INTRODUCTION

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 "harmonization." 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 and approximation 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]

[1] See, for example, 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 procedural law has made much less progress. Some conventions on civil and human rights contain fundamental procedural guaranties, such as equality before courts and the right to a fair, effective, public, and oral hearing or trial before an independent court. These guaranties are common international standards and a universally recognized basis of procedural harmonization.[2]

Further harmonization 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 Conventions on the Service Abroad and on the Taking of Evidence Abroad, the efforts of the Hague to frame a Convention on Jurisdiction and Judgments, and European conventions on recognition of judgments.[3] 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.

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.

[2] See, for example, Article 47 of the Charter of Fundamental Rights of the European Union, OJ 2000 C 364/1; Article 7 of the African Charter on Human and People's Rights, June 27, 1981, 21 I.L.M. 58; Article 8 of the American Convention on Human Rights, November 22, 1969, 1144 U.N.T.S. 123; Article 14 of the International Covenant on Civil and Political Rights, December 16, 1966, 999 U.N.T.S. 171; Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms, November 4, 1950, E.T.S. No. 5, as amended by Protocol No. 11, E.T.S. No. 155.

[3] See Hague Convention on the Service Abroad of Judicial and Extra Judicial Documents in Civil and Commercial Matters, November 15, 1965, 20 U.S.T. 1361; 16 I.L.M. 1339; Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, March 18, 1970, 23 U.S.T. 2555, 8 I.L.M. 37; Brussels Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters, September 27, 1968, 8 I.L.M. 229, reprinted as amended in 29 I.L.M. 1413, substantially replaced by the Council Regulation (EC) No. 44/2001 of December 22, 2000, on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ 2011 L 12/1; Lugano Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters, September 16, 1988, 28 I.L.M. 620. See also, for example, Catherine Kessedjian, Report, Hague Conference on Private International Law, Enforcement of Judgments, "International Jurisdiction and Foreign Judgments in Civil and Commercial Matters," Prel. Doc. No. 7 (April 1997).

However, the pioneering work of Professor Marcel Storme and his distinguished collaborators has demonstrated that harmonization is possible in such procedural matters as the formulation of claims, the development of evidence, and the decision procedure.[4] This project to develop Principles and Rules for transnational civil procedure has drawn extensively on the work of Professor Storme's group.

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 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.[5] Instead, the typical stipulation concerning hearing procedure in international arbitration is that the procedural ground rules shall be as determined by negotiation or by the administering authority or the neutral arbitrator.[6]

This project endeavors to draft procedural principles and rules that a country could adopt for adjudication of disputes arising from international commercial transactions.[7] The project is inspired in part by the Approximation project led by Professor Storme, mentioned earlier; in part by The American Law Institute (ALI) project on Transnational Insolvency; and in part by the successful effort in the United States a half-century ago to unite many diverse jurisdictions under one system of procedural rules with the adoption of the Federal Rules of Civil Procedure. The Federal Rules established a single procedure to be employed in federal courts sitting in 48 different semisovereign States, each 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

[4] Marcel Storme, ed., *Approximation of Judiciary Law in the European Union* (Amsterdam, the Netherlands: Kluwer, 1994). See also Anteproyecto del Código Procesal Civil Modelo para Iberoamerica, Revista de Processo (Creating a Model Code of Civil Procedure for Iberoamerica), vols. 52 and 53 (São Paulo: Editora Revista dos Tribunais, 1988 and 1989).

[5] See New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 19, 1958, 21 U.S.T. 2517, T.I.A.S. No. 6997, 330 U.N.T.S. 38.

[6] Alan S. Rau and Edward F. Sherman, Tradition and Innovation in International Arbitration Procedure, Texas International Law Journal, vol. 30 (Winter 1995), 89, 90.

[7] See John J. Barceló, III, Introduction to Geoffrey C. Hazard, Jr., and Michele Taruffo, "Transnational Rules of Civil Procedure," *Cornell International Law Journal*, vol. 30, no. 2 (1997), 493, 493–494.

four dozen different legal communities. The project to establish Principles of Transnational Civil Procedure conjectures that a procedure for litigation across national boundaries is also worth the attempt.

II. UNIDROIT Partnership

In 2000, after a favorable report from Professor Rolf Stürner, the International Institute for the Unification of Private Law (UNIDROIT) joined the ALI in this project. Professor Stürner has been a Reporter, appointed by UNIDROIT, since 2001. It was at UNIDROIT's initiative that the preparation of Principles of Transnational Civil Procedure was undertaken. Since then, the project has primarily focused on the Principles.

A formulation of Principles generally appeals to the civil-law mentality. Common-law lawyers may be less familiar with this sort of generalization. Since the Principles and Rules have been developed simultaneously, the relation between generality and specification is illuminated more sharply. The Principles are interpretive guides to the Rules, which are a more detailed body of procedural law. The Principles could also be adopted as principles for interpretation of existing national codes of procedure. Correlatively, the Rules can be considered as an exemplification or implementation of the Principles, suitable either for adoption or for further adaptation in particular jurisdictions. Both can be considered as models for reform in domestic legislation.

The ALI/UNIDROIT Working Group has had four week-long meetings in the UNIDROIT headquarters in Rome in four years. The ALI Advisers and Members Consultative Group have had six meetings and drafts have been considered at five ALI Annual Meetings. Much additional discussion has also taken place by means of international conferences held in different countries and correspondence over the last seven years.

III. 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 civil procedural systems 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
- 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 practice and formal conventions. Concerning jurisdiction, the United States is aberrant in that it has an expansive concept of "long-arm" jurisdiction, although this difference is one of degree rather than one of kind, and in that U.S. law governing authority of its constituent states 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 should be disinterested. Accordingly, in transnational litigation reliance generally can be placed on the local rules expressing that principle. Similarly, an adjudicative system requires a principle of finality. Therefore, the concept of "final" judgment is also generally 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.

IV. 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 and, in a borrowing or migration of legal systems, those of Latin America, Africa, and Asia, including Brazil, Argentina, Mexico, Egypt, Russia, Japan, and China.

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 primary 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 is generally subject to more searching reexamination in the court of second instance than a common-law judgment. Reexamination in the civil-law systems extends to facts as well as law.
- The judges in civil-law systems typically serve a professional lifetime as judge, whereas the judges in common-law systems generally are selected from the ranks of the bar. Thus, most civil-law judges lack the experience of having been a lawyer, whatever effects that may have.

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 information and evidence, including through oral deposition.

- The American adversary system generally affords the advocates far greater latitude in presentation of a case than is customary in other common-law systems.
- The American system operates through a cost rule under which each party ordinarily pays that party's own lawyer and cannot recover that expense from a losing opponent. In almost all other countries, except Japan and China, the winning party, whether plaintiff or defendant, recovers at least a substantial portion of litigation costs.[8]
- 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.

Most of the major differences between the United States and other common-law systems stem from the use of juries in American litigation. American proceedings conducted by judges without juries closely resemble their counterparts in other common-law countries.

V. 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, place, time, and sequence 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.[9] This rule was abandoned in federal courts in the United States in 1938 and replaced by Notice Pleading, which required a much less detailed pleading. The Principles and 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.

[8] See, generally, James W. Hughes and Edward A. Snyder, "Litigation and Settlement under the English and American Rules: Theory and Evidence." *Journal of Law and Economics*, vol. 38, no. 1 (1995), 225, 225–250; A. Tomkins and T. Willging, Taxation of Attorney's Fees: Practices in English, Alaskan and Federal Courts (1986). See also, for example, A. Ehrenzweig, "Reimbursement of Counsel Fees and the Great Society." *California Law Review*, vol. 54 (1963), 792; T. Rowe, "The Legal Theory of Attorney Fee Shifting: A Critical Overview," *Duke Law Journal*, vol. 31 (1982), 651, 651–680.

[9] L. Tolman, "Advisory Committee's Proposals to Amend the Federal Rules of Civil Procedure," *ABA Journal*, vol. 40 (1954), 843, 844; F. James, G. Hazard, and J. Leubsdorf, Civil Procedure §§ 3.5, 3.6 (5th ed. 2001).

VI. Exchange of Evidence

The pleading rule requiring specific allegations of fact reduces the potential scope of discovery, because it provides for tightly framed claims and defenses from the very beginning of the proceeding. Moreover, the pleading rule 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, summary of expected testimony of witnesses, and experts' reports. The Principles and Rules require disclosure of these sources of proof before the plenary hearing. These requirements presuppose that a claimant 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 additional exchange of evidence. A party generally must show its own cards, so to speak, rather than getting them from an opponent. 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, a civil-law judge has authority to compel presentation of relevant documentary evidence and testimony of witnesses. 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, pretrial depositions are unusual and, in some countries, 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 and, as noted earlier, the rules of pleading require full specification of claims and defenses.[10] In contrast, wide-ranging pretrial discovery is an integral part of contemporary American civil litigation, particularly in cases involving substantial stakes. The American Federal Rules of Civil Procedure were recently amended to restrict disclosure and discovery in certain respects, but the scope is still much broader than it is in other common-law countries. The Principles and Rules offer a compromise toward approximation in international litigation.

[10] See, generally, C. Platto, ed. *Pre-Trial and Pre-Hearing Procedures Worldwide* (London: Graham and Trotman and IBA, 1990).

Introduction

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. . . . [11]

Under the civil law there is no discovery as such. However, a party has a right to request the court to interrogate a witness or to 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. In some civil-law systems, a party cannot be compelled to produce a document that will establish its own liability – something like 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 can also be accomplished by holding that the burden of proof as to the issue shall rest with the party having possession of the document. In any event, the standard for production under the civil law appears uniformly to be "relevance" in a fairly strict sense.

VII. Procedure at Plenary Hearing

Another difference between civil-law systems and common-law systems concerns presentation of evidence. It is well known that in the civil-law tradition the evidence is developed by the judge with suggestions from the advocates, while in the common-law tradition the evidence is presented by the advocates with supervision and supplementation by the judge. Furthermore, in many civil-law systems the evidence is usually taken in separate stages according to availability of witnesses, while in the common-law system

[11] *Compagnie Financière 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").

it is usually taken in a consecutive hearing for which the witnesses must adjust their schedules. More fundamentally, the basic conception of the plenary hearing in the civil-law system has been that of an inquiry by the judge that is monitored by advocates on behalf of the parties, while the conception of a trial in the 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 judge and advocates. An effective judge in the civil-law system must be able to frame questions and pursue them in an orderly series, and an effective advocate must give close attention to the judge's 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 questions and pursuing them in orderly sequence, while the judge must be attentive to pursuing further development by supplemental questions. However, these differences are ones of degree, and the degrees of differences have diminished in the modern era.

VIII. Second-Instance Review and Finality

The Principles and 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 Principles and Rules define conditions of finality that discourage the reopening of an adjudication that has been completed. An adjudication fairly conducted is the best approximation of true justice that human enterprise can afford. 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 and not reasonably discoverable at the time. The Principles and Rules adopt an approach to finality based on that philosophy.

IX. Recognition of the Principles and Rules

The Principles express basic concepts of fairness in resolution of legal disputes prevailing in modern legal systems. Most modern legal systems could implement the Principles by relatively modest modifications of their own codes of civil procedure. More substantial modification would be required in systems in which a party ordinarily has no opportunity to obtain evidence