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Introduction

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Introduction

Louis F. Del Duca*

The articles which follow are based on papers presented at the 2006 Conference sponsored by The American Society of Comparative Law and The Italian Society of Comparative Law held on April 6-7, 2006 at the Pennsylvania State University Dickinson School of Law.¹

While the harmonization of substantive law has made great progress, harmonization of procedural law to meet the needs of an increasingly globalized world has made much less progress.² Nevertheless, while differences in Common and Civil law procedure are substantial, harmonization is occurring and the procedural models are less at odds than assumed in the past.³ Both systems attribute the same purpose of achieving an efficient and just resolution of disputes to civil procedure. Although differences still exist between the two models, these differences no longer are as substantial or have the importance they once had.

The major difference between the two systems is based on the central feature of Common Law procedure, the jury. The jury has produced features of the Common Law model of procedure that are distinct from the Civil Law approach, such as the importance of the oral stage of the proceeding, the sharp separation between the pre-trial state and the trial state, the passive role of the judge, and the detailed rules of evidence. However, the jury's importance in Common Law procedure has been diminishing. The jury has disappeared in the English system and the written elements of procedure have a greater importance in the

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1. Other topics addressed at conference were *Establishing An Adversarial Criminal Procedure System In Italy—Shifting From A Centuries Old Non-Adversarial Procedure To An Adversarial Mode* and *An Italian Federalism?—Adapting Political Structure To Societal Needs—Regionalism and Supranationalism*.

2. See Joint American Law Institute/UNIDROIT Working Group on Principles and Rules of Transnational Civil Procedure, International Institute for the Unification of Private Law 2003, Study LXXVI—Doc. 10, 2.

3. See Vincenzo Varano, *Some Reflections on Procedure, Comparative Law, and the Common Core Approach*, GLOBAL JURIST TOPICS, Vol. 3, No. 2, Article 4, 2 (The Berkeley Electronic Press, 2003).

United States procedural system. Additionally, recent reforms in Common Law nations, such as England, Australia and the United States, grant the judge greater directional and management power which decreases the adversarial nature of the proceeding.

Procedural models not only vary between Common Law and Civil Law systems but also vary among Civil Law nations. Some nations rely heavily on the written elements of procedure, while others emphasize the oral element. Likewise, some Civil Law models are more inquisitorial while others are heavily influenced by the adversarial model. Thus, differences exist not only between Common Law and Civil Law systems, but also within the Civil and Common Law procedural systems.

Despite the harmonization of Common Law and Civil Law procedural systems that has taken place, differences continue to exist which cause problems when legal conflicts cross these procedural boundaries. The massive and continuing growth of commerce has created a need for an internationally acceptable basis for dealing with legal aspects of transnational disputes. This need is not filled by legal procedure systems largely confined to and limited by national boundaries.

A joint project by the American Law Institute and UNIDROIT⁴ has produced the Principles and Rules of Transnational Civil Procedure which attempts to harmonize these procedural differences. The Project emerged due to the negative consequences, such as the costs and uncertainty and lack of predictability of working within different procedural systems. These negative consequences can be mitigated by reducing the procedural differences so that the same procedural rules apply wherever the conflict may be adjudicated. The Principles and Rules provide a system that can be adapted legislatively or administratively by rule or by incorporation by agreement by parties into their contract to adjudicate international commercial disputes. The objective of these Principles and Rules is to offer a fair procedure to all parties to reduce the uncertainty resulting from litigation in unfamiliar surroundings and thereby facilitate the expansion of transnational commerce. The Principles have been officially adopted by the ALI and UNIDROIT. The accompanying Rules have been prepared by the project co-reporters as an example of how the Principles may be implemented.

The Principles and Rules attempt to combine the best elements of the Common Law adversarial procedure with the best elements of the

4. See *ALI/UNIDROIT Principles of Transnational Civil Procedure*, American Law Institute, Cambridge University Press (2006) [hereinafter *ALI/UNIDROIT Principles of Transnational Civil Procedure*].

Civil Law judge-centered inquisitorial system. The project recognizes numerous fundamental similarities as well as differences in the two procedural systems and tries to harmonize these aspects into a single set of Principles and Rules. An example of an issue addressed by the Principles and Rules is the rules for the formulation of claims.⁵ The Principles and Rules require details with particulars regarding the basis of the claim and that the particulars reveal a set of facts that would entitle the claimant to a favorable judgment.⁶ The Principles and Rules regarding the exchange of evidence requires disclosure of sources of specific proof supporting the allegations set forth in the pleadings, such as relevant documents, expert reports, and summary of expected witness testimony before the plenary hearing.⁷ Therefore, the parties must have sufficient evidence to support their claims and be prepared to reveal all their evidence to their opponent without having to demand particular information from them.⁸ Additionally, the rules provide a limited right to document discovery and deposition.⁹ The Principles and Rules also address the procedure at the plenary hearing and second-instance review and finality of decisions.¹⁰

The Pennsylvania State University Dickinson School of Law joint conference of the American Association of Comparative Law and the Italian Association of Comparative Law addressed the topic of *Globalization of Civil Procedure—The ALI & UNIDROIT Principles And Rules of Transnational Civil Procedure*. The authors of the papers which follow are eminently qualified to address the subject. Jeffrey Hazard, Jr., (a distinguished professor of procedural law, co-reporter of the project, and former Director of the ALI) addresses the applicability of the Principles to legal systems which retain the right to trial by jury with particular attention to the discovery process and use of expert witnesses in the United States legal system. University of Pavia Professor Michele Taruffo (a co-reporter to the project and also a distinguished professor of procedural law) addresses the applicability of the Principles in legal systems which do not utilize jury trials with particular emphasis on the absence of discovery and use of court appointed experts in civil law countries. Chief Third Circuit Judge Anthony Scirica responds to the presentations by Professors Hazard and Taruffo from his perspective as a Judge who has worked extensively in American rule making as a

5. *See id.* at 7.

6. *See id.* at 7.

7. *See id.* at 8.

8. *See id.* at 8.

9. *See id.* at 8.

10. *See ALI/UNIDROIT Principles of Transnational Civil Procedure, supra* note 4, at 9-10.

member of the Advisory Committee on Civil Rules and as Chairman of its parent committee, the United States Supreme Court's Committee on Rules of Practice and Procedure.

Judge Scirica notes in his paper that:

The value of the Transnational Principles and Rules for U.S. courts and courts in all countries lies in at least two areas. First, over time, parts of the Transnational Principles and Rules might be adopted by courts or legislatures for use in commercial disputes between citizens of different countries, or might serve as a procedural mechanism for resolution outside the judicial system by agreement of the parties. Second, the Transnational Principles and Rules may cause us to reexamine the foundations of our respective procedural rules with a view toward considering revisions. Over time, this reexamination may encourage transnational harmonization of civil procedure.

As stated by Herbert Kronke, Secretary General of UNIDROIT, and Lance Liebman, Director of the American Law Institute, the "Principles will have influence as the growth of global commerce increases the need for dispute-resolution systems that deserve public confidence" and hopefully the "project will lead to further efforts to help national legal systems adapt to an interconnected world."