process, the Reporters benefited from the constructive criticism of Advisers from many countries, a Consultative Group consisting of ALI members, and a group of International Consultants, as well as from annual discussion and consideration by the ALI’s Council and membership. In the UNIDROIT process, a distinguished Working Group devoted four week-long meetings at the UNIDROIT headquarters in Rome to vigorous analysis of the Reporters’ drafts.

In addition to the formal procedures of the two sponsoring organizations, the drafts were subjected to close critical review at numerous professional meetings and conferences held around the world. The great number of countries visited and of national systems taken into account and compared was crucial not only in demonstrating that the project and its goals were feasible on a broader scale than originally envisioned, but also in providing access to practitioners and scholars from many different jurisdictions, whose comments and criticisms enabled the Reporters both to refine their work and to make it more practicable.

UNIDROIT and ALI are proud that the work has been completed, confident that it will have influence as the growth of global commerce increases the need for dispute-resolution systems that deserve public confidence, and hopeful that this project will lead to further efforts to help national legal systems adapt to an interconnected world. In the process we have learned
Foreword

again what an early ALI leader once said, that “law reform is not for the short-winded.”

Herbert Kronke  
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The International Institute for the Unification of Private Law

Lance Liebman  
Director  
The American Law Institute

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Presented herewith are the Principles of Transnational Civil Procedure. Appended to the Principles are the Rules of Transnational Civil Procedure, which are the Reporters’ model implementation of the Principles, which may be considered for adoption in various legal systems.

There are, understandably, skeptics who think the idea premature at best that there can be “universal” procedural rules, and others who, though sympathetic to the idea, have reservations about the present execution of the concept. These reservations are at two levels. First, there is doubt that it is feasible to overcome fundamental differences between common-law and civil-law systems and, among common-law systems, to cope with the peculiarities of the U.S. system. We think, however, that the reservations based on the civil-law/common-law distinction reflect undue anxiety. The U.S. system is unique among common-law systems in having both broad discovery and jury trial. Thus, a second-level reservation is that, if such a project is feasible, it is not feasible if it corresponded in any substantial way to characteristic U.S. procedure.

We conclude that a system of procedure acceptable generally throughout the world could not require jury trial and would require much more limited discovery than is typical in the United States. This in turn has led us to conclude that the scope of the proposed Principles of Transnational Civil Procedure is limited to commercial disputes and excludes categories of litigation such as personal-injury and wrongful-death actions, because barring jury trial in such cases would be unacceptable in the United States. The definition of “commercial disputes” will require some further specification, but we believe that it is adequate to frame the project.

In this era of globalization, the world is marching in two directions. One path is of separation and isolationism, with war and turmoil: In such a world, this project is useless and unwelcome. The other path is increasing exchange
Reporters' Preface

of products and ideas among the peoples of the world; this path underscores
the need for a transnational civil procedure.

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The explosion in transnational commerce has changed the world forever. International commerce and investment are increasing at an enormous rate and the rate of change is continuing to accelerate. The legal procedures applicable to the global community, however, have not kept pace and are still largely confined to and limited by individual national jurisdictions. The Principles of Transnational Civil Procedure comprise an unprecedented international analysis and a unique statement of an internationally acceptable basis for dealing with the legal aspects of international disputes and controversies.

The Principles seek nothing less than to provide a system of legal procedures applicable to a wide-ranging variety of disputes throughout the world. It is an undertaking of enormous magnitude and its potential to improve cross-border and multinational commerce, trade, and investment is inestimable. Too often, local legal and commercial procedures in practice operate, whether intentionally or otherwise, in a manner that favors local parties in transnational disputes. International investment and credit decisions must take into account local proclivities of this kind and, consequently, prospective commerce and investment are inevitably and invariably curtailed in order to allow for them.

International trade and investment is thereby diminished to the direct disadvantage of the parties involved and, indirectly, to the disadvantage of their communities and their public. On a macroeconomic scale, the sum of these diminished opportunities in aggregate is extraordinarily large. International commerce and the communities affected by it are impoverished as a result. The Principles provide an exceptionally valuable pattern for “Best Practices” dispute-resolution procedures but they are, as well, international benchmarks that can be used in connection with efforts to improve standards and systems in countries around the world. For the participants in international commerce, they are ideally suited to improve and enhance the
climate for international commerce and investment. Parties to international transactions will be able to adopt the Principles, with or without modifications, in their transactions or to incorporate them by reference in their arrangements.

The Principles are a welcome and highly constructive contribution to the advancement of international cooperation in the legal and commercial area, where contributions of this magnitude and significance are still regrettably rare. The Principles should achieve general recognition as have the ALI’s Guidelines Applicable to Court-to-Court Communications in Cross-Border Cases that, as in the case of the Principles, have been translated into many of the world’s leading languages and distributed to leading judges and lawyers around the world. The Guidelines are already making a positive contribution to international insolvency systems and procedures in the same way that the Principles can and will contribute to the advancement of international legal systems and procedures.

The Principles carry the potential to provide for an unequaled advance in international commerce that will bring with it consequent benefits to all of the world’s economies. The drafters of the Principles have given the international community the tools to improve significantly the world’s legal systems. The Principles, therefore, reflect not only an advance in international legal systems and procedures, but also the means to advance and improve international commerce generally for the benefit of everyone affected by it. It is a challenge and an opportunity that the legal and commercial communities should not fail to grasp.

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PREFACE

It is a pleasure and an honor to write a preface to this transcendental work for the evolution of law at the universal level. Its inspiration is found in the spirit of two extraordinary attorneys: Geoffrey Hazard, from the University of Pennsylvania Law School, and Michele Taruffo, from the University of Pavia. They developed the blueprint for this ambitious project on transnational-civil-procedure rules, and The American Law Institute (ALI) decided to take it up in 1997. The ALI project began with Rules, the International Institute for the Unification of Private Law (UNIDROIT) suggested the need for Principles, and final approval by both organizations was of the Principles only, with the Rules conceived as the Reporters’ model of how the Principles might be implemented in a particular jurisdiction.

The challenge was Herculean, especially considering the difficulty comparative law has faced in transferring legal devices and concepts from one legal system to another.¹ It has been asserted that the more an institution is integrated into the political and legal environment in a specific country, the more difficult it is to assimilate it into another one.² In addition, it has been stated that the majority of these legal concepts are intimately linked to the political structures of a country and, therefore, to the distribution of power among the three state branches: the Executive, the Legislative, and the Judicial. Such is the nature of Civil Procedural Law. If this is true, it would seem natural that drafting universal uniform civil-procedure rules would have been impossible. Only two determined legal spirits like those of Professors Hazard and Taruffo, practicing in two legal systems supposedly quite different in their legal underpinnings, could have imagined and so strongly influenced the creation of the Principles of Transnational Civil Procedure.

On May 22, 2000, at the head offices of UNIDROIT in Rome, as a result of the study\(^3\) conducted by the esteemed German Professor Rolf Stürner, a Working Group was summoned\(^4\) in order to analyze and propose the foundation for the Principles and Rules of Transnational Civil Procedure. When UNIDROIT President Berardino Libonati welcomed the group’s members,\(^5\) he praised the proposed effort to unify such a technical and sensitive area as procedural law. “The globalization process,” he underlined, “set the conditions in order to enhance it.” His comment was prescient and his perspective has provided invaluable support to the effort.

Yet those present felt that something more incredible was taking place. It was the outset of one of the most important and exciting legal projects of recent times. The task involved several challenges for the prestigious members of the Working Group, as well as the institutions concerned: UNIDROIT and the ALI. These two prominent organizations chose to join forces to accomplish a common purpose. After having agreed to travel down such an unpredictable path, they should now feel proud of the results and their significant contribution to legal evolution at a universal level.

The international legal community should also take pride in the success of a project of this magnitude, especially given the challenges it faced and the unfortunate fate that other international legal projects of this scope have suffered.

The initial context of the project can perhaps best be described as transitional. During most of the 20th century, a concept espoused by Professor

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\(^3\) The study of Professor Rolf Stürner of Freiburg University was requested by UNIDROIT to determine whether the project was feasible and to decide about the convenience of implementing it both by UNIDROIT and ALI. In Frédérique Ferrand, “La procédure civile internationale et la procédure civil transnationale: Incidence de l’intégration économique régionale.” *Uniform Law Review* [Revue de Droit Uniforme], NS – vol. 8, nos. 1/2 (2003), 422.

\(^4\) In 1999, the UNIDROIT’s Chair Council agreed to join with the ALI in the publication of the *Principles of Transnational Civil Procedure*, using as a support the feasibility study by Professor Rolf Stürner. The Working Group consisted of the Chair, Ronald Thandabantu Nhlapo from South Africa, and Co-Reporters, Professors Geoffrey C. Hazard, Jr. (USA) and Rolf Stürner (Germany). Other members were Neil H. Andrews (UK), Aída R. Kemelmajer de Carlucci (Argentina), Frédérique Ferrand (France), Masanori Kawano (Japan), and Pierre Lalive (Switzerland). Antonio Gidi was the Secretary and the Assistant Reporter (later Associate Reporter) for the ALI. Michele Taruffo (Italy) was Co-Reporter for the ALI. Michael Joachim Bonell was Project Coordinator for UNIDROIT. In Herbert Kronke, “Efficiency, Fairness, Macro-Economic Functions: Challenges for the Harmonisation of Transnational Civil Procedure.” *Uniform Law Review* [Revue de Droit Uniforme], NS – vol. 6, no. 4 (2001), 740.

Preface

Konstantinos D. Kerameus6 prevailed. He supported the view that, despite the functional connection with substantive law, procedure ruled the judicial power system and that, therefore, the nature of its norms should be considered as of ordre public. Administration of justice was an expression of political authority and its institutions developed a state function. For this reason, the basic principles of procedure often have constitutional significance. Professor Stephen Goldstein’s arguments in this respect are particularly useful:

First, there are norms which are peculiar to a given system, which reflect the peculiar history of that system, but which do not, at all, represent a general norm of due process or natural justice. Second, there are constitutional norms that do reflect general norms of natural justice, but are not the only possible manifestations of such general norm. Third, at least in theory, one could posit a given constitutional norm which is the only possible manifestation of a general norm of natural justice. … In general, however, there are very few examples of constitutional norms that do not at all reflect a universal norm of due process or natural justice. Most of the constitutional norms in most systems do reflect such universal norms.7

Within this concept, some asserted that procedural law was a “State sovereignty prerogative”8 since judicial power is one of the three main state branches and, as such, it was a structural expression of national sovereignty. The Mexican expression of the concept is quite eloquent in this respect.

However, in the last part of the 20th century, this new concept set the stage for drastic changes based on a fundamental difference. Judicial organization and procedural law strictu sensu follow different functions: procedural law rules the relationships between the parties and between the parties and the court.9 It is what Professor Herbert Kronke,10 the Secretary-General of UNIDROIT, appropriately calls “substantive procedural law” or “substance of the proceedings.” In its strict meaning procedural law can be qualified as procedural “software” and can be subject to harmonization processes. On the other hand, the rules regarding judicial organization are considered “procedural hardware” and they belong to the sovereignty of each national state.

9 Kerameus, “Some Reflections,” n.6, 448.
This new tendency is evident in several new European Civil Procedure Codes. Examples include the Spanish Ley de Enjuiciamiento Civil from April 30, 1992, the Italian Provvedimenti urgenti per il processo civile, from November 26, 1990, and the French Nouveau Code de procédure civile.11

Emerging multinational arbitration proceedings also accurately reflect this new concept, a notable example being the United Nations Commission on International Trade Law’s (UNCITRAL’s) 1985 model law of commercial arbitration.

This model law represents one of the many instances of “contractualization” in the private-law movement.12 We find similar movements supporting the standardization of civil-procedure law, where again inclusion of the emergence of international commercial regions has not been unfamiliar.13

Against this backdrop, we can more fully appreciate the importance of various proposals within the American continent seeking to harmonize civil procedure. Recent examples include a Civil Procedure Model Law for Latin America (1988),14 and the Mercosur region protocols of Las Leñas15 and Ouro Preto16 (the most recent civil-procedure instruments).17 The driving forces behind the standardization movement are quite varied and have been extensively discussed.18 One such force is the growing need for legal certainty in a world where people and corporations have seemingly unfettered mobility. Ensuring legal certainty places enormous responsibility on those in charge of managing justice, but it also creates confidence when people believe that

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13 In the American continent, there are many free-trade agreements and treaties; one of the most significant is the North American Free Trade Agreement (NAFTA). In Mercosur, there are the Protocols of Leñas 1992 and Ouro Preto, from 1994. In Claudia Lima Marques, “Procédure civile internationale et Mercosur: Pour un dialogue des sigles universelles et régionales.” Uniform Law Review [Revue de Droit Uniforme], NS – vol. 8, nos. 1/2 (2003), 472.
14 Anteproyecto del Codigo Procesal Civil Modelo para Iberoamerica, Revista de Proceso, Vols. 52 y 53.
17 In Lima, “Procédure civile internationale et Mercosur,” n.13, 472.
18 Storme, “Procedural Law,” n.8, 768.
equivalent systems of civil procedure will assure them access to justice in a system renowned for its efficiency, transparency, predictability, and procedural economy.\textsuperscript{19}

As the emerging views of the international legal community matured, this type of legal enterprise became feasible. This time, the Working Group was able to tackle it with a uniquely creative perspective.

The \textit{Principles of Transnational Civil Procedure} are intended to help reduce the impact of differences between legal systems in lawsuits involving transnational commercial transactions. Their purpose is to propose a model of universal procedure that follows the essential elements of due process of law. The Rules and Principles involve “a universal equitable process in the commercial area”\textsuperscript{20} and are distinguishable for their contribution to the attainment of a truly equal access to justice.

The Project was developed with a dualistic structure: a system of basic Principles of civil procedure accompanied by specific Rules. This structure reconciles important needs of both major legal systems: the Anglo-Saxon preference for concrete rules, and the continental European, Latin American, and Asian emphasis on the formulation of abstract principles rather than detailed rules.\textsuperscript{21} By taking into consideration this cultural diversity, the dualistic structure allows its incorporation into the different legal systems in a more harmonious way.\textsuperscript{22} The formulation of the Principles has been quite novel in comparison to the regional\textsuperscript{23} or universal human-rights conventions,\textsuperscript{24} as well as their jurisdictional interpretation.\textsuperscript{25}

\textsuperscript{19} Storme, “Procedural Law,” n.8, 768.
\textsuperscript{22} Ferrand, “Les ‘Principes’ relatifs,” 1013.
\textsuperscript{24} Arts. 14 and 16 of the International Covenant on Civil and Political Rights of New York, known as the New York Pact of December 19, 1966.
\textsuperscript{25} See the jurisprudence of the European Charter of Human Rights, especially the one regarding the interpretation of article 6, paragraph 1 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.
Preface

On the other hand, the Rules do more than merely illustrate the development of the Principles. They intentionally avoid interpreting several Principles that differ across legal cultures and thereby assure the recognition of the main principle of standardization that underlies the project’s objectives.  

26 Thus, there are several reasons why I am writing this Preface: One of them is my dual role as a member of UNIDROIT’s Governing Council since 1990 and of the ALI since 2001. This dual role allowed me to understand and synchronize the perspective of both institutions and to appreciate the effort needed to accomplish this seemingly impossible project. The skeptics, vastly outnumbering us, the aficionados, had several reservations: Some considered writing “universal” process rules premature;  

27 others sympathized with the cause but held a number of reservations regarding its implementation. 

These reservations varied: The fundamental differences between the common-law system and the civil-law system were considered insurmountable. Even more, within the common-law system itself, the peculiarities inherent in the U.S. procedural system added more complexity. The ALI/UNIDROIT Working Group estimated and demonstrated, however, that the differences between the systems of common law and continental law had been exaggerated. The differences were not irreconcilable as had been dogmatically claimed. There are fundamental principles of civil procedure that transcend the differences between the system of continental law and that of common law.  

28 The examples of the “Woolf reforms” in the United Kingdom are, in this sense, quite eloquent.  

29 The Principles and Rules show an extended scope of convergence between these two legal systems. The Working Group skillfully managed to orient its goal toward, and fit into, the sphere of commercial controversies. 

There are other reasons for writing this Preface. I am a Mexican attorney. This is my origin and the context I use to explain myself. Mexico is part of the continental system, particularly the Latin American legal subsystem that has

Preface

been stigmatized by a misplaced reputation for excessive formalism. In the last decade, my country adopted dynamic participation in free-trade zones. It has entered into multiple free-trade agreements, three of which were signed with the most important universal economies: the United States of America and Canada (NAFTA), the European Union, and recently Japan. This has helped my country better understand the consequences of globalization, including how to manage the accompanying increase in social friction, legal controversy, and litigation. The Mexican system shares the conviction that the greater costs and degree of social turbulence might be mitigated if the procedural differences between competing legal systems were to diminish.

In this regard, the Principles and Rules have a special importance. The opportunity to convene a seminar in Mexico to discuss the ALI/UNIDROIT Transnational Civil Procedure Project finally occurred in February 2002. The Mexican forum exceeded all expectations. Attorneys from across the Mexican legal landscape came together: from government officials, including the Legal Counselor of the President himself, to federal and local judges, arbitrators, and practitioners.

Two events occurred that were unforeseeable in the Mexican academy, and to me they symbolize the importance of this seminar: The first was the attendance of two Justices of the Mexican Supreme Court who dedicated a full session to discuss the project. Their presence was emblematic of the high level of interest in the project. The second was the presence of the editor of the Model Code of Civil Procedure Project of the Conference of Chief Justices of Mexico.

Since the seminar, the Principles and Rules have continued to be discussed in Mexico, and they have become a necessary point of reference. The ALI/UNIDROIT document has begun to have a significant impact on the development of legal systems, as can be discerned in the legal structure of Mexico.

It would be disingenuous to assert that the Mexican system provides a model for harmonizing its civil-procedure rules with those of its main commercial partners. Nothing could be further from the truth. Nonetheless, the notion of “approximation” of legal systems would be more accurate if approximation is understood as an arduous reformation process making

31 Ferrand, “La procédure civile internationale,” n. 3, 422.
32 Justices Olga Sánchez Cordero and Juan Silva Meza attended this working meeting.
33 Judge Díaz Ortiz is the editor charged by the Conference of Chief Justices of Mexico to create the Mexican Model Code of Civil Procedure. This Model Code would be established subject to the consideration and approval of the federal states that comprise the Mexican Union.