

HARMONIZATION OF CIVIL PROCEDURE

Moderator: Frederic Bloom

Participants: Geoffrey Hazard, Michele Taruffo

HALEY: I want to welcome you back. I hope you had a good evening. I will reconvene this morning. Today we have two panels and two substantive papers after lunch. Our panels this morning deal with problems of harmonization, convergence, and procedure. We begin with a panel on transnational litigation. Our moderator is Professor Frederic Bloom from St. Louis University. I turn it over to you.

BLOOM: Good morning. Thank you. As Professor Haley noted, the focus of the panel is the harmonization of differing civil procedure regimes in the transnational context. In the past few years, a great deal of work has been directed toward creating a rational transnational civil procedure system. This morning we will have the pleasure of listening to three of the true engines and luminaries in this field: Professor Hazard, Professor Taruffo, and Professor Gidi, all of whom have worked to fashion a body of innovative solutions to transnational civil procedure hurdles. Together, these three can provide a uniquely informed perspective on the challenges and structures of transnational civil procedure.

Professor Hazard is the Trustee Professor of Law at the University of Pennsylvania Law School. A prolific scholar and distinguished teacher, Professor Hazard is an expert in the areas of legal ethics, federal courts, and civil procedure, as a long list of publications and awards attests. Before joining the faculty at Penn, Professor Hazard taught at Yale University, the University of Chicago, and the University of California, Berkeley. He also served as a visiting professor at Arizona University, Arizona State, Harvard Law School, and Stanford Law School. From 1984 to 1999, Professor Hazard was the Director of the American Law Institute and he serves as the co-reporter for the ALI-UNIDROIT Project on Principles and Rules of Transnational Civil Procedure. This project, of course, is at the heart of the topic this morning. It is a true honor to introduce Professor Hazard.

HAZARD: Thank You. A pleasure to be with you. I'm delighted to say that I have my colleague Michele Taruffo with me, who was the originator of the transnational rules project, and my colleague Antonio Gidi, who came on the project at an early stage and has stayed with it all the way through. He has provided continual technical assistance, and a good deal of substantive assistance, consistent with his junior position in the faculty world. One other person whose name should be mentioned is Rolf Sterner

of the University of Freiberg in Germany, who got involved with the project in a way I will identify in a moment.

I am mindful that a number of you are quite familiar with the transnational civil procedure project, because some of you participated in one way or another in it. I hope you will forgive me if I give a brief reprise of what the project was and where it is for the benefit of the rest of the audience.

The project started about ten years ago over a cup of coffee between Michele and myself at an international legal conference on comparative civil procedure. We noted an awful lot of talk about the difficulties of harmonization, but wondered whether it really could be done. Michele said "Well, who knows. Maybe it can. Let's try." So Michele and I exchanged documents, texts, and drafts for about a year and a half, trying to see whether one of us could draft something. We worked in English because Michele is completely fluent in English, and my Italian is a little weak. At the end of that initial period, we concluded that we could get close enough. We were emboldened to propose it to the ALI, which we did. I was then Director, so I had an inside track to access. They were quite concerned, as I learned, about whether we knew what we were doing, and they had some considerable skepticism. ALI set up an independent committee to look at the possibility of harmonization, and the committee concluded that there was enough of a prospect to authorize it.

We were quite aware that the project would be intellectually impoverished and politically vulnerable if we did not have additional international participation. Therefore, we approached UNIDROIT, and they agreed to consider a collaboration. UNIDROIT appointed Rolf Sterner, who was a friend and colleague of Herbert Kronke, the director of UNIDROIT at the time. Kronke rightfully had confidence in Rolf to do an appraisal of the project, and he and Rolf completed a report that was guardedly supportive. Supportive in that he said yes, it's worth trying, guarded in the sense that he thought there were some important aspects of the project that needed to be changed. So with joint sponsorship, we began.

It was around then that Gidi enrolled in the graduate program at Penn. He came with an introduction from Taruffo and also another colleague of ours who is now in Genoa, Angelo Dundi. One of the great positive accidents was the involvement of Gidi, because it meant there was always immediately at hand a strong-willed common law participant, me, and somebody familiar with the civil law tradition and technically acquainted with civil law civil procedure. So we began to draft.

UNIDROIT appointed a group called the working group, ALI had its usual advisory system, and we began a series of meetings. The meetings followed a pattern approximately similar to UNIDROIT, and certainly similar to ALI meetings, in which the reporters do a draft. I will begin by explaining my view of drafting, which is one that I am glad my colleagues shared and which I strongly recommend. Always envision that you are doing the final draft. Write the draft as you now think it ultimately ought to be. No prospectuses, prolegomena—none of that. Just do it. Also, to the extent possible, start with the hard parts, because if you can work through the hard parts so that you are more or less satisfied with them, then the rest of the project can go. If you spend a lot of time, as it were, doing background work—which is a classic tradition not only in European scholarship, but in American scholarship too—you can spend a lot of time without really realizing whether you can pull the project off.

We began drafting the text, and it was submitted annually, in one-week sessions in Rome to UNIDROIT, and in two-day sessions following the ALI pattern in the United States. The draft was also presented at the annual ALI meeting. We went through a series of drafts with the philosophy I have described: as you are writing, you are trying to do your best work writing a final text. Of course you are going to revise it, but the whole idea of the project is encapsulated by the following: a draft is a set of questions in the form of an answer. You must understand that people are going to say, “I don’t know about this. I don’t understand that. I think this is wrong.”

You should be receptive to that kind of criticism and listen to understand, not to create a counter-argument. This is something that I think I have learned. To the extent I have learned it, I learned it the hard way.

We finally produced a text that I am glad to say was approved by the UNIDROIT council in April 2004, and by the ALI annual meeting in May 2004. We have since been involved in making a number of minor changes. I say a number because there are probably fifty or one-hundred places where we have changed the text. Minor, because they are all minor changes.

One major change that was accomplished at an early stage was to convert the concept of the project from a code of rules into a set of principles. It turns out that the difference in terminology is, to an important extent, rhetorical, political, and cosmetic. If you are going to be serious about this, you have to strive for a reasonable degree of detail. It is said that the devil is in the details, and that is true. Unless you focus on details, you often do not know whether you have something that will work

and whether it's intelligible, operable, and so on. The ultimate project consists of principles which are relatively detailed. There are about thirty-four or thirty-five principles that do everything from introducing to talking about a collateral attack on a judgment and cooperative enforcement. An annex of rules tracks the principles and supplies some additional detail.

UNIDROIT felt much more comfortable promulgating a project called "principles," and ALI did not have any trouble going along with that. ALI has done that sort of thing on a couple of other projects unrelated to this topic. But I want to stress that getting fine detail is very important, and let me just give one illustration.

The question of whether proceedings, following the civil procedure covered by these rules for international commercial transactions, should be public. You have got two very strong traditions. The United States and most of the common law countries believe everything in a court proceeding is public. You have other legal traditions, Japan for example, that believe the parties have a right to maintain the proceeding in confidence. We always had in the back of our minds that these principles had to be thought of as useful in arbitration, and arbitration by definition is confidential. So we had a very tough time. We went over it several times and wound up with a solution of Solomon that really straddled the problem, because we felt that these are fundamental concepts in legal systems, and they are antagonistic. So what are you going to say about it? We wound up straddling the issue. I don't have any apology for that, and I understand that you can write a well-articulated brief on either side of the proposition. But in most instances we did not have this problem.

I now want to return to two general points and then pass the microphone to my colleague Michele. First, I am not fundamentally a comparativist. I have become one late in life. Comparative law scholars tend to emphasize differences. If you are articulating German civil procedure to an English audience, you are destined to focus on the ways in which German procedure differs from English procedure. That is okay, but it is not a good route to harmonization. Rather, in harmonization you want to see whether beneath the evident linguistic differences there are fundamental functional similarities. This is where Michele and I began our journey, thinking about how these systems work. This is not a criticism of comparative legal scholarship. It is an observation about the necessary character or the typical characteristic of comparative legal scholarship, which needs to be modified when you are trying to work out a set of legal institutions that would work in different legal traditions.

The other key point in my estimate was beginning to think about civil litigation in a way that Michele and I had shared in our discussions for

twenty years. We have known each other happily for a long time. As a teacher in the United States, I think of civil litigation as beginning with the role of the lawyer. If you think about a civil dispute in a civil law system, the traditional discourse begins with the role of the judge. But if you think about the lawsuit, how did the judge know that there was a lawsuit? Well, a complaint was filed. What are the requirements of the complaint in a civil law system? They are the requirements of the specification, of what it is the plaintiff says happened, and why the plaintiff (according to the plaintiff) is entitled to a remedy.

One of the things that was pressed hard on me, by Gidi in particular, is that in the civil law tradition the judge is strictly bound by that formulation. You do not have anything like the American liberality in modifying the framing of the case and accounting for the information learned in discovery. Gidi said we do not have discovery. Civil systems start with what the lawyer says to the court, and the court is essentially bound by that statement of claims. One can see that if you assume a similar obligation is imposed on lawyers in a common law system—and it is in all systems except the United States—then you can see that the fundamental impetus of the lawsuit and its defining characteristic in substantive terms is going to be the same in a civil law system as it is in a common law system.

I knew from my experience in the United States that code pleading used to be the rule in the United States as well. So, if you start with code pleading you see that from then on all systems rely on a tripartite interaction between the lawyers, functioning within their respective traditions, and the judge. Then the rest of the procedure is an interaction, tripartite dynamic, and we asked, what are they going to be talking about? This analysis led to writing rules for the conversation or principles of civil procedure.

I am satisfied that these principles of civil procedure would work in the United States. The principles have been tested by many lawyers in the ALI, whom I consider to be an excellent critical audience. They are well-regarded by lawyers and judges in the common law countries, for example, Canada and Australia. I am also satisfied that they would work in civil law systems, because Michele, Antonio, and my colleague Rolf Sterner in Germany all tell me so. I have every reason to believe them.

BLOOM: Professor Michele Taruffo is a professor of law at the University of Pavia. An expert on legal theory, comparative law, and civil procedure, Professor Taruffo has served as a visiting professor at Cornell University School of Law and at the Hastings College of Law, University of California, San Francisco. Professor Taruffo is the author of a number

of articles and books and he has collaborated with Professor Hazard before, co-authoring *American Civil Procedure: An Introduction*.¹ As Professor Hazard noted, Professor Taruffo has also worked on the ALI UNIDROIT project for the Principles and Rules of Transnational Civil Procedure, serving as Co-Reporter with Professor Ralph Sterner and Professor Hazard. It is my pleasure to introduce Professor Taruffo.

TARUFFO: Thank you, Mr. Chairman.

If I had to define this project in three words, I would use this definition: a piece of living, comparative law. Why living? Because we were not just starting with different procedural systems in order to compare them with a tripartite system. As Geoff was saying, we wanted to do much more than that. We wanted to rely upon a fully broad knowledge of the most important procedural systems in order to create something. In my opinion, this is not the usual kind of work for the average comparativist. Usually when we practice comparative law, we study, but we don't try to make law. This is a distinctive feature of what we tried to do. There are some topics I would like to stress from the point of view of the method that we used.

I am not going to be excessively boring, going through the contents of the project. As Geoff said, it begins with issues of jurisdiction, and it ends with enforcement of judgments. It is not a code. It is not very long. There are some dozens of principles and some dozens of rules. To an American audience, it may be useful to compare this text with the Federal Rules of Civil Procedure. Many of the topics are the same as you may find regulated by the Federal Rules of Civil Procedure or the Federal Rules of Evidence. The format of the text is something like those. But since we are here in a conference about comparative law, I would like to discuss two or three points concerning methodology, or at least the kind of method we tried to apply in doing this work.

We did not start by comparing specific procedural rules to register similarities and differences between some provisions existing in Germany, France, Canada, Australia, Japan, China, and so on, with the aim of building up a list of similarities and differences. This was not our goal. Of course, we used all the available sources about the topics we were dealing with, but not in that way. We were not interested in making a list. We used a different approach. We started discussing and considering which were, in our opinion of course, the most important problems in the functioning of

1. GEOFFREY C. HAZARD & MICHELE TARUFFO, *AMERICAN CIVIL PROCEDURE: AN INTRODUCTION* (Yale University Press 1993).

civil litigation in the most important systems we were considering. The range was the United States, England, Canada, most of the European systems, Japan, to some extent China, and to some extent Latin America. We selected some dozens of problems and decided arbitrarily, but maybe not in an absurd way, that those were the most important topics to consider. Then we applied what in sociology might be defined as the method of functionally equivalent solutions.

After having identified the problems, we discussed the range of solutions and compared those solutions. This allowed us to intellectually shift. We were considering apparently different or even conflicting regulations as possible answers to the same kinds of problems. So we discussed first the problems, then the various solutions. This is different from the usual analytically detailed, micro-comparative work many of our colleagues are doing. And it allowed us not to be excessively conditioned by differences. When you reason from a common problem to a variety of solutions, it is easier to find the similarities at the level of the problem being solved than it is to consider the differences at the level of the specific solutions. We were not looking for a sort of minimum common denominator in all the alternative solutions that we found. We were not interested in finding an average, generally acceptable solution for these problems.

Our aim, though not very modest, was to find, for each of the problems we selected, what seemed to us the ideal or relatively better solution. We were not working at the average level, or at the bottom level. We were working at the highest possible level. That is why I said we were not very modest, but we were having a lot of fun doing this kind of work. It was not boring. It was fascinating.

The aim of finding, through a comparison of the functionally equivalent solutions, the relatively better one, was not easy. This required not only reading the rules and comparing them, but also collecting data, information, and experiences concerning the actual functioning of those rules. We needed to know the practical impact of the interpretation and application of rules upon the practice of civil litigation in a number of different systems.

The method we followed was to have a lot of meetings with lawyers, judges, professors, and arbitrators in several parts of the world. This was not only for tourism purposes. We were interested in learning from people in various parts of the world how things were going in their practice of litigation. We were able to read the code and the rules without traveling, but of course, that was not enough. The law in the rules was not enough. The law in the books was not enough for the kind of enterprise we were

engaged in. While looking for the relatively better solution to the problems, we faced different kinds of situations. Sometimes we found among the existing practical solutions a relatively better one. But then we were often faced with conflicts.

I provide two examples to help you understand the nature of the problem. One example, already noted by Geoff, is the model of pleading, or fact pleading versus notice pleading. Here we were faced with a strong and long European continental tradition of fact pleading in which the statement of the claim has to include a detailed allegation of all the relevant facts. This is the practice in Italy, Germany, France, Spain, and so on. As Geoff said, and as you know very well, under the Federal Rules of Civil Procedure, the United States has notice pleading as the leading model for the statement of the claim. We had to make a choice—a relatively simple choice because we had only two alternatives. We made a choice in favor of the fact pleading system. We found models of fact pleading in European codes. We may borrow the rules from Germany, Italy, and France. They are more or less the same. Only the details may be different, but this is a very well-defined type of solution. It was easy. Not so easy to explain to American lawyers. Because they were accustomed to notice pleading, we had to explain why we were choosing fact pleading as the solution.

Another example is expert evidence. Here, differences were even more dramatic. I do not need to explain to an American audience how the expert witness is used in the American system. However, the civil law, the European tradition, was and still is completely different. The expert is not a witness—he is the expert. He or she is appointed by the court. She has to be neutral and so on and so on. Here again we have two completely different models, and once again we made a choice and preferred the European continental model. If you look at the principles and the rules dealing with expert evidence, you may perceive that this solution is more or less an almost literal translation of rules found in European codes. Once again, we set aside the American model in favor of the European model.

I am stressing this in order to say that, although we were working with the support of the American Law Institute and although we were using the English language, we were not conditioned by those factors. When we thought the best solution was the European, the French rather than the Japanese solution, we decided in favor of that solution. Our main concern was which system works better as a solution to the problem of providing the court with reliable, neutral knowledge of the scientific data the court needs to decide the case.

In many cases, we were not satisfied by any of the pre-existing solutions we found by analyzing the materials we had. In such cases we were even less modest than on the other point, because if we did not find a ready-made solution, we invented or created one. We had no limits in doing this.

Two examples will illustrate this. First, the examination of witnesses once again follows two different traditions. In Anglo-American systems, witnesses are subjected to direct and cross-examination by lawyers. In civil law systems examination is performed by the court. We learned on the two sides of the divide between common law and civil law that neither of these solutions is working well in its pure form. Geoff was not satisfied with the functioning of the practice of cross-examination. I was not at all satisfied with the practice of having witnesses examined by the court. Here the problem was not choosing one of the two. It was trying to create a new solution. So we did.

We tried to build rules combining the role of the court and the role of the lawyers of the parties. We tried to combine the best parts of the two models rather than combining the worst parts of the two models, as often happens. For instance, when cross-examination is transplanted into civil law systems it does not work. As it didn't work in Japan and as it doesn't work in the Italian criminal procedure for instance. So we built, tried at least to build, new rules combining the positive aspects of the two systems.

Another example was discovery: non-discovery, open-ended discovery, American style limited document discovery, English style. Well, at a certain point we stopped using the term discovery because outside the United States it is not very popular. We were getting negative reactions in France, for instance, just by using the term "discovery." So we made what Geoff calls cosmetic changes. We changed the vocabulary. We cancelled the term "discovery," which is dangerous because of how it sounds, and instead we used disclosure, which is more popular, less dangerous, and accepted by the French. They did not perceive that it was just cosmetics. It worked, and so it was a good move.

In continental Europe, we don't have anything equivalent to the Anglo-American discovery, but I was aware that if we used a double-phased structure of pretrial and trial for the proceeding, we should have something equivalent to discovery in pretrial. In Italy and France, we do not have discovery, not because we do not need it, but because the structure of the proceeding is different. The way lawyers learn about the facts and the available evidence is structurally different. We adopted the two-phase model of proceeding in the project, so we were obliged to build a form of

discovery. The form of discovery we drafted is very different from the American model of pretrial discovery. It is different from the non-existent discovery in continental Europe, and it is also different from the English documentary discovery. We tried to draft rules of disclosure that could work within the procedural structure.

Another important point is the method we followed in those years drafting and re-drafting this text. In the meetings we had with groups of lawyers from all kinds of legal practices and backgrounds, including China and Japan and other places, we were not looking for consensus. We were looking for objections. We were looking for the reactions of lawyers belonging to different cultures and to different historical and institutional traditions. In some cases we were amazed to find out that those different cultures and traditions were not real obstacles. For instance, after having spent two full days in Beijing with a group of Chinese lawyers, I was surprised that we were talking more or less the same conceptual language, notwithstanding the divide of our cultures.

What are we going to do with this after almost ten years of work? Well, we do not really know how this project will be used. It could be used in different ways as a basis for an international convention concerning transnational civil litigation, or as a model law. It could be adopted in national procedural systems as a set of special rules for times when a national court has to decide a transnational case. It could be used as a term of reference for domestic reforms concerning civil procedure as some foreign colleagues suggested to us. With some minor adaptations, it could be used in international arbitration. These possible uses do not conflict with each other. We will see what will happen, but I would like to stress that this project might be used also at the level of scientific research. It could be taken as a standing reference point for a comparative study of the national procedural systems. This could be done at the international level as a sort of test of the acceptability of international systems.

I have just one example in mind. The WTO system for settling disputes is under attack from many points of view. Is it judicial or not judicial? Is it a fair trial or not a fair trial? This text could be used to make systematic evaluations about existent systems or to interpret and assess the pros and the cons of national systems of procedure. We were told many times in many countries that their own procedural systems could improve very much by following the lines we laid down in the project. I am sure my own national system could be improved. Italy would have a much better system of litigation if we adopt this draft. The draft could provide a kind of common standpoint from which to consider existing systems.

Another interesting but very complex problem is that the principles and rules do not cover all the aspects and details of a procedure of civil litigation. Therefore, they should be combined with the existing procedural rules in any national system. Combining the different sets of procedural rules may give rise to a lot of technical and cultural problems.

At least three types of problems exist. Cultural differences, between the kind of culture laid down in this project and the local culture of the national system in which the problem is considered, represent the first type of problem. Second, the principles are more general than ordinary procedural rules, so they could be considered as general standards to be applied vertically, so to speak, to the existing procedural rules. This could mean an improvement on the existing rules but also a lot of conflict. The publicity of the proceedings is just one example. Another example is the principle of necessary written justification of judgments in systems like the American system, in which a constitutional provision does not exist. Finally, if a national system considers the rules that are more specific, there may be a problem of horizontal harmonization. The general standard would be that where a topic is regulated by these principles and/or rules, they supercede. It can be a very difficult and puzzling kind of job to imagine, for instance, how to combine the transnational principles with the German civil process or the *Cour de Procedure Civile* in France or here with the federal and state rules. But this is nothing special. We were not solving all the problems of the world. It is better to leave something for other people to do. Thank you.

BLOOM: Thank you, Professor Taruffo. To help us frame our ongoing discussion of the harmonization topic, we will now hear a few remarks from Professor Antonio Gidi. Professor Gidi is an Assistant Professor of Law at the University of Detroit, Mercy College of Law. Before joining the faculty at Detroit Mercy, Professor Gidi taught for several years as an adjunct professor at the University of Pennsylvania Law School. A true polyglot, Professor Gidi has written and published extensively in Portuguese, Spanish, and English, and he serves as a general reporter in a project sponsored by the Ibero-American Institute of Civil Procedure to create a model class action code for Latin America. Professor Gidi is the Associate Reporter and Secretary to the ALI-UNIDROIT Project on Principles and Rules of Transnational Civil Procedure.