Some European Remarks on a New Joint Project of the American Law Institute and UNIDROIT

ROLF STÜRNER*

I. Introduction

Parties obliged to litigate in unfamiliar and foreign surroundings may feel uncertainty and anxiety. The reduction of differences in procedural systems could be an important aspect in efforts to achieve more fairness and predictability in international litigation. The American Law Institute project on Transnational Rules of Civil Procedure endeavors to draft procedural rules that the countries of the world could adopt for the adjudication of private international disputes.[1] First steps are currently being taken for a joint project of the International Institute for the Unification of Private Law (UNIDROIT) and the American Law Institute. A working group of nine members appointed by both institutes is preparing a code of principles of international civil litigation. This code of principles could be a first step toward a UNIDROIT Model Code. Transnational Rules of Civil Procedure for the world, a single system of procedures for hundreds of different legal communities: is it only a dream or could it become reality? As a reporter of UNIDROIT for this project and as a member of the joint working group, the author of this article is no neutral observer. This article is the report of a committed European proceduralist who is convinced of the necessity for better worldwide procedural cooperation. This conviction is not only the result of legal studies in international law, but also of having practiced international litigation for

*Professor of Law, Institute for German and International Civil Procedural Law, University of Freiburg, Germany; Judge on the Court of Appeals of Baden-Württemberg, Karlsruhe. The UNIDROIT-Council, Rome, asked the author to submit a feasibility study on the joint project of UNIDROIT and the American Law Institute on Transnational Rules of Civil Procedure. The text of this article is a revised version of this study and of a paper given at Harvard Law School in September 1999. The author wishes to express his gratitude to Peter Murray, Robert Braucher Visiting Professor, Harvard, and to Dr. Alexander Bruns, LL.M., and Dr. Robert Schumacher, LL.M., Freiburg, for their cooperation.

1. *See* Gary B. Born, *Critical Observations on the Draft Transnational Rules of Civil Procedure*, 33 TEX. INT'L L.J. 387 (1998); Geoffrey C. Hazard, Jr., *Preliminary Draft of the ACI Transnational Rules of Civil Procedure: Preliminary Draft No. 1*, 33 TEX. INT'L L.J. 489 (1998); Geoffrey C. Hazard, Jr. & Michele Taruffo, *Transnational Rules of Civil Procedure*, 30 CORNELL INT'L L.J. 493 (1997); Catherine Kessedjian, *First Impressions of the Transnational Rules of Civil Procedure*, 33 TEX. INT'L L.J. 477 (1998); Russell J. Weintraub, *Critique of the Hazard-Taruffo Transnational Rules of Civil Procedure*, 33 TEX. INT'L L.J. 413 (1998).

nearly twenty years as a judge in state courts with special competence for recognition and enforcement of foreign judgments. The first part of this article analyzes the present situation of transnational civil procedural law. The second part describes the purposes and chances of success of transnational rules. The third part reflects on the position of U.S. civil procedure from a European point of view.

II. The Present Situation of Transnational Civil Procedural Law

A. Significance of Multilateral Conventions

Present transnational civil procedural law endeavors to overcome the territorial limitations of national law by international conventions. The most important conventions for the practicing international lawyer or judge are the Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters (Hague Service Convention)[2] and the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters (Hague Evidence Convention);[3] a Hague Convention on international jurisdiction and recognition does not exist but is now being discussed again.[4] Not without importance for the special field of family law is the Hague Convention on the Recognition and Enforcement of Decisions Relating to Maintenance Obligations (Hague Recognition Convention),[5] which the United States has not ratified yet. For the European States, the Brussels[6] and Lugano[7] Conventions provide common rules for international jurisdiction and recognition; a signed European Service Convention will improve the international service of process.[8]

B. The Practice of International Litigation and its Difficulties

The practice of international litigation has to cope with remarkable difficulties in fields where no international conventions apply; but the same is often true for matters where there are such conventions.

2. Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, *done* Nov. 15, 1965 [hereinafter Hague Service Convention].

3. Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, *opened for signature* Mar. 18, 1970, 23 U.S.T. 2555, T.I.A.S. No. 7444 [hereinafter Hague Evidence Convention].

4. *See* Arthur T. von Mehren, *The Case for a Convention-mixte Approach to Jurisdiction to Adjudicate and Recognition and Enforcement of Foreign Judgments*, RabelsZ 61, 86–92 (1997); *Preliminary Draft Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters*, *at* http://www.hcch.net/e/conventions/draft36e.html (Oct. 30, 1999) [hereinafter *Draft Convention on Jurisdiction*].

5. Convention on the Recognition and Enforcement of Decisions Relating to Maintenance Obligations, *at* http://www.hcch.net/e/conventions/menu23e.html (Oct. 2, 1973) [hereinafter Hague Recognition Convention].

6. Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, *done* Sept. 27, 1968, 1972 O.J. (L299) 32, *reprinted in* 8 I.L.M. 229 [hereinafter Brussels Convention].

7. Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, *done* Sept. 16, 1988, 1988 O.J. (L319) 9, *reprinted in* 28 I.L.M. 620.

8. For drafts of Council regulations replacing those conventions within the European Union, see Proposal for a Council Regulation (EC) on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, 1999 OJ (C376E/I) and Proposal for a Council Directive on the Service in the Member States of Judicial and Extrajudicial Documents in Civil or Commercial Matters, 1999 OJ (C247E/11).

1. *International Jurisdiction and Lis Alibi Pendens*

The efficiency of an action is not seldom disturbed by the differences between the rules on personal and in rem jurisdiction and by a strong diversity of the rules regarding lis alibi pendens (lack of jurisdiction of the second court, parallel proceedings, antisuit injunctions, etc.). These discrepancies are a permanent source of conflict between the courts of different nations and often hinder the recognition and enforcement of foreign judgments.

2. *Commencement of Proceedings*

The Hague Service Convention is not mandatory and exclusive in the opinion of most signatory countries; rather, it specifies optional rules governing various possible ways of service abroad that could be used directly or by letter of request; many states have excluded certain forms of service provided by the Convention. In the field of service abroad and of the Hague Service Convention, the unification of law has made but poor progress, as each country practices its own method of service abroad; moreover, there is a strong tendency towards fictitious domestic service to avoid service abroad. This practice generates many issues and difficulties first in the proceedings of the forum and later in recognition procedures. As a consequence, the U.S. Supreme Court, the European Court of Justice, and national constitutional courts have had to cope with matters of service abroad.[9]

3. *The Taking of Evidence Abroad*

The Hague Evidence Convention is not mandatory and exclusive in the opinion of most signatories as well—the United States and its Supreme Court included.[10] The signatory states seek to conduct the taking of evidence under their respective national rules and to avoid letters of request to a foreign authority under the Hague Evidence Convention where possible. The limits to taking evidence abroad under national rules and the problems of the violation of foreign sovereignty are still in dispute (i.e., depositions, production of documents or things to experts, and medical examinations in foreign territory). When the courts avail themselves of the mechanism of the Hague Evidence Convention, the appropriate latitude of discovery has become an issue of continuous discussion between the United States with their broad approach and the rest of the world.

4. *The Active Roles of Judges and Lawyers*

It is common knowledge that the Anglo-American adversary system lives on the activity of the parties and their attorneys—automatic discovery at the pre-trial stage, presentation of evidence at trial, parties' responsibility for legal grounds and legal authorities, and parties' responsibility for settlements. Continental European proceedings are managed by judges who have responsibility for fact-finding, law, and settlements. This divergence results from profound differences between the legal cultures and is rooted in different conceptions of the citizen–state relationship. Sometimes the adversary system is assigned to democracy and the continental European judge-dominated system to more authoritarian[11] or, in modern times, social or even socialistic societies. In any case, this fundamental difference nurtures the somewhat prejudiced mutual impression that the proceedings sometimes lack fairness.

9. *See* Volkswagen AG v. Schlunck, 108 S. Ct. 2104 (1988); Lancray v. Peters and Sickert [1990] 1 ECR 2725; *Punitive Damages*, BVerfGE 91, 335, *at* http://www.uni-wuerzburg.de/dfr/bv091335.html (1994).

10. *See* Société Nationale Industrielle Aérospatiale v. United States Dist. Court, 482 U.S. 522 (1987).

11. *See* D. v. National Society for the Prevention of Cruelty to Children [1977] 2 W.L.R. 201 (Lord Simon).

There is still another, seldom-discussed difference in the civil procedural practice: between thirty and fifty percent of the continental proceedings are finished by judgment after final hearing or trial, whereas only five or six percent of Anglo-American disputes proceed to trial with a final judgment.[12] The judicial decision is more of a dominant purpose of civil procedure in the continental European than in the Anglo-American concept of justice and its administration. The pretrial process provides a good chance to settle a dispute through the activity of the lawyers, and this case management seems to be better accepted in Anglo-American than in civil law countries.

5. *Professional Judges and Jury*

The continental European and the present English civil procedure prefer professional judges; hearings and trials in U.S. federal civil procedure are ruled upon by professional judges, but in many cases laymen jurors return a verdict after instructions from a professional judge. The right to a jury trial,[13] which is an important guaranty of the federal Constitution and nearly every state constitution, has remarkable consequences for the structure of civil procedure and the law of evidence; necessarily, both focus on the presentation of all the material and evidence before laymen jurors. For European continental critics, this presentation sometimes appears to be more of a drama than a due process of law to find the truth and to give a fair judgment. The jury trial is the main source of mistrust and aversion of European defendants in the United States as a forum of international litigation, even though jury verdicts and especially punitive damage awards are often overruled and reduced by the courts of appeals as "unreasonable." The poor opinion of the jury trial is increased by intra-American criticism, and contrasts in a peculiar way with the great esteem in which U.S. law is held as a mainspring of innovation and legal dynamism.

6. *The Structure of the Proceedings*

Nearly all national civil procedure laws divide proceedings into two stages.[14] In Anglo-American law, the pretrial stage with its discovery is used to gather all the facts and to find new evidence, to determine the crucial issues for trial, and in most cases, to settle the dispute by a lawyers' agreement. The German pretrial stage prepares the final hearing and the taking of evidence at trial without any chance for fishing expeditions. French and Italian civil procedure is divided into a stage of judicial fact-finding and a stage of legal decision through the final hearing. The variety of these structures makes the mutual understanding of foreign procedural law more difficult and produces misunderstandings when evidence is to be taken abroad.

7. *Costs*

Most civil procedure laws entitle the prevailing party to reimbursement of all necessary costs from the losing party; under the "American rule" each party has to bear its own costs

12. *See, e.g.*, STATISTICAL ABSTRACT OF THE U.S., No. 330 (1994) (3.5 percent of federal district court procedures in 1993); SETTLEMENT IN CIVIL PROCEEDINGS 279–87(German Federal Justice Department ed. 1983) (thirty percent to fifty percent from 1971 to 1981).

13. For further details on the institution of a jury trial, see Edward H. Cooper, *Directions for Directed Verdicts, A Compass for Federal Courts*, 55 MINN. L. REV. 903 (1971); James Fleming, *Right to Jury Trial in Civil Actions*, 72 YALE L.J. 655 (1963); and Hans Zeisel, . . . *And Then There Were None: The Diminution of the Federal Jury*, 38 U. CHI. L. REV. 710 (1971).

14. *See* Rolf Stürner, *The Structure of the German and European Civil Procedure*, SYMBOLAE VITOLDO BRONIEWICZ DEDICATAE 417–34 (1998).

and expenses.[15] In the United States, the widespread use of contingency fee arrangements may tend to increase the volume of punitive damage awards. This system encourages lawyers to initiate new actions; their fishing for clients with good cases is a competition for a market, whose permanent growth is in the interest of all lawyers and their representatives. The value of a case depends on the credit a lawyer is willing to give to it. There is nearly no risk for the claiming party, but the defendant has to pay his attorney without any opportunity to recover his expenses. Further burden may be placed upon the shoulders of the defendant due to the practice of American lawyers to bill by the hour, which often creates incalculable and immense costs. Continental European lawyers consider this system of cost allocation unfair because the aggressor bears no real risk and there is no proportionality of the burdens of cost and interest in litigation. "As a moth is drawn to the light, so is a litigant drawn to the United States"[16]—a well-known and often cited statement of Lord Denning.

8. *Recognition and Enforcement*

The enforcement of judgments in foreign countries is burdensome and time-consuming. The refusal of recognition and enforcement sometimes is the consequence of fundamental differences in the substantive law (i.e., punitive or multiple damages[17]), which cannot be eliminated by measures of procedural law, though special emphasis should be given to the fact that the jury system and the American rule for costs intensify the effect of legal divergence, especially in liability cases. Very often, errors and mistakes during the commencement of proceedings are important reasons for the denial of recognition: exorbitant jurisdiction rules, parallel proceedings with inconsistent judgments, but mostly, inappropriate service abroad (even within the European Union). The execution itself, which is governed by the law of the executing country, may be delayed by the exequatur proceedings. Once the exequatur is granted, the enforcement usually requires no more time than a normal national execution under the domestic law of the judgment rendering state with its sometimes very different effectiveness. Some national laws do not provide for the execution of judgments that order a party to perform or to refrain from a given act and instead prefer damage awards. Many debtors, though bound by well-reasoned judgment, instrumentalize the creditor's longer way to execution for delaying tactics.

III. The Purposes and the Chances of Success of Harmonization

A. Unification of Laws or Harmonization of Laws?

Many problems with international litigation would be solved if the same rules of civil procedure were in place all over the world. However, not only would it be unrealistic to attempt to standardize procedural law worldwide, it may not even be desirable to have only one uniform law of civil procedure. The competition between different systems of law is vital to the development of law worldwide. Moreover, the law of civil procedure is too deeply embedded in the legal culture to permit a worldwide unification. However, a clearly

15. For a discussion of the American and English rules, see Neil Andrews, Principles of Civil Procedure 442 (1994); Jack I. H. Jacob, The Fabric of English Justice 274 (1987).

16. Smith Kline and French Laboratories Ltd. v. Bloch [1983] 2 All ER 72, 74 (C.A.).

17. *See* BGHZ 118, 312 (refusal of recognition and enforcement of a punitive damages award).

perceptible harmonization (as opposed to standardization) of procedural laws would facilitate cross-border litigation substantially; it could save costs and may strengthen the confidence of parties in the enforcement of law worldwide. Furthermore, grounds for a court's refusal to enforce a foreign judgment would become more and more exceptional; also, it would be possible to simplify considerably the national procedures for the recognition of foreign judgments. Cross-border law enforcement would become more effective. Finally, international conventions would be based more and more on common rules and guidelines.

B. Fundamental Obstacles to the Harmonization of Procedural Laws

It should be stressed in concurrence with the drafts of the American Law Institute that all important laws of civil procedure have certain basic categories in common: the right of access to justice, the principle of public trial, the right to a neutral judge, and the right to be heard (which implies some basic elements of the adversary system or *principe du contradictoire*).[18] Further common elements concern the right to give evidence and the rules of finality of judgments. It is often said that there are fundamental differences between the civil law system and the common law system that hinder a successful harmonization.[19] This is, however, not the case (which is also the opinion of the American Law Institute's drafts). For example, the difference in structure between the modern German procedure and the new English procedure is but relative. Both English and German law provide for preliminary proceedings, which are conducted mainly in writing and serve the purpose of preparing the taking of evidence at trial. At the preliminary stage, there is only one "preparatory" hearing if possible. In regard to the pretrial stage, the differences between the modern English and German procedures on the one side and the Romanic systems on the other side are even greater in many respects. The "instruction proceedings" of French, Spanish, and Italian law with their series of hearing sessions aim at a full inquiry into the facts. They are hardly separated from the final hearing where questions of law are decided. In German procedure, the judge traditionally plays quite an active role. The same applies to modern French civil procedure. In Italian and in ordinary Spanish procedure, on the other hand, the judge is considerably less active. The English reform of civil procedure as prepared by the Woolf Report shows that a more active role of the judge is not altogether incompatible with common law traditions and the traditions of one of the oldest modern democracies of Europe.[20]

Much stronger are the differences between U.S. civil procedure and the rest of the world: broad discovery, no cost-shifting (American rule), and jury trial. While U.S. rules on discovery and costs seem to be open to compromise, the jury system is, for the time being, mandatory on constitutional grounds. The impact of jury participation on the structure of a trial should be neither underestimated nor overestimated. Even if there is a jury, the chair of the trial remains with the judge. If it were possible to strengthen the active role of the

18. *See* Walther F. Habscheid (ed.), *Effectiveness of Judicial Protection and Constitutional Order, General Reports for the VIIth International Congress on Procedural Law*, Congress Volume (1983).

19. *See, e.g.*, Robert Wyness Millar, Civil Procedure of the Trial Court in Historical Perspective 27 (1952). "English Civil Procedure thus became a sealed book to all but Englishmen—a completely insulated system which did not look beyond itself." *Id.*

20. *See* CPR Part 1.4, but see the critical remarks of many authors in Reform of Civil Procedure (A.A.S. Zuckerman & Ross Cranston eds. 1995).

judge during the presentation of the evidence to the jury, the risk of manipulative conduct by attorneys, which is feared by Europeans as well as by Japanese, South Americans, and Australians, would diminish. The jury trial would then become more similar to a civil law trial with influential participation of lay judges, like proceedings in commercial matters where lay participation is very usual. It would be necessary here to explore in detail the elasticity of the U.S. constitutional framework. After all, the jury is not an absolutely insurmountable obstacle to the harmonization process. Finally, it should be noted that not all proceedings in U.S. courts are jury proceedings. In those instances, the possibilities of harmonization are better. In the long run, the effect of harmonization may influence the reality of jury trials.

C. Convention or Model Code?

One conceivable way to achieve harmonization would be a convention that provides a framework to be implemented by the contracting states. However, as far as civil procedural law is concerned, the experience with the Hague conventions is not very encouraging. The contracting states tend to fear binding obligations and a loss of creative freedom. Such conventions are, therefore, quite often too broadly worded, or they are merely an optional collection of the existing national solutions. This is the shortfall of the Hague Service Convention and of the Hague Evidence Convention. In the present negotiations to the conclusion of a Hague Recognition Convention, the preliminary draft refrains from prescribing a limited number of grounds for international jurisdiction. The draft of the special commission of the Hague Conference provides for a "white list" with fully accepted grounds for jurisdiction, a "black list" with exorbitant and excluded grounds, and a "grey list" with grounds for jurisdiction of tolerable national preference.[21]

A model code or a code of principles of international litigation has the advantage of definitely leaving each state its creative freedom. It is up to each state to decide whether it is convinced in full or in part of this code and its rules and whether and to what extent it is going to adopt those rules. In this respect, the UNCITRAL model code on arbitration has had very encouraging results. The free decision for the convincing solution of international legal problems is a better basis for legal progress than a multilateral convention with its inflexibility.

D. Scope of the Model Rules

1. *Conceivable Alternatives*

Of course, the complete or only slightly modified adoption of all the model rules through the national legislators would always best suit the intentions of the draftsmen of a model code. Different options are conceivable: the legislator may decide that all the rules should apply to all kinds of civil proceedings, that they should only apply to "international civil proceedings," or that they should apply to certain types of international proceedings. Additionally, the national legislator may also choose to adopt only some of the model rules or to leave the choice of the model rules to the parties to the litigation.

21. *Draft Convention on Jurisdiction*, *supra* note 4, arts. 3–16 (white list), art. 17 (grey list), and art. 18 (black list).

2. *Rejection of a Too Narrow Scope of Application*

Only rarely will all of the rules be adopted. It is, therefore, sufficient for the model rules to define their core scope of applicability, for example, civil litigation of international or transnational character. A further reduction of the scope to contractual claims or contractual choice of the parties would appear less recommendable, since this would mean a limitation to the genuine area of international arbitration. Other important fields of litigation such as tort litigation, antitrust law, intellectual property law, or statutory claims should not be excluded. Otherwise, in the view of important trading partners of the United States, the model code might lose attraction.

3. *Attraction of Transnational Rules of Civil Procedure—Equality of the Parties to the Litigation*

The limitation of a code of principles or a model code to "transnational proceedings" would create a special set of procedural rules to accompany domestic procedure. The full or partial adoption of the rules in respect of transnational and domestic proceedings would be hard to achieve and could—if at all—only take place very slowly. The idea of special proceedings for certain types of cases is not new to national procedural laws. The question remains, however, whether this idea is convincing; in particular, the introduction of special proceedings for transnational litigation contradicts the rule that the law should be applied regardless of the nationality of the parties. Why should, for example, a foreign plaintiff in a European court have wider discovery at his disposal than a European plaintiff? Or, why should the American plaintiff in the United States be limited in discovery, only because he is suing a Japanese defendant? Such differentiations can only be justified if the model rules offer some advantage to the parties. This advantage may and must consist of the fact that during the proceedings it is easier to get cross-border judicial assistance and that the recognition and enforcement of judgments is easier to achieve under the model rules than under the national rules of procedure.

E. Some Important Aspects of Harmonization

1. *International Jurisdiction*

The various national rules regarding international jurisdiction and the common rules of bilateral or multilateral conventions are—at least in the central questions—converging. The controversial discussion about questions of jurisdiction at the negotiations on a Hague Recognition Convention are not very encouraging and strengthen the reservations against providing clear and mandatory rules of international jurisdiction in a code of principles of international litigation. However, it is not advisable to waive from the start any chance of reaching a common rule on international jurisdiction and of excluding expansive grounds for jurisdiction. A code of principles could take into account the results of the Hague negotiations and the experiences with the Brussels Convention and its reforms.

It would be very important, too, to make provisions for the consequences of lis alibi pendens. The experiences with the rules of the Brussels Convention—lack of jurisdiction of the court of the second suit[22]—are not very convincing because many slow-working courts in some European regions are preferred by parties demanding a negative declaratory

22. Brussels Convention, *supra* note 6, art. 21.

judgment. The solution to this problem may consist of a compromise between the European system (lack of jurisdiction of the court of the second suit) and the Anglo-American system (parallel suits). The second proceeding could be stayed with the option of reopening it again in case the first proceeding does not provide timely and satisfying relief. This seems now to be the wise compromise of the last draft of a Hague Recognition Convention.[23] The regulation of lis alibi pendens would also presuppose an agreement on the question of when separate actions concern "the same subject matter."

2. *Commencement of International Suits*

A mere reference to the Hague Service Convention raises many doubts and does not provide answers to numerous questions of practical importance. For example, it is left to the lex fori to draw the line between the service of documents abroad and the domestic service of documents. This will often lead to the nonapplication of the Hague Service Convention. There is no rule on the consequences of irregularities of proceedings, for example, lack of translation. The Hague Service Convention knows many forms of service abroad, some of which are subject to reservation clauses of contracting states.[24] It does not mention the American practice of service by waiver[25] and the problems resulting from it. It is worth considering whether a code of principles or model rules should not seize the opportunity to solve some of these problems and to regulate in greater detail how the conventions should be applied. One important proposal of the American Law Institute on the commencement of international suits would clearly improve the present situation in that it demands for the translation of the statement of claim as well as of the summons to appear.

3. *Disclosure and the Taking of Evidence*

A worldwide acceptable conception of disclosure and the taking of evidence should attempt to strike a balance between the U.S. concept of pretrial discovery followed by the taking of evidence at trial on the one hand and the European system on the other.

a. Basically Unrestricted Access to All Evidence

American law in principle grants a party access to all evidence of the other party and of third persons (written and oral testimony, documents and things, expert testimony, interrogation of parties, etc.). The principle of unrestricted access corresponds to recent European developments. The restrictions of German law on the right to demand disclosure of evidence from the adversary or from third persons are rather exceptional. Another common feature of American, modern French, and English procedure is the tendency to provide for an "automatic" disclosure principally without court order as to documents and other forms of information and for a court order where the disclosure involves more substantial interference, such as medical examinations.

b. Scope of Disclosure and of the Taking of Evidence—Relevancy

American law seeks to limit the scope of preliminary discovery by introducing the concept of "relevancy to the subject matter involved in the pending action." It provides for prelim-

23. *See Draft Convention on Jurisdiction*, *supra* note 4, art. 21.
24. *See* Hague Service Convention, *supra* note 2, arts. 8–10.
25. *See* FED. R. CIV. P. 4(d) and (f).

inary disclosure of certain categories of documents, and for the disclosure of potential witnesses and other forms of information. The court has the authority to limit or bar disclosure that is too far-reaching and abusive.[26] These rules, however, do not prevent fishing expeditions, which are a matter of concern in Europe and elsewhere. Evidence is considered to be relevant when it tends to achieve rationally reliable knowledge of a fact in issue.[27]

In European civil procedure and—with some restrictions—even in the reformed new English procedure, the strict relevancy of disclosure and evidence to the action is controlled by the court from the very commencement of the suit.[28] The parties are obliged or more obliged to identify specifically and individually the objects of discovery or evidence.

A meaningful compromise may consist of a two-step-system. In the first step, discovery or evidence may only be demanded or taken as to facts that are "strictly relevant to the action;" the object of disclosure or evidence must be specifically identified by the party. In the second step, the court may order, where justified, that further disclosure should take place (reversion of the rule-exception-relationship of U.S. law). From the standpoint of the European legal systems and of other similar legal systems, it is sufficient that a party may demand disclosure only of specifically identified evidence; the U.S. model, however, may have great advantages in exceptional cases where the European civil procedures break off the process of ascertaining the truth too early. In this regard, there is a pressing need for further discussion. The present, still very broad, American concept of disclosure and even evidence hardly stands a good chance of success elsewhere in the world.

c. Examination of Witnesses and Parties—Expert Witnesses

The equation of witness examination and party examination is one of the most remarkable developments of the English and American law of evidence in the nineteenth century. It will probably be accepted by continental European systems, since the special rules for party statements (i.e., subsidiarity, party oath as irrebuttable presumption, etc.) are somewhat in retreat and are not representative of modern tendencies. Austrian and German civil procedure follows nearly the same rules for witness and party examination and they abandoned the irrebuttable presumption of the party oath many decades ago.

The Anglo-American model of witness or party examination is the cross-examination of the jury trial; this is also true for trials without a jury and for depositions. The principles of cross-examination survived the recent reform of English civil procedure. Each party presents its own witness, and so does the court if—more extraordinarily—a court witness is called to give testimony. This procedure is expressive of the idea that the parties prepare their witnesses and that it is up to the parties to comport with certain evidentiary rules during the examination. The continental European approach clearly differs somewhat from the Anglo-American model: the witness in German civil proceedings, for example, is to tell his story first *coherently*, unaffected by the parties and the court; but then the court and the

26. *See* FED. R. CIV. P. 26(b); JACK H. FRIEDENTHAL ET AL., CIVIL PROCEDURE § 7.2 (2d ed. 1993).

27. *See* FED. R. EVID. 401; FRIEDENTHAL, *supra* note 26, § 10.2.

28. For information on Germany, see LEO ROSENBERG ET AL., ZIVILPROZEßRECHT, § 113 I 3 (15th ed. 1993). For information on France, see HENRY SOLUS & ROGER PERROT, DROIT JUDICIAIRE PRIVÉ, Tome 3, No. 734 (1991) *(fait pertinent)*. For information on Italy, see ENRICO TULLIO LIEBMANN, MANUALE DI DIRITTO PROCESSUALE CIVILE, PRINCIPI No. 152 (5th ed. 1992) *(giudizio di relevanza)*. For information on Spain, see MONTERO AROCA ET AL., DERECHO JURISDICCIONAL 184 (1995). For information on England, see CPR Parts 31.6 (limited standard disclosure), 31.12 (specific disclosure), and 32.1(1)(a) (control of evidence by the court).

parties may pose questions. This model is likely to correspond better to the results of the psychological analysis of the examination process. The harshness of cross-examination is, inter alia, due to the preparation of the witnesses, which the other systems often do not consider serviceable to the revelation of the truth. A compromise could combine continental and Anglo-American advantages: the full and coherent story of the witness under the court's instruction in the first stage, and cross-examination by the parties in the second phase.

The European development prefers the independent expert of the court; the new English procedure focuses on the expert's duty to help the court, overriding any obligation even to persons and parties from whom an expert witness is instructed or paid. English courts may direct that evidence be given by a single, joint expert only.[29] The elevated position of court-appointed experts in modern American civil procedure[30] is progress towards common conceptions.

d. Privileges

In the United States, the privilege most widely accepted and most significant is the attorney–client privilege, complemented by the work-product rule and the privilege of communication in settlement negotiations. The husband–wife privilege and privileges of other relatives as well as other professional privileges are disputed in the United States and subject to diverging state law (qualified privileges, privileges as absolute rights of substantive law, etc.).[31] In Europe, except for England, privileges for all important professionals are recognized, and for relatives and spouses as well; like in the United States, the business and trade-secrets privileges are still in dispute, but normally better protected than in Anglo-American civil procedure with its pretrial protective orders and its tendency towards full and unlimited evidence at trial. The main reason for this remarkable divergence is the equation of witness and party examination in Anglo-American civil procedure: the scope of disclosure would be too narrow if parties could claim the various continental third-person privileges. A bad compromise—partially realized by the Hague Evidence Convention—is the applicability of the privileges of the lex fori. The continental idea of an absolute protection of privacy and business secrets by privileges for third persons reflects the common procedural tradition before the nineteenth century's equation of witness and party testimony; its extremely rigid performance might have been a wrong development because of the lack of any differentiation between the duties of self-interested parties and third persons giving evidence for someone else's dispute.

e. Taking Evidence Abroad

It is, as mentioned at the beginning, an open question, whether and when the taking of evidence abroad should be admissible (investigations of experts, depositions, etc.) without leave of the foreign courts. For example, in the United States, civil procedure depositions are not taken in court; rather, only the attorneys are present. Therefore, American civil procedure law is prone to consider the taking of depositions or expert evidence abroad appropriate without assistance of foreign courts, unless immediate compulsion is necessary; in contrast, indirect compulsion, like a good faith control of a party who is the employer

29. *See* CPR Parts 35.3, 35.4, and 35.7.

30. *See* FED. R. EVID. 706; CAL. EVID. CODE §§ 730–32 (2000).

31. For more information, see Federal Rules of Evidence 501 with the advisory committee's note and the reports of the parliamentary committees. *See* CAL. EVID. CODE §§ 900–1070 (2000).

of a witness, is permissible. In such cases, the European practice demands a letter of request under the Hague Evidence Convention and the assistance of the foreign court. A code of principles of international litigation would be a propitious occasion to resolve this permanent conflict and to provide for a common rule of practice, taking the request under the Hague Evidence Convention as remedy of the first resort.

f. Rules of Evidence and Consideration of Evidence

American, not modern English, law knows manifold evidentiary rules that in part are explicable by the presentation of the evidence before a jury (i.e., the hearsay rule, restriction of character evidence to impeachment of witnesses, evidentiary rules against opinions of witnesses, etc.).[32] Those evidentiary rules are not intelligible to an ordinarily qualified European lawyer because he cannot exactly know their systemic origin. The traditional law of evidence has more and more disappeared in the present English civil procedure as the rule against hearsay is now being abandoned in the most recent English Evidence Acts.[33] The modern continental and English civil procedure is governed by the general principle of the free consideration of proof. Whether additional exclusionary rules of evidence must continue to exist in American law is a difficult question, the answer to which depends on whether the function of the jury can be confined in favor of an increased influence of the judge controlling the taking of evidence and especially the cross-examination.

4. *The Role of the Court and the Parties*

a. Inquisitorial and Managerial Judge

European civil procedure is never really inquisitorial; neither is the German civil procedure nor the modern French civil procedure. Nearly worldwide, civil procedure relies on party activity, but allows for additional court activity. The coordination of party activity requires case management by the court. This case management, which is not an inquisitorial fact finding but invites the parties to coordinate their activities, is mandatory in many continental codes of civil procedure and now in the reformed English procedure, too.[34] The difference between modern European civil procedure and U.S. civil procedure concerns not only the extent of court management, but also the important question of whether court management should be merely optional or really mandatory.

b. The Burden of Legal Findings

In this context, one should discuss if and to what extent the burden of legal findings rests entirely with the court as it is common practice on the European continent *(da mihi facta dabo tibi ius)* or whether the parties need to present the legal grounds. Case management by the court without a clear legal basis is hardly conceivable, and from my point of view one of the open questions of the English reform. The English reform fully breaks the Anglo-American tradition of the judicial umpire and demands for the managing judge; but in Anglo-American tradition, it requires that the parties state the legal grounds of their claim and their defenses respectively and remains silent as to the authority or duty of the judge to discuss issues of law and to make independent legal findings.

32. For a very short survey, see FRIEDENTHAL, *supra* note 26, at 466–72.

33. Civil Evidence Acts 1968 and 1995; *see* Civil Procedure, Volume 2, The White Book (2000) mn. 9B-229 and 9B-268.

34. *See, e.g.*, art. 8, 10 N.C.P.C. (France); §§ 139, 278 ZPO (Germany); and CPR Parts 1.4 (c), 3.3, and 32.1 (England).

c. Court Managed Party Activity as a Compromise

A code of principles of international litigation must take into account the worldwide tendency toward court-managed party activity; it should avoid the extreme positions of the judge as a mere umpire and of the inquisitorial judge. The judge's authority to initiate or further settlements reflects the present state of common legal developments, not always of a common reality.

d. Court Management and Jury System

A harmonization of systems with professional judges and the American jury system might be achieved by means of more judge-dominated case management as well. One should think about whether further harmonization would be possible if special verdicts or general verdicts with interrogatories were made obligatory. A general verdict lacks any reasoning; jury instructions and their effect often remain unclear. A special verdict or a general verdict with interrogatories would make the decision-making process more transparent and strengthen the position of the professional judge. Even a procedural structure with its separation between pretrial and trial will find the acceptance of the procedural laws in the European tradition if an active role of the judge is ensured sufficiently even at the pretrial stage.

5. *Costs*

A compromise between the American cost rule and the law of the rest of the world is nearly impossible. It is interesting that the model code draft of the American Law Institute recommends discarding the American rule. However, the reasonable extent of litigation costs—hourly billing, specified lump sum attorney's fees depending on the amount in dispute—needs further clarification and the new English cost rules could be a sensible compromise. The Anglo-American payment into court is a very attractive instrument to further settlements and to avoid the waste of time and unnecessary costs.

IV. The Position of the United States from a European Point of View

It would be a strong mistake to consider the cooperation between different procedural cultures and the chances of an adaptation of national procedural law to be merely a question of legislative technique and of craftsmanship. Rather, the procedural structure is deeply rooted in the fundamental values of the respective legal and political cultures. In my opinion, there are four important aspects of American legal and political culture that should be taken into account when procedural cooperation between the United States, Europe, far eastern countries, and the rest of the world is discussed: the long and never seriously disturbed American tradition of democracy and its connection with the adversary system and jury trial; the American conviction of a genuine Anglo-American way to truth and justice by jury trial; the powerful position of the American lawyers; and a fundamental American aversion to relinquish a part of national sovereignty in the interest of a better international administration of justice.

A. Adversary System, Jury Trial, and Democracy

Sometimes, the American procedure with its adversary system, settlement-favoring pretrial stage, and jury trial is attributed to democratic constitution; the continental procedure with its judicial activity and dominating professional judges is attributed to bureaucracy,

hierarchy, and even totalitarianism.[35] Because of their political catastrophes within the twentieth century, Germany and Japan especially take this kind of classification very hard, for example, when the German roots of the Japanese procedural law are connected with totalitarianism and the U.S. influence on this law after 1945 is connected with the introduction of democracy in Japan.

On the other hand, it would be wrong to indulge in false touchiness. It is true that the American procedural model is based on the idea of subsidiarity of state interference: only when the pretrial discovery of the parties does not lead to any results, in a small number of cases a judgment will follow, which is often not given by professional judges but by elected citizens as members of the jury. The structure of the American procedure is by all means an expression of the citizen's responsibility for the administration of justice. The structure of the continental procedure shows a public, authoritative, and more hierarchical responsibility for the administration of justice. In American legal thinking, the law is a means of solving conflicts within society, a matter of practical experience, and common sense, therefore more a permanent task, which concerns the whole of society.[36] In the earlier continental legal thinking, law has been more a matter of ideas, concepts, and scholarliness; it has been set down in codifications and distributed as a ready-made product by the courts among the citizens. It may be the case that the capacity of American legal culture to cope with political pressure and seduction is stronger because this culture keeps its citizens awake. Those, for example, who seriously argue in Germany that the courts could have blocked the road to totalitarianism sixty-five years ago fail to realize that the law is already half lost if it is left exclusively to the courts. Rights are only prospects and possibilities that come to nothing when nobody struggles for them; so states the fundamental thesis of James Goldschmidt,[37] a German-Jewish proceduralist holding the chair of civil procedural law in Berlin, before his emigration because of the Third Reich. It may be true that the American procedure keeps this basic truth more alive than the continental systems.

This assignment of the American procedural structure to democratic self-government is, however, only half of the truth. This is because the determination of the law through the parties and laymen juries has its own inherent risks. The adversarial procedure is very time consuming and expensive and, in case of great intellectual or economic differences, it cannot be realized. Moreover, it requires the willingness of the lawyers to cooperate. Fully deciding laymen juries without proved intellectual standard or legal knowledge are a big risk, especially for defendants. Only the balancing activity of the professional judge can compensate for these deficits. The modern English tendency towards a more active professional judge is less caused by a growth of bureaucracy and least of all by tendencies toward totalitari-

35. *See, e.g.*, D. v. National Society for the Prevention of Cruelty to Children [1977] 2 W.L.R. 201 (Lord Simon); ANDREWS, *supra* note 15, at 40; Marcus, *Malaise of the Litigation Superpower*, *in* CIVIL JUSTICE IN CRISIS: COMPARATIVE PERSPECTIVES OF CIVIL PROCEDURE 71, 101 (Adrian A.S. Zuckerman ed., 1999) (the subheading "Judges Über Alles: The Rise of Managerial Judging" is an innuendo concerning the former first verse of the German national anthem; its text had been permanently abused in a very misleading way by the Nazis in the Third Reich). This argument is critically discussed in John H. Langbein, *The Influence of the German Emigrés on American Law: The Curious Case of Civil and Criminal Procedure*, *in* DER EINFLUß DEUTSCHER EMIGRANTEN AUF DIE RECHTSENTWICKLUNG IN DEN USA UND IN DEUTSCHLAND 320, 328–31 (Marcus Lutter et al. eds., 1993); Takeshi Goto, Dissertation, *The Respective Roles of the Parties and the Judge in Civil Litigation: English and Japanese Laws* (1992).

36. *See* OLIVER WENDELL HOLMES, THE COMMON LAW 1 (1881).

37. JAMES GOLDSCHMIDT, DER PROZEß ALS RECHTSLAGE I (1925).

anism; it is the well-prepared development of a strong and well-working democracy towards a better compromise between the adversary system and judicial management.

B. The Jury Trial and Its Evidentiary Rules—A Genuine American Way to Truth and Justice?

The jury trial and its evidentiary rules seem to be an important part of a special American procedural identity supported by the conviction of an existing genuine American way to truth and justice.[38] Common efforts at the harmonization of procedural law are based on the conviction of a broad, common procedural tradition—including American civil procedure. The influence of the Roman-canonic civil procedure on continental civil procedure was undoubtedly great. But the same is true for Anglo-American civil procedure. Its most important part is not the jury trial or trial with its partially Germanic roots. When the normal American citizen brings his case to the courts as claimant or defendant he will nearly never come to the trial judge or jury, because more than nine out of ten cases are disposed of at the pretrial stage. The normal procedural reality is not the trial stage but the pretrial stage. The American pretrial stage is the historical successor of equity proceedings and, therefore, similar to the continental procedure of Roman-canonical procedure.[39] Even the evidentiary rules of the trial stage are no real innovation of the Anglo-American legal culture as a consequence of the jury trial. It is true that this is a well-accepted opinion established by Thayer and Wigmore as important authorities. The most recent works of English and American authors on procedural history show that many evidentiary rules of the trial are of Roman-canonical and continental origin, for example, the rule against hearsay as rejection of testimony *ab alio auditu* or the parol evidence rule as a very old rule of the Codex Justinianum.[40] Many European procedural cultures know laymen judges, especially in commercial matters. The idea of a citizen judge is no special Anglo-American tradition. In Europe, the Laymen judges of the French Revolution could not cope with the evidentiary rules of the Roman-canonic procedure, the free consideration of proof, and the free admissibility of evidence have been the important consequences.[41] Even though the modern English civil procedure is governed by the general principles of free admissibility of evidence and consideration of proof, the traditional law of evidence has more and more disappeared. The protection of lay judges by evidentiary rules in the United States—perhaps it is a solution without future. The carefully appointed and elected lay judges of the French commercial courts need not be protected by evidentiary rules—in my opinion the better way of lay participation in the administration of justice.

38. *See* James Bradley Thayer, Preliminary Treatise on Evidence at the Common Law 1–6 (1898); J. Wigmore, Treatise on Evidence at Common Law, *e.g.* §§ 4, 8, 575, 2250, 2256, 2426, and 3426 (3rd ed. 1940). For England, see Rupert Cross, Cross on Evidence 1 (7th ed. 1990) and G. D. Nokes, An Introduction to Evidence 18 (4th ed. 1967).

39. *See* Millar, *supra* note 19, at 23; R. C. van Caenegem, *History of European Civil Procedure*, *in* International Encyclopedia of Comparative Law 45, 74, 103, and 105 (Mauro Capalletti ed., 1972).

40. For details and references, see Michael R. T. Macnair, The Law of Proof in Early Modern Equity (1999).

41. For further details, see Massimo Nobili, Il Principio del Libero Convincimento del Giudice 147 (1974).

C. The Powerful Position of American Lawyers

For American lawyers worldwide, international litigation is a new and perhaps growing market especially if the procedural role and position of the lawyers will be the same as in national proceedings. The more active role of the judge and more strict judicial relevancy control diminish the chance for extensive pretrial discovery proceedings with big bills by the hour. American attorneys and their organizations are, therefore, sometimes no friends of procedural reforms seeking to compromise with the continental system. Nevertheless, the victory of the better and more convincing concept—which would consist of a compromise—over economic interests is a question of time, and the English development[42] is very encouraging. Ten years ago, nobody would have thought of an English procedural move towards continental procedural models—now it is reality.

D. The American Aversion to Relinquish Sovereignty

The American aversion to relinquish a part of national sovereignty in the interest of better worldwide cooperation in transnational litigation and a better worldwide administration of justice seems to be fundamental; this is the understandable consequence of the experience that the due process of law has been an unchallenged essential of American democracy for more than two centuries and that most countries of the world are without strong and long-standing traditions in the due administration of justice. But the world is sometimes afraid of the long arms of the American courts—a feeling that is growing in the new era of a nearly uncontested *pax americana*. The United States never ratified a convention with an obligation to change or adapt their procedural law. All the Hague Conventions were interpreted by the United States and the Supreme Court as an additional option for international litigation, not as an obligation to obey mandatory contractual procedures. In the eyes of many foreign observers, the multi-armed Brahman of the American jurisdiction has always got an arm more. There are some indications giving reason to hope for better compromises in the present Hague negotiations on a recognition convention. "The strong man is the mightiest alone"[43] and nobody concludes a binding contract or convention without any need. But the rest of the contracting world is not out only for harmonization, but for its own advantage as well. Harmonization without mutual sacrifice and adaption has no future and perhaps the time of splendid procedural isolation has already passed. For European countries, harmonization of procedural law is more and more the reality of a European Union, even for England. It is encouraging that the American Law Institute has made important first steps to remarkable compromises with continental European and continentally influenced procedural forms. And it was a big minority of four U.S. Supreme Court judges who voted for a more mandatory understanding of the Hague Evidence Convention with the clear intention to create a model of transatlantic civil proceedings.[44] Let us go on to cultivate a common transatlantic and transpacific legal culture.

42. Critically discussed from an American point of view by Richard L. Marcus, *"Déja Vu All Over Again"? An American Reaction to the Woolf Report*, *in* Reform of Civil Procedure, *supra* note 20, at 219.

43. Friedrich Schiller, Wilhelm Tell, Act 1, Scene 3.

44. *See Société Nationale*, 107 S. Ct. at 2557 (Blackmun, Brennan, Marshall, and O'Connor dissenting).