

A REPORT ON THE ELI CIVIL PROCEDURE PROJECT

Developing
**CIVIL PROCEDURE RULES
FOR EUROPEAN COURTS**



BY GEOFFREY C. HAZARD JR.

ELI is the European Law Institute. Its Secretariat is based in Vienna, Austria; its members include judges, lawyers, law professors, ministry of justice officials, and law firms from the European Community. It is substantially modeled on the American Law Institute, but its wider range of membership, particularly government lawyers *ex officio*, means that ELI has something of a quasi-governmental standing. ELI is currently engaged in a number of interesting law reform projects in such areas as consumer protection law, insolvency law, and contract law. The aim is to formulate laws and codes that could be adopted in member states, thus contributing to the harmonization of law among the European countries.

Among ELI's projects is developing a set of rules, or code, of civil procedure. The project has been underway for about three years and has made substantial progress. At this stage, its conclusions are only tentative and its specific provisions will be reconsidered in light of the whole set.

Among the important issues are — no surprise to U.S. law people — jurisdiction over foreign parties, notice requirements, pleading, and joinder of claims. Most sensitive — again no surprise — is the question of pretrial discovery, including depositions and production of documents. Indeed, the subject is so sensitive that in the ELI project the process is called “access to evidence” rather than “discovery.” (The matter of discovery/access is further discussed below.)

THE TRANSNATIONAL RULES

The ELI Civil Procedure project has had a head start by reason of an earlier project, the Principles of Transnational Procedure and accompanying rules. See ALI/UNIDROIT PRINCIPLES OF TRANSNATIONAL CIVIL PROCEDURE (Cambridge U. Press, 2006). The Principles and Rules have been taken by ELI as the framework for its project.

The Transnational Rules project was cosponsored by the American Law Institute (ALI) and UNIDROIT. “UNIDROIT” is the French acronym for the International Institute for the Unification of Private Law. UNIDROIT was established in 1923 as a part of the League of Nations apparatus and has its headquarters in Rome. It has a long and positive provenance although a relatively modest record in model legislation.

The Transnational Rules project began as an idea developed by Prof. Michele Taruffo, an Italian law professor specializing in comparative law, and myself, then winding down my term as ALI Director. Taruffo, whose background is in civil law, and I, with a background in common law, had done several studies together. This led us to believe that, contrary to conventional legal opinion, the civil law and common-law systems could be integrated. We spent a year working together to develop a skeletal version of such a system. Armed with resulting confidence,

we obtained approval from ALI to propose a joint venture to UNIDROIT.

UNIDROIT engaged Prof. Rolf Sturmer of Freiburg University in Germany to evaluate the proposal. Sturmer's career involved being a judge as well as a distinguished professor of law. Sturmer had done important work in comparative procedure, including a project with Peter Murray of Harvard comparing German civil procedure with its U.S. counterpart. Sturmer made a positive evaluation of the proposed project and later joined the project team as a Co-Reporter. Also joining the team as Associate Reporter was Prof. Antonio Gidi, who was trained in Brazil's civil-law system and teaches comparative law in the U.S.

The Transnational Rules project had an ALI advisory committee that included judges, lawyers, and legal academics. The legal academics notably included Professors Mary Kay Kane of the University of California, Hastings, a coauthor of a leading treatise on U.S. federal procedure, and Edward Cooper of the University of Michigan, who was Reporter for the Civil Rules subcommittee of the Standing Committee on Practice and Procedure of the Judicial Conference of the United States.

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UNIDROIT appointed a parallel working group that included specialists from England, France, Argentina, and Japan. Notable among the members of the working group were Justice Aida Kemelmayer de Carlucci, an appellate judge in Argentina, Prof. Neil Andrews of Cambridge University in the U.K., and Prof. Frederique Ferrand of Jean Moulin University in Lyon, France. Ferrand is completely versed not only in French law but also in German civil procedure.

The Transnational Rules project was not targeted at any particular audience, thereby to avoid people who thought the idea of integrating civil and common-law systems was a pipedream. The discussions in both ALI and UNIDROIT groups “proceeded without the elaborate introductions often typical in international deliberations. On the contrary, discussion was simple, direct, professional, and sympathetic.” ALI/UNIDROIT, *supra*, at p. xlv. During the drafting process, working texts were disseminated to various legal scholars, some of whom expressed the usual doubts. At the conclusion of the drafting stage, in both English and French, the project conducted roadshows around the world. Those attending these sessions included legal scholars, judges, and practitioners from about 15 countries, including China, Russia, Brazil, and Australia.

The Transnational Rules project was completed in 2004. In the intervening years the Principles and Rules attracted attention primarily in academic circles and some in international arbitration. See Bibliography, *in* ALI/UNIDROIT, *supra*, at pp. 157 et seq. No national regime adopted them. However, the transnational formulations were widely available and had attracted no substantial negative attention.

The transnational texts have proved very useful in the ELI project. Several members of the transnational team are now engaged in the ELI enterprise, including Professors Sturmer, Andrews, and Ferrand.

DIFFERENCES AND SIMILARITIES

It is worth reviewing the differences and similarities between, on the one hand, the Transnational Rules and

the emergent ELI formulations, and, on the other hand, the counterpart rules of civil-law systems and the American model epitomized in the Federal Rules of Civil Procedure (FRCP). Notable differences are: jury trial, the roles of judges and lawyers, and the scope of appellate review.

No European civil procedural system uses juries, although some of them have lay arbiters in labor court procedure. Although jury trial in civil cases originated in England, English courts over a century ago ceased using juries except in a very limited category of cases. The Transnational Rules proceed on the premise that they can work equally well under a jury system. Rule 23.2 of the Transnational Rules requires:

The judgment should be accompanied by a reasoned explanation of the essential factual, legal, and evidentiary basis of the decision.

The accompanying comment states that compliance with this rule can be achieved by reference to “the transcript of the instructions to the jury.”

REGARDING THE ROLE OF JUDGES AND LAWYERS, a distinction is traditionally drawn between “inquisitorial” civil-law systems and “adversarial”

common-law systems. This distinction is becoming more formal than actual. In England, the judges now have very substantial authority to manage civil cases, particularly in complex litigation. The same is true in the U.S. federal system, as expressed in FRCP 16 (pretrial conferences) and FRCP 26 (discovery). Many state systems have similar rules and some also have specialized courts with “managerial judges” to handle commercial litigation.

The Transnational Rules address the roles of both judges and lawyers. Rule 10.1 provides:

A judge . . . must not participate if there are reasonable grounds to doubt [his/her] impartiality.

Rules 10.2 and 10.3 go on to provide that “A party must have the right to make reasonable challenge of the impartiality of a judge” and that such a challenge must be heard by or appealable to a different judge.

Principles 4.1 and 4.2 provide that “a party [be able] to engage a lawyer of the party’s choice” and that “a lawyer’s professional independence should be respected.” The comment to these provisions states that “lawyers are expected to advocate the interests of their clients and gener-

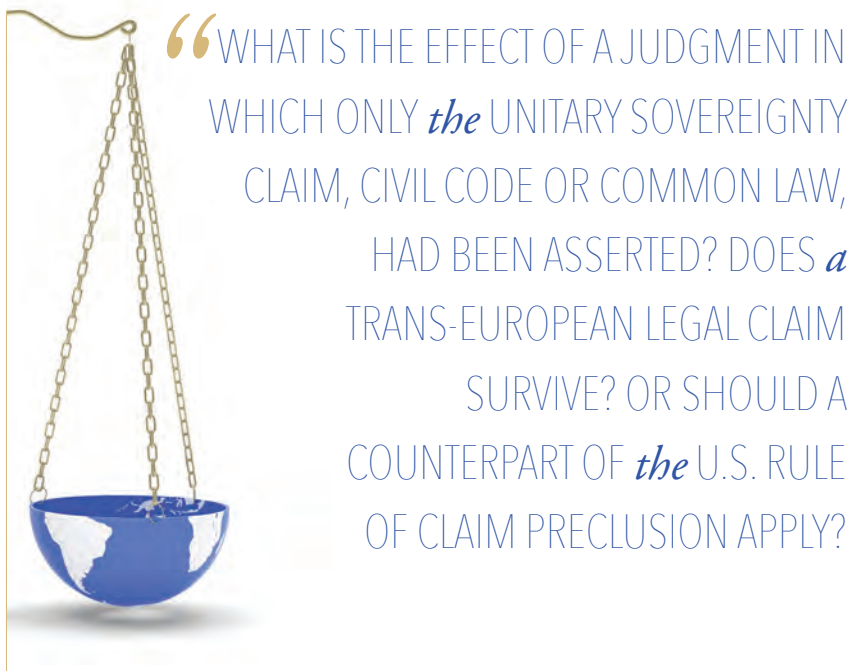
ally to maintain the secrecy of confidences obtained in the course of representation.”

Rule 27.1 provides that “evidence may not be elicited in violation of the legal-profession privilege of confidentiality under forum law [or] confidentiality of communications in settlement negotiations.”

REGARDING THE SCOPE OF APPELLATE REVIEW, the difference remains at least formally significant. In the civil systems an appellate court has plenary authority to review an inferior court’s judgment, not only as to issues of law but also as to issues of fact. The underlying theory is that the civil code determines the substantive basis of the case and that the higher court judges have more authoritative understanding of the code’s provisions. The underlying civil-law theory regarding issues of fact traditionally has been that evidence is a legal science and that the strength of an item of evidence is governed by a set of rules. For example, the probative value of a witness’s testimony depends on his or her position in society — whether a professional or merely a worker. These evidentiary rules, like the substantive law of the civil code, are therefore more authoritatively understood by higher level judges.

In common-law systems the appellate court reviews for “error” in jury-tried cases and “abuse of discretion” in most judge-tried cases. The deference to jury findings derives from the constitutional basis of the jury trial itself. The deference to trial court findings in judge-tried cases reflects recognition that the trial judge has had opportunity to see and hear the witnesses. It would appear that the civil-law system makes appeals relatively attractive; I have heard some lawyers in civil systems say that the proceeding in the first-instance court is actually a preliminary hearing. Moreover, common-law systems include the concept of “harmless error,” so that establishing that the trial court committed a mistake does not necessarily make for a successful appeal.

In light of these complications, the comment to Rule 33 states that in general “appellate review should be through the procedures available in the court system of the forum.”



Some differences between civil-law and common-law systems are of low visibility. In the matter of notice, for example, it was interesting to learn that in Germany and perhaps some other European countries, notice to defendants is ordinarily given electronically, whereas in our systems the old-fashioned manual service of summons is the default rule and is still used in most cases. The Transnational Rules recognize that there are differences in notice procedure and adopt the forum's procedure subject to specified requirements. Rule 7.1 provides:

A party must be given formal notice in accordance with forum law by means reasonably likely to be effective.

Rule 7.2 goes on to require that notice be in the target's language and include the statement of claim and specify the time to respond.

A more visible difference is that in many civil-law systems, and in English high courts, the advocates wear black robes, signifying a judicious role similar to the judicial role. The Transnational Rules leave that subject alone.

JOINDER, PLEADING, RES JUDICATA

Three other low-visibility differences are interrelated: the joinder of claims in a civil action; the pleading of multiple theories of liability; and the scope of *res judicata* upon conclusion of a civil action. Understanding these issues requires reference to the underlying substantive law in contemporary civil-law systems.

The substantive law in civil-law systems historically is expressed in comprehensive civil codes, patterned on the Napoleonic Code that was adopted in France at the turn of the 19th Century. The civil-law theory is that law is exclusively expressed in the codes, and that other legal sources, including judicial opinions, are on a lesser footing.

UNITARY OR DUAL SOVEREIGNTY

This civil-law premise is based on the unitary sovereignty that is established in the national state in which a civil code has been adopted. From different historical

origins, the United Kingdom of England and Wales (thus not including Scotland) also has a unitary sovereignty.

In contrast, the American federal system involves dual sovereignty: A supreme but subject-matter limited national authority, founded in the Constitution, and a residual plenary authority in the states, formally recognized in the Tenth Amendment. Among other things, the U.S. dual-sovereignty system has resulted in a major law-making role for the judiciary, centered in the Supreme Court. It is generally the courts that authoritatively determine the boundaries between national and state authority. Because the boundaries have changed over time and have always been gray areas rather than strict lines, American law on the subject has always been complicated.

In a dual-sovereignty system, advocates on both sides in a civil case must consider whether both federal and state substantive law may afford at least arguable rights and defenses. For example, a claim of invasion of privacy may be available under the U.S. Constitution and under a state constitution or statute. So also law regulating the environment may emanate from both federal and state statutes. Attention may also be required to differences in procedure in federal and state courts where those courts have concurrent jurisdiction. American lawyers and judges therefore have long functioned in a very complicated legal system.

What has been emerging in Europe over recent decades is a similar if narrower dual sovereignty. This is a product of a trans-European body of higher "constitutional" law, propounded by the courts in interpreting basic European treaties. As this body of law has gradually accumulated, it creates increasing possibilities that a given event or transaction in a European system can be subject to both the traditional civil code or common law (in England) and the limited but supreme reach of trans-European law. These possibilities invite claimants to propound multiple claims based on multiple substantive theories; defendants have similar leeway in affirmative defenses.

These possibilities require recognition of a right to plead alternative theories

and to join multiple claims, and may also affect joinder of parties. Accordingly, Transnational Rule 12.4 provides that "a party who is justifiably uncertain of a fact or legal grounds may make statements about them in the alternative."

There is a correlative *res judicata* question: What is the effect of a judgment in which only the unitary sovereignty claim, civil code or common law, had been asserted? Does a trans-European legal claim survive? Or should a counterpart of the U.S. rule of claim preclusion apply? Many European jurists and lawyers have been puzzled by these possibilities, given their professional acculturation in systems of unitary national sovereignty. The subject of *res judicata* is outside the scope of typical procedural codes. At any rate, the U.S. rule is that if the two claims arose out of the same event or transaction, then generally both must be asserted in the original action, on pain of preclusion in subsequent litigation. *See* RESTATEMENT (SECOND) OF JUDGMENTS § 24.

JURY, DISCOVERY AND ROLES OF LAWYER AND JUDGES

The differences between European and American systems are more evident in the procedure for determining facts; in "access to evidence" a.k.a "discovery"; and in the roles of lawyers and judges. These differences are correlated with each other.

Jury Trial

The basic American procedure for determining facts is of course jury trial. Jury trial is a right largely determined by constitutional provisions — the Seventh Amendment in the federal system and similar provisions in state constitutions. Moreover, the right to jury trial has wide popular support, such that it is virtually impossible for it to be repealed. In contrast, civil-law systems have never had general use of juries. As noted earlier, England, although historically a common-law jurisdiction, has long since discarded the jury role in all but narrow categories of civil litigation.

The practical importance of jury trial is not that there are so many jury trials — the "vanishing jury" is much talked about. In most American jurisdictions jury trials are actually held in less than five percent of

civil cases filed. Accordingly, it should be recognized that in American civil litigation the significance of jury trial is rather the prospect of jury trial that hovers over most civil cases. The possibility of jury trial is especially menacing to corporate defendants whose conduct could be considered as overreach according to popular concepts of right and wrong.

Broad Discovery

The broad discovery afforded in FRCP 26–37, and its state law counterparts, is justified in important part as a means of assembling evidence before trial for eventual presentation to a jury. Any particular jury is assembled ad hoc, sits through a single continuous trial session, and then is dissolved. It is therefore generally impractical to have a jury function in sequential sessions. Accordingly, all evidence for trial must be assembled before trial. Before modern pretrial discovery exemplified in the FRCP, the adversaries typically had to guess what the opposing party's proof would be. Under modern discovery, that proof can be fully exposed before trial.

Roles of Judges and Lawyers

Theoretically, assembly of the evidence could be assigned to judges. However, this would be inconsistent with the fundamental proposition that a litigant is entitled to assistance of a lawyer. Proper legal assistance in the common-law tradition includes fashioning legal claims and pursuing evidence relevant to those claims. Discovery obtained by the advocates serves these purposes.

Expert Testimony

Expert testimony is helpful and often essential in much modern litigation. An important issue is selection of the experts. In most common-law jurisdictions, and in the U.S., each party may select its experts, taking into account their stature in the field, their effectiveness as a witness, and their availability. In most civil-law systems, engaging experts is in the court's discretion and the selection is up to the judge. Typically, when expert testimony is regarded as necessary, the judge will confer with a convenient university or specialized source to identify a suitable expert.

The advocate's role also includes a discerning assessment of the quality of the evidence. This too is furthered by pretrial discovery. For example, an important question is whether, in the estimate of the advocates for the parties, a key witness is reasonably articulate and can hold up under cross examination at trial. Discovery depositions afford a preview of that issue. In the present era of electronic communication, a decisive issue can be whether key email documents — damaging or protective — are available. Pretrial discovery can resolve that issue.

Discovery depositions and documents discovery ordinarily are almost entirely the responsibility of the lawyers. FRCP 16 confers broad authority on the judge to provide case management. In practice, however, most of the scheduling and calendaring is done by agreements of the lawyers that are ratified in orders by the judges. Indeed, the broad discovery enabled by FRCP 26–37 is possible only because it is conducted primarily by the advocates. Under typical judicial staffing in the American system, caseloads are such that the judges do not have time, or inclination, to pursue extended case management. There has been growing pressure for greater judicial involvement, but in practice substantial judicial involvement typically will focus on complex cases.

In any event, broad pretrial discovery of course is not an unmixed blessing. Wide-ranging advocate-driven discovery is notoriously considered a curse by many in the legal fraternity. Efforts continue to devise practical limitations, such as conferring broad powers on the judge to limit discovery, as in FRCP 26(b)(2), and imposing tight limits on the number and duration of depositions, as in many state civil procedure rules. The discovery system also generates the need for advocates who can maintain a balance between being civil and being zealous.

Broad discovery is regarded with horror by most European lawyers, judges, and government officials. Their conception of U.S. discovery is anecdotal, responsive to aggressive efforts by American lawyers to obtain evidence from European sources. At the same time, sober assessments of access to justice recognize that there is often unequal

access to evidence, particularly in litigation between individuals and organizations.

A type of “discovery” is the rule governing pleading. American lawyers are well aware of the U.S. Supreme Court's decisions in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). These decisions tightened the requirements of FRCP 8, if in uncertain degree, but they clearly require specificity in key factual allegations.

The pleading requirements in the Transnational Rules entail substantially greater “discovery.” Rule 12.1 provides:

The plaintiff must state the facts on which the claim is based, [and] describe the evidence to support those statements . . .

Rule 12.3 provides:

The statement of facts must, so far as reasonably practicable, set forth detail as to time, place, participants, and events.

Rule 13.4 imposes the same requirements on defendants in an answer, affirmative defense, and counterclaim.

The Transnational Rules make carefully guarded provisions for further disclosure of evidence, with emphasis on the role of the judge.

Rules 21–21.1.2 require that a party “identify to the court and other parties the evidence on which the party intends to rely, including . . . copies of documents . . . [and] summaries of expected testimony of witnesses, including experts.” Rule 21.2 requires updating the disclosures if additional items are to be used. Rule 21.3 addresses a matter that is very sensitive in most European systems: “A lawyer for a party may have a voluntary interview with a potential nonparty witness. The interview may be on reasonable notice to other parties, who may be permitted to attend the interview.”

Rule 22.1 gives the court broad authority to order additional disclosure:

A party may request the court to order production by any person of any evidentiary matter, not protected by confidentiality or privilege, that is relevant to the case and that may be admissible, including . . . documents

... persons having knowledge of a matter in issue . . . [and] the report of any expert that another party intends to present.”

The foregoing authority would empower a court to order pretrial disclosure virtually as broad as the U.S. rules in FRCP 26–37. Given the European tradition, however, it is quite unlikely that any such order would be issued or, if issued, sustained on appeal.

Pretrial Motions

All legal systems provide for activities prior to final hearing. In civil-law systems, cases usually proceed in a sequence of short hearings. These hearings can address preliminary objections, such as a challenge to jurisdiction, or issues on the merits, or consideration of evidence. In common-law systems similar sessions are called pretrial hearings, and the matters typically are addressed through motions. Pretrial motions can address procedural matters, such as scheduling of depositions, and substantive matters.

The classic substantive motion is the motion to dismiss, originally called the general demurrer in common-law systems. A motion to dismiss addresses the text of the complaint (or an affirmative defense), and contends that, even if the allegations are eventually proved through evidence, they do not constitute a valid basis for a claim. But the demurrer or motion to dismiss does not address potential evidence. Accordingly, in classic common law, any examination of evidence had to await trial.

Under modern procedure the court has comprehensive authority to deal with matters prior to plenary trial. American lawyers are familiar with FRCP 16, governing pretrial procedure, and Rule 26 governing discovery in particular. Transnational Rules 18–18.7, entitled “Case Management,” require the court to “assume active management of the proceeding in all stages of the litigation.” To do so, a judge may:

- set “a planning conference early in the proceeding” (Rule 18.2)
- “suggest amendment of the pleadings” (Rule 18.3.1)

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- “order [a] separate hearing of one or more issues” (Rule 18.3.2)
- “make decisions concerning admissibility and exclusion of evidence” (Rule 18.3.4)
- “order any person subject to the court’s authority to produce documents or other evidence” (Rule 18.3.5)

Summary Judgment

In combination the foregoing powers authorize what is known in common-law procedure as the motion for summary judgment. That motion is key in common-law systems, particularly in the U.S. with its right of jury trial.

The motion for summary judgment was invented in late 19th-century English procedure. It allowed a motion to dismiss not only to address an opposed pleading but also to be supported by evidence, particularly relevant documents and affidavits by witnesses. Originally the summary judgment motion could be brought only in suits to collect on promissory notes. Over the years the motion was adopted in the U.S. and its scope enlarged. In the Federal Rules of Civil Procedure adopted in 1938 the motion was made available in any kind of case. It is now officially called a motion for judgment as a matter of law, but in practice it is still called the motion for summary judgment. It has become the

most important pretrial motion and the most important event in civil litigation except trial itself.

The prospect of jury trial is the driving force in motions for, and in resistance to, summary judgment. The essential issue posed by the motion is whether there is enough admissible evidence to send the case to a jury. If there is not such evidence in the judge’s estimate, then according to FRCP 56 there should be a “judgment according to law” for the moving party. The procedure builds on the long-established rule concerning a motion for a directed verdict. That motion, made a trial, authorizes the judge to preempt a jury verdict if the judge determines that the evidence is insufficient to permit the jury to make a reasonable decision against the party making the motion.

The motion for summary judgment advances the issue of sufficiency of evidence to the pretrial stage. Many lawyers and law teachers consider that the combination of FRCP 26–37 (discovery) and 56 (summary judgment) is what most modern contested cases are about. To be sure, not all of the 95 percent or so of civil cases resolved without trial are determined by summary judgment. Indeed probably less than half of those cases have involved a summary judgment motion; the available statistics are not refined enough to say. Nevertheless, a judge’s decision on a summary judgment motion can grant it in

part, overrule it with skeptical comment, or otherwise express an opinion about the evidence. The lawyers will pay close attention and adjust their assessment of settlement possibilities.

The procedure involved in summary judgment is functionally similar to the procedure in a civil-law sequence of court determinations: First, statements of claim in the pleadings; second, assembly of evidence, through discovery (common law) or directions of the court (civil law); third, decision short of final plenary hearing.

THE TRANSNATIONAL RULES

The key provisions in the Transnational Principles and Rules of Civil Procedure are:

- Notice to a defendant should be according to the regular procedure of the first-instance court, but if defendant resides elsewhere then additional notice would be appropriate.

- Interlocutory procedures for securing an eventual judgment, such as attachment, should be according to the forum's rules.
- The first-instance court should be active in managing the litigation.
- Joinder of claims and parties should be liberally allowed. Attention should be paid to the correlative rule of res judicata.
- The parties should append to their pleadings copies of documents and sworn declarations of witnesses they expect to rely on.
- Limited discovery should be afforded, broader than typical European systems but more limited than in the U.S.
- The parties should be allowed to present expert witnesses that they engage, rather than being limited to experts appointed by the court.
- The finder of fact should give a written explanation of its determination.

- Appellate review should be conducted according to the forum's regular appellate procedure.

The European Law Institute is proceeding in light of these proposals. Its work has only begun and will culminate in its own determinations. However, it is a reasonable forecast that the final product will be substantially similar to the Transnational Principles and Rules.



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