# Comparative Civil Procedure

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The Oxford Handbook of Comparative Law (2nd edn)
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Print Publication Date: Mar 2019 Subject: Law, Comparative Law, Civil Law Online Publication Date: May 2019
DOI: 10.1093/oxfordhb/9780198810230.013.42

## Abstract and Keywords

This essay will first examine the attempts to categorize and label procedural systems, an impulse that many comparatists cannot, but should, resist because the very exercise of creating categories invites undue generalizations. The focus will then shift to procedural harmonization, a term that encompasses a number of topics of increasing importance to proceduralists. This section forms the centrepiece of the essay because it is here that most opportunities to benefit from comparative scholarship present themselves—and are still being missed. After illustrating the dynamics and results of regional, particularly European, and supra-regional harmonization initiatives, this section identifies trends towards harmonization through private rule making and examines principles that determine the scope of, and limits to, procedural harmonization. The final section addresses the growing concern about access to justice, specifically cost considerations and claim aggregation techniques, which prompt the somewhat related questions of whether and to what extent one legal system can borrow procedural rules from another one.

Keywords: access to justice, borrowing procedural rules, private rule making, procedural harmonization, procedural law

# I. Introduction

Procedural law, and civil procedure in particular, was long neglected by comparative scholars. Perceived as painstaking, ministerial, and ultimately boring, the subject was (p. 1307) dreaded by students and avoided by professors who had higher aspirations. It was considered an unattractive candidate for comparative study because it appeared to be nothing more than a technical framework designed to define, assign, and enforce rights in the domestic courtroom. To the extent one focuses on purely technical matters, such as time limits for filing appeals, it is indeed true that comparative civil procedure does not promise a great deal of insight. Yet, in comparative law, the emphasis on the restatement or juxtaposition of black-letter rules has by and large been overcome in the last couple of decades. Accordingly, scholars have begun to examine comparative procedure's many facets, its purposes, and methodology. On the other hand, comparative research in procedural areas is still at a relatively early stage. More importantly, a solid theoretical foundation that would include a theory of comparison and would guide and connect the various research efforts has yet to emerge. As comparative law in general,[1] this nascent sub-discipline generates knowledge without necessarily advancing the cause or formation of a greater comparative enterprise. While comparative procedural thinking has thus not realized its potential, it is increasingly employed in a variety of areas. The inquiries into procedural regimes range from concrete practical concerns, such as improving civil justice at home (by adopting foreign procedural law) or handling issues of international litigation, to pondering broad epistemological questions such as the relationship between forms of procedure and their cultural and political environment.

This essay will first examine the attempts to categorize and label procedural systems (Section II), an impulse that many comparatists cannot, but should, resist. The focus will then shift to procedural harmonization, a term that encompasses a number of topics of increasing importance to proceduralists (Section III). This section forms the centrepiece of the essay because it is here that most opportunities to benefit from comparative scholarship present themselves—and are still being missed. After illustrating the dynamics and results of regional, particularly European, and supra-regional harmonization initiatives, we will look at trends towards harmonization through private rule making and at principles that determine the scope of, and limits to, procedural harmonization. Section IV will address the growing concern about access to justice, specifically cost considerations and claim aggregation techniques, which prompt the somewhat related questions of whether and to what extent one legal system can borrow procedural rules from another one.

# II. Taking Stock—Legal Procedural Families and Other Attempts to Categorize

Historically, comparative law was concerned with the study of substantive law. One of its objectives was to organize legal systems into a number of distinct families, by distinguishing, for example, between Romanic, Germanic, and Anglo-American law.[2] This process of 'mapping' the legal world marks early attempts by comparative scholars to learn enough (p. 1308) about various systems to assign them to one family or another. While these typologies may have served as a useful launching pad for subsequent comparative inquiries, the very act of creating categories invites generalizations that run the risk of drawing attention away from the meticulous work needed to uncover and appreciate the make-up of individual legal systems, including their philosophical, political, and cultural roots. Focusing on legal families also does little to improve our understanding of the growing body of transnational law that has arisen from the voluntary transfer of sovereignty to international bodies and treaty regimes, as well as from private law-making activities (eg *lex mercatoria*).

## 1. Traditional Labels

While the comparative study of procedural laws as defining elements of certain legal families is also unlikely to yield useful insights, a historic examination of the specific structure of a procedural system or, by extension, of the differences between procedural systems that continue to exist, remains a particularly useful tool for understanding the procedural features and preferences of any given regime.[3] Nevertheless, the historical perspective no longer supports the idea that procedural systems can be neatly divided into the traditional legal families of Romanic, Germanic, and Anglo-American procedure.

Nor can meaningful insights be gained by adhering to another, frequently employed typology, which limits itself to a distinction between adversarial and inquisitorial procedures. The former focuses on the strictly party-driven features of traditional Anglo-American procedure, such as the litigants' control and presentation of evidence , and the passive role of judges. The latter assumes, by contrast, that in Continental European models, and in their non-European offshoots, it is the decision-maker who exerts control throughout the proceedings with only modest powers left to the parties and their representatives. Whatever the historical truth and ramifications of these assumptions, the distinction is moot for purposes of assessing civil justice systems in the Western world today. In reality, Continental civil systems are not 'inquisitorial'; rather, they vest parties with a great deal of autonomy in shaping the proceedings, for example, by determining which evidence will be introduced at trial. And, in many instances, the judge in the so-called 'Anglo-American' procedure is no longer the passive arbiter who merely presides over the case and leaves its development to the parties.

English law in particular has taken a major step away from the so-called 'adversarial' model. Aimed at reducing the length of judicial proceedings, a comprehensive reform of English civil procedure has severely curtailed the power of parties and strengthened the authority of courts to manage cases. That shift is particularly evident in Part 32.1 of the new Civil Procedure Rules which reads:

> **(1)** The Court may control the evidence by giving directions as to—
> **(a)** the issues on which it requires evidence ;
> **(b)** the nature of the evidence which it requires to decide those issues; and
> **(c)** the way in which the evidence is to be placed before the court.
>
> (p. 1309) **(2)** The court may use its power under this rule to exclude evidence that would otherwise be admissible.
> **(3)** The court may limit cross examination.

Together with other changes, such as the limitation of document discovery,[4] this shifting of control places English civil procedure more in line with Continental European, Latin American, and international arbitration models than with US-American law.

Some reallocation of authority between parties and courts has also occurred in the United States, albeit to a lesser extent. Pre-trial conferences, in which the court dictates the course of the proceedings, are now common. Complex multi-party litigations require active management skills and considerable creativity on the part of the court that cannot easily be reconciled with traditional perceptions of 'the adversarial system'. These developments notwithstanding, American procedure, its institutions, and actors remain in many ways unique. No other system allows for such aggressive lawyering and nowhere else does lay participation in the form of the jury trial play such a significant role. The underpinnings and worldwide impact of this procedural regime are the subject of numerous comparative studies and will be recurrent themes in this essay.

Overall, the development of procedural law governing civil litigation has resulted in the emergence of hybrid systems. There is a growing approximation driven by 'a worldwide procedural civilization which has developed independently from national preconditions'.[5] This development will be explored in greater detail below. For present purposes, it suffices to point out that the trend towards harmonization is not due only to procedural reforms through state action and the introduction of procedural rights and guarantees through international treaty obligations;[6] it can also be found in the context of private initiatives (ALI-UNIDROIT) and non-state dispute resolution mechanisms (arbitration), which complement the worldwide production of norms without state input in various fields of substantive law. There are, of course, procedural rules that have proven resistant to harmonization. Institutional settings, that is, the structure of court systems, the role and status of the actors operating these systems, as well as the scope and course of appellate procedures, often reflect long-standing traditions that continue to vary from one system to another.

It would thus go too far to claim that the harmonization of procedural law has led to widespread convergence, that is, to a state in which national idiosyncrasies have largely vanished. It would also be patently unwise to withdraw scholarly attention from the differences that do remain, for example, from the effort to unearth the origins of certain procedural rules. However, today, taxonomies that dwell on legal families, or merely distinguish between adversarial and inquisitorial systems, do not adequately capture the differences and similarities in current procedural law.

##  2. Damaska's Categories

This scepticism applies as well to more elaborate and ambitious efforts that aim at categorizing legal styles. The best known among them, Mirjan Damaska's *The Faces of Justice and State Authority*,[7] seeks to develop recognizable, and distinguishable, features of civil and common law procedure by focusing on two themes. One involves the organization of authority in general and the organization of procedural authority in particular; the other addresses the role of procedural law in common and civil law systems. The organization-of-authority element of this scheme distinguishes between a hierarchical (vertical) and a coordinate (horizontal) ordering ideal. Civil law jurisdictions, it is argued, adhere by and large to a hierarchical ordering principle. Among other things, these systems favour career judges who are appointed to distinct echelons within a tightly organized bureaucratic structure, multi-stage trials, the legalistic (and impersonal) application of the law that favours the use of written rather than oral evidence , and decisions that are regularly not accompanied by dissenting opinions but are subject to comprehensive review. By contrast, common law procedure is said to unfold in a coordinate or horizontal

structure of judicial authority consisting of lay personnel or elected officials. This system prefers oral evidence , focuses on facts rather than doctrine, and produces decisions which are subject to minimal appellate review. To be sure, these observations produce valuable insights in their own right, but they do not lead to an understanding of the actual functioning of regimes. Hierarchically organized systems, for example, historically have produced very different types of judges, ranging from very active to rather uninvolved.[8]

The second component of Damaska's model relates to the functions of government because 'dominant ideas about the role of government inform views on the purpose of justice, and the latter are relevant to the choice of many procedural arrangements'.[9] The study contrasts two extreme types of government, the reactive state and the activist state. The former is associated with common law proceedings while the latter is linked to the civil law world, including former communist nations. The reactive (common law) state is uninvolved. It merely provides a bare bones framework for a civil society that allows citizens to manage their own affairs. Law in such a setting is not a consequence of state activity, but rather the result of 'agreements, contracts and pacts' (p 75). Conflict resolution manifests itself in a *contest* between private citizens. The reactive state leaves it largely to individuals to pursue their rights, initiate legal disputes, and have them resolved by courts that function as neutral supervisors and disinterested arbiters of fact and (contractarian) law.

By contrast, the activist (civil law) state assumes the role of a social welfare provider. It is the primary forum for political activity and the principal source of norm production (p 80 f). Legal norms thus epitomize state interests and the judicial process serves as means for the *implementation of policies* that promote societal objectives (p 82). While reactive systems strive for 'fair' results in the individual case, the goal in activist systems is to generate the 'right' decision in line with policies embodied in legal norms. Thus, procedural rules in the activist state must be flexible and, if necessary, even dispensable in the pursuit of higher (p. 1311) societal goals through substantive decisions in individual disputes. The activist state accomplishes this by vesting state officials with strong interventionist powers and control over legal proceedings. As opposed to the reactive (common law) state, the prevailing procedural form in the activist (civil law) state is *inquest* rather *contest*.

Neither the organization of authority (hierarchical versus coordinate), nor the purposes of adjudication (reactive versus activist government) in Damaska's model are meant accurately to describe real world settings. They represent ideal types of procedural designs to which existing systems can be compared. The model is thus built on the understanding that every procedural regime exhibits some of the characteristics of each of its four constituent elements. Hierarchically organized (civil law) systems must also solve two-party conflicts and, according to Damaska, these systems will employ adversarial tools to do so. Conversely, legal proceedings in coordinate (common law) systems face disputes that require policy input, and the procedural forms employed to solve such disputes are said to be inquisitorial.[10] This model thus acknowledges the existence of hybrid systems. Coupled with a wealth of illustrations of mixed procedural patterns, it provides more and deeper insights than the traditional undifferentiated classificatory schemes.

Nevertheless, Damaska's model is still rooted in the dubious distinction between common and civil law procedure. It also is suspect in its claim that the organization of authority must entail certain consequences. Further, it rests on the assumption that policy implementation and conflict resolution settings—no matter where they present themselves—reflect more or less distinct categories that can be used as 'markers' for classificatory purposes. Conceptually, it is difficult to think of either category as serving only one purpose or the other.[11] First, policy implementation (inquests) settles real life conflicts not only by way of *inquest* but on the basis of individual *contest* as well. Criminal procedural law in Continental Europe, Damaska's prime example of an inquest-driven,

policy implementation process, involves such a contest between the individuals pursuing their rights and the state seeking punishment. That contest involves bargaining, albeit within narrower limits than the open plea bargaining regime that characterizes the American criminal justice system. Continental European criminal justice, therefore, is more than a mere reflection of policy implementation interests. Second, dispute resolution (*contests*) settings provide the venue for the implementation of state policies. This is nowhere more visible than in the United States where generous standing rights encourage individuals to press claims that also serve larger public interest objectives (eg to avoid violations of antitrust laws, improve prison conditions, or overcome racial discrimination).[12] Damaska's own study is rich with illustrations of how litigation purposes and, respectively, procedural forms increasingly overlap and blend.[13]

While it is difficult to agree with Damaska's claim that grouping procedural systems into categories is either possible or useful, at the end of the day, his findings are invaluable and prove the need to pay attention to historical detail and the contemporary political, economic, and cultural conditions that prevail in individual systems. Before exploring the trend towards greater harmonization and functional overlap, which also undermines the effort (p. 1312) to compartmentalize procedural systems, a brief account of American procedure and its institutions is necessary to clarify the special status of that system.

## 3. The Special Status of American Law

American procedural law, specifically as it unfolds in first instance civil and criminal proceedings, represents a category of its own—one that fits into Damaska's coordinate ideal like no other regime. The most important institutional reason for this aspect of American 'exceptionalism'[14] is the presence of the jury and, specifically, its power to decide the outcome at the conclusion of the trial. Lay participation of this magnitude does not exist anywhere else. It fosters a peculiar procedural style that is both informal and formal. It is informal because the presentation of facts, as well as the legal instructions directed at the jury, must be couched in language that is accessible to lay persons. The formal dimension manifests itself in rigid evidentiary rules designed to shield the lay jury from exposure to overly speculative or inflammatory presentation of facts. Oral eloquence, employing clear, simple, and even populist, language, is a key ingredient in the successful court-room performance of a trial lawyer. Constitutionally mandated, and anchored in the American version of egalitarianism, the jury system is fundamentally incompatible with managerial judging. The judge, though vested with the power to instruct the jury on legal matters and to overrule civil verdicts in cases of grave errors, remains largely passive in this setting.[15] The input and initiative available to the parties through their attorneys is correspondingly large.

Although fewer than 3 per cent of all cases ultimately get decided by a jury, this institution shapes American procedural dynamics in other respects as well. Rather than involving various trial stages, which professional judges elsewhere use to monitor and develop a case over an extended period, the American trial must be a single, uninterrupted event so as to conclude the proceedings before jurors whose service is limited to a single block of time (eg a week), and who cannot be reconvened after that time has expired. The single event concept, in turn, has been one reason for the comprehensive, party-driven, pre-trial proof-taking proceedings (discovery) that can entail massive information exchanges. American discovery rules enable private litigants to obtain access to information held by their opponent or third parties to a much greater extent than any other legal system. American attorneys request, and routinely receive, information that would be unavailable in civil litigation elsewhere. Thus, plaintiffs in the American judicial process can develop a case which is initially supported by little or no evidence and which might not make it to court or even settlement negotiations in other systems. Prejudicial surprises at trial are rare under these circumstances. Settlements, in contrast, occur frequently. One reason to settle arises when discovery

has unearthed facts that clearly favour one party. More frequently, however, cost considerations prompt an out-of-court resolution of the dispute. Under the American rule of cost, each party bears its own expenses. The costs to engage in and defend against discovery efforts are so substantial that a settlement is often less costly than winning at trial without the possibility (p. 1313) of recouping the expenses associated with trying a case. Abuse in this setting is a real danger and there are defendants who settle for the nuisance value of the suit. Finally, the jury, and its perceived lack of rational decision-making and predictability, plays a role in a decision to accept an early settlement. On the other hand, the negotiations leading to the settlement proceed in the 'shadow of the law', that is, they are influenced by results reached in actually adjudicated cases and by an assessment of what a potential jury trial would yield in this particular dispute.[16] Although a high rate of settlements occurs in other systems as well, this short account should suffice to explain that American civil procedure unfolds within a unique institutional framework and produces dynamics that are not found elsewhere. Thus, while there has been a certain approximation of procedural systems over the last two decades, at least in the West, American procedure remains a case apart.

# III. Harmonization

There are a number of procedural principles that are widely shared. For instance, the power of the litigants, rather than the judges, to initiate civil proceedings, to control their scope, and to terminate the litigation by withdrawal, admission, or settlement, is a defining principle in all Western legal regimes and has become a basic premise in many former socialist systems as well. Public trials, the independence and impartiality of courts, the procedural equality of the parties, and the right to be heard are likewise commonplace. Yet, the remaining differences are numerous and, in some cases, significant. High on the agenda of many comparative proceduralists today is the effort to examine the harmonization of those procedural elements that are not universally acknowledged principles, but rather domestic idiosyncrasies. This part focuses on the sources, dynamics, and scope of various aspects of procedural harmonization. We begin with observations on comparative law as an instrument of integration, a traditional goal that has fallen out of fashion with post-modern comparatists but that has retained much of its practical relevance.

The success of greater economic integration, worldwide or regionally, depends in part on a harmonized body of *substantive* legal rules that facilitate the free movement of persons, goods, services, and capital. Arguably, furthermore, legal systems compete with one another for the most practical set of rules, that is, norms that provide a transparent foundation for the fair and predictable outcome of disputes, or are capable of avoiding disputes altogether. Whether the resultant rules emanate from 'above', through legislative action, or emerge at a sub-legislative level through 'private law production' (eg soft law, *lex mercatoria*), harmonization of the evolving *substantive* legal framework would hardly be effective without the approximation of the underlying *procedural* regimes. This is so because different procedural and institutional frameworks tend to produce different substantive results. Conversely, similar procedural regimes and institutional conditions promote comparable outcomes. As to the latter, consider the Louisiana Civil Code, which is grounded in French and Spanish civil law. These roots notwithstanding, litigation in Louisiana produces results that are not markedly different from those elsewhere in the United States. Among other things, the reasons lie in the procedural and institutional framework in which litigation (p. 1314) occurs. Thus, contingent fee arrangements, jury trials, discovery, and the expectations of all participants in this process generate the same dynamics in the Louisiana justice system as in other states.

The observation that differences in procedural devices and other framework factors can result in divergent substantive litigation outcomes can also be illustrated by reference to the special American conditions. For example, substantive American product liability law, including the concept of strict liability, is similar to the corresponding European black-letter rules. However, the frequency of litigation and settlement, as well as the amounts of damages claimants receive in the United States, are significantly higher than in Europe. While there are a number of reasons for these differences, such as the use of private actions as a substitute for a largely absent social insurance safety net, there are specific procedural and institutional conditions that shape the American litigation experience.

While these factors are substantially more similar in other Western systems, the remaining differences can be significant enough to pose obstacles to greater integration. For example, the effort to create greater regional integration has prompted procedural approximation projects in Latin America. Particularly in the member states of MERCOSUR, the Model Code of Civil Procedure for Iberoamerica has been a catalyst for harmonization. Drafted by the Iberoamerican Institute of Procedural Law in the 1960s, the model law has been adopted almost verbatim by Uruguay as its code of civil procedure and has inspired procedural reforms in Argentina, Bolivia, Brazil, Costa Rica and Peru.[17] This success in harmonization prompted the draft of a Model Code of Collective Actions for Iberoamerica which was finalized in 2004.[18]

# 1. Harmonization of Procedural Law in the European Union

In the European Union, both diverging substantive laws and varying levels of procedural protections for market participants, such as their ability to access the judiciary, are perceived as obstacles to market integration. In the following sections we will examine the harmonization of procedural law in Europe, first with a view towards domestic law applicable in intra-state disputes and, second, with respect to rules that govern cross-border litigation in the European Union.

## (a) Domestic Law for Intra-state Disputes in Europe

In 1990, the EU Commission brought together a group of procedural law experts from every European Union member state and asked them to render an opinion on the feasibility and content of a future European Code of Civil Procedure. Led by the Belgian Marcel Storme, the group sought to produce a draft EU Code of Civil Procedure, that is, a model code with rules that could be adopted by the member states. It soon became apparent, however, that the group lacked sufficient consensus to produce the envisaged draft. Instead, the (p. 1315) experts formulated and commented on fourteen articles which were thought to restate procedural principles generally agreeable to all member states in the European Union.[19] Published in 1994, these principles address, in more or less general terms, court-conducted mediation (‘conciliation’), the commencement of proceedings, the subject-matter of litigation, proof-taking rules pertaining to documents and witnesses, the withdrawal of claims, default judgments, costs, provisional remedies, the order for payment, enforcement of judgments and penalty payments. The idea behind these principles—that they could constitute the foundation for a comprehensive future harmonization of domestic procedural law through EU legislation—was widely opposed. Among other things, the critics pointed to the cultural identity that they saw reflected in the existing diversity of domestic rules.[20] The EU Commission, initially supportive of the comprehensive European Code of Civil Procedure project, has apparently abandoned it. Instead, European piecemeal initiatives, aimed primarily at harmonizing various procedural aspects of consumer protection, have prevailed.[21] These measures, like the substantive law initiatives they complement, were not the result of comparative, let alone historical, research but were inspired by the perception that a level

playing field for consumer protection law can serve both consumer interests and the free movement of goods and services throughout the Union.

In addition to such legislative initiatives, the case law of the European Court of Justice (ECJ) has established certain uniform procedural obligations in domestic courts for cases addressing the application of EU law. Among other things, this type of 'Europeanization' of domestic procedural law makes it mandatory for domestic courts, in certain circumstances, to raise issues of substantive EU law on their own motion even though domestic procedural law only permits—but does not require—an ex officio court examination of the issue.[22] This procedural obligation is meant to facilitate the widespread implementation of EU law principles, such as the freedom of establishment, as well as EU consumer protection law, through the domestic courts. Whether this and other European impositions on domestic legal procedure will actually lead 'towards European procedural primacy in national systems'[23] is far from certain. In fact, the ECJ itself has repeatedly acknowledged the principle of procedural autonomy of the EU member states. It is true, none the less, that EU member states have lost some of their traditional independence in procedural matters.

As with the harmonization of substantive law, Europeanization of procedural law also occurs irrespective of EU legislative or judicial activities. There have been several domestic law reform initiatives aimed at refining procedural law by adopting features favoured in the procedural law of neighbouring states. The German legislature, for example, explicitly acknowledged such 'borrowing' in the recent revision of the German Code of Civil Procedure. Thus, key components of the reform, including the strengthening of single-judge trials, (p. 1316) limited review of facts in appellate proceeding, and greater access to evidence , reflect a conscious adaptation to presumably superior competing models in Europe.[24]

## (b) Unified Rules for Cross-Border Litigation in Europe

Even those who would resist any attempt to reduce the diversity of domestic procedural laws do not dispute the need for greater uniformity in international litigation settings. In the European Union, questions of international jurisdiction and the recognition of foreign judgments have been governed by uniform law for more than thirty years. Here, too, the driving force behind the unification was the desire to advance market integration in Europe. The EEC Treaty aimed at the creation of a common market and, for that purpose, contained explicit rules for the free movement of persons, goods, services, and capital. Market integration, however, requires more. Among other things, it also depends on the free movement of judgments, that is, the ability of market participants involved in private and commercial disputes to seek redress before the courts of one member state and to swiftly enforce the resultant judgment in another. Although the EEC Treaty did not contain specifically applicable rules facilitating judgment recognition throughout the Community, the drafters recognized that need by calling on member states to enter into negotiations with a view towards that end.[25] In 1968, these negotiations resulted in the so-called 'Brussels Convention',[26] a treaty which not only established the rules for the recognition of judgments in civil and commercial litigation but also set out a limited number of circumstances in which courts may exercise personal jurisdiction over defendants domiciled in contracting states.[27]

The adoption of an exclusive set of jurisdictional rules proved crucial for the success of the Convention. The consensus over when the exercise of personal jurisdiction is appropriate was the result of an exercise in 'normative' comparative law and effectively removed a major obstacle to transnational judgment recognition.[28] Courts which are faced with a request to recognize and enforce a judgment that was rendered under these rules in another member state need not and, for all practical purposes, must not, review the jurisdictional findings of the first tribunal.[29] Because other potential objections to foreign judgments, that is, public policy concerns and service

of process flaws, are also narrowly defined, recognition and enforcement occur almost as a matter of course. In essence, the Brussels Convention and its successors, Regulation 44/2001 and the Recast Brussels Regulation, operate much like the (p. 1317) Full Faith and Credit Clause in the American Constitution,[30] which likewise guarantees the liberal enforcement of other (American) states' judicial decisions. Unlike under American law, however, courts which exercise jurisdiction under the rules of the Convention do not engage in any due process analysis and are therefore unencumbered by the layer of constitutional inquiry that often results in lengthy and expensive threshold litigation before American courts.

Overall, the jurisdictional rules of the Brussels Convention have produced a high degree of legal certainty as well as outcomes that are considered fair for purposes of intra-community litigation. Yet, there have been cases in which the application of these rules to particular facts was not a simple matter. In these instances, domestic courts, uncertain about the application of a Brussels Convention provision, stayed the proceedings before them and referred the question to the European Court of Justice.[31] The case law generated by that court has significantly improved the evenhanded application of these jurisdictional rules by domestic courts in European member states. Indeed, the Court's comprehensive interpretations of structural elements of the Convention, such as the meaning of 'cause of action' or the difference between tort and contract claims, transcend the limited scope of the Convention and inspire a reconsideration of domestic rules in light of this case law. This process in itself may generate a degree of procedural harmonization of domestic rules.

In 2002, the Convention was replaced by Council Regulation 44/2001.[32] This regulation introduced some, but no major, changes. Thus the existing case law produced by the European Court of Justice under the Convention will continue to provide important guidance in many future cross-border disputes. The shift from (Brussels) Convention to (Brussels) Regulation, that is, to an EU legislative instrument directly applicable in every member state, was made possible through changes introduced by the Treaty of Amsterdam. In force since 1999, these changes widened the legislative competence of the Council of the European Union to adopt measures in the field of judicial cooperation in civil matters with cross-border implications (Art 61 c and Art 65 EC Treaty). According to Art 65 EC Treaty (now Art 81 TFEU), 'the field of judicial cooperation' includes cross-border service of process, taking of evidence , the recognition and enforcement of judgments, the harmonization of conflict of laws and jurisdictional rules, as well as the harmonization of civil procedural rules in the member states if that is necessary to ensure the proper functioning of civil proceedings.

In addition to Regulation 44/2001, the European Union has made use of this legislative competence in many ways. In 2005, a regulation creating the first uniform European Enforcement Order for uncontested claims entered into force.[33] For this type of claim, the regulation obviates the need for any domestic intermediate enforcement proceedings. Judgments, court settlements, and authentic instruments to which the regulation applies are enforceable throughout all member states on the basis of the original enforcement order issued in the member state in which the dispute was originally pending. This concept was expanded to all types of decisions in civil and commercial matters by virtue of the Recast (p. 1318) Brussels Regulation, which replaced Regulation 44/2001 as of January 2015.[34] In dispensing with the former, time-consuming enforcement proceedings in the forum where the judgment debtor's assets are located, the Recast Brussels Regulation further facilitates and expedites the enforcement of foreign judgments within the European Union. Only in extreme cases will the judgment debtor be entitled to raise certain public policy objections to prevent the enforcement of the foreign judgment.

Other examples illustrating the Europeanization of procedural rules applicable to cross-border disputes include a regulation concerning the service of judicial and extrajudicial documents in civil or commercial matters,[35] a

regulation on cooperation between the courts of the member states in the taking of evidence in civil or commercial matters,[36] and a regulation on insolvency proceedings.[37] Additional legislative initiatives, also grounded on Arts 61 and 65 EC Treaty (now Art 81 TFEU), include a regulation creating a European order for payment procedure[38] and a regulation establishing a European small claims procedure.[39] Disputes involving claims of up to €2,000.00 are now subject to a fast-track, uniform European procedure. A directive on certain aspects of mediation in civil and commercial matters has also been adopted.[40]

More harmonization projects related to both cross-border and domestic disputes are certain to arise. The pressure on domestic systems to stay competitive by individually adapting to modern developments in neighbouring states will not relent, either. Whether, and to what extent, comparative scholarship will play a proactive rather than reactive and descriptive role in this process is another question. So far, the Europeanization of procedural law has occurred primarily in response to practical needs associated with market integration objectives. Comparative scholarship devoted to the phenomena of approximation or harmonization of procedural concepts is still not very highly developed although it is very much needed if legislative and judicial activism without adequate reflection is to be avoided. Scholarly input would be invaluable in many respects: it could test the need for harmonization, evaluate its feasibility, and determine the reach and limits of concrete projects. For that purpose, it could help to identify particular political, economic, or historical conditions that have shaped existing domestic procedural rules. And if the choice is indeed harmonization, rather than continued diversity, implementation studies could and should assess the actual functioning of a body of law that was meant to apply uniformly in systems with different institutional cultures and legal personnel.

For any of these tasks to be performed, however, scholarship would first have to gain access to, and have an impact on, the decision-making process. In recent years, that input (p. 1319) was rarely noticeable in the harmonization measures that emanated from the institutions of the European Union. Instead, EU civil servants and bureaucrats representing the member states controlled much of the process. Things ‘got done’ but not necessarily with a view towards the more fundamental questions inherent in harmonization projects of this magnitude.

## 2. Supra-regional Harmonization of Procedural Law

Diverging rules pertaining to international jurisdiction, service of process, and obtaining evidence located abroad, as well as differing attitudes towards the recognition and enforcement of foreign judgments, have worldwide implications. These differences increase the costs and risks for litigants and sometimes may even cause tensions between sovereign states. The following sub-sections provide an overview of the strategies formulated to avoid these problems. After an introduction to the most ambitious project in this respect, the failed attempt to draft a worldwide convention on jurisdiction and judgment recognition, the focus will shift to private law-making efforts aimed at mitigating the frictions in international disputes through model rules and arbitration.

### (a) The Hague Judgment Project

In many cases of transnational litigation in which the resultant judgment must be enforced abroad, international treaties provide fast and effective relief for the judgment creditor. American judgments, however, do not fare so well in foreign courts. Although the United States signed and ratified the 1958 New York Convention on international arbitral awards which greatly facilitates their enforcement in more than 130 states,[41] the United States is not a member of any bilateral or multilateral treaty on the mutual recognition and enforcement of judgments. Absent any treaty benefits, judgments handed down by American courts often encounter difficulties abroad. Chief among the reasons for the reluctance of courts worldwide to enforce American judgments are higher damage

awards, the types of damages (eg punitive or treble), and procedural rules governing American litigation. In contrast, American courts overall have been relatively generous in the enforcement of foreign decisions. In light of this real or perceived imbalance, the US delegation to the Hague Conference proposed in 1992 that the Conference attempt to prepare a convention on jurisdiction and the recognition and enforcement of foreign judgments in civil and commercial matters. Similar to the Brussels Convention, this instrument was intended to regulate the circumstances in which the exercise of international jurisdiction by a court would be appropriate (white list) and the circumstances in which it would not (black list).

It soon became apparent that even though the European model had successfully bridged the gap between Continental and English procedural law, it could not easily be transposed into a worldwide convention. The disagreements centred on certain American rules, such as the exercise of general jurisdiction based on unrelated activities of the defendant in the (p. 1320) forum or on the defendant's transitory presence there.[42] In order to accommodate these and other differences, the American delegation proposed a so-called *convention mixte* which divided rules of jurisdiction into three categories. In addition to the white and black lists of jurisdictional bases which mandated and excluded recognition of the resultant judgment, the American proposal introduced a 'grey' zone. This category would be open-ended, permitting member states to assume jurisdiction on grounds not listed in the new Convention as either permitted or prohibited.[43] A judgment on such a grey-zone jurisdictional ground would neither be entitled to nor excluded from recognition in the enforcing forum. The jurisdictional bases in the grey zone would be handled as if there were a treaty: The question of enforceability would depend exclusively on the law of the forum where enforcement is sought. This category reflected, ultimately, the inability to reach agreement on which jurisdictional bases should be permitted and should thus enter the white list.[44] Despite, or perhaps because of, the proposed compromise of a grey zone, and the disagreement over how to compartmentalize various jurisdictional rules, including those pertaining to electronic commerce, the project was never completed as envisaged. Many representatives, particularly the Europeans, insisted on a draft that traced rather closely the successful Brussels Convention model which, from the American perspective, did not exhibit enough flexibility and tolerance for American jurisdictional idiosyncrasies.

With the failure of the initial plan to create a comprehensive jurisdiction and recognition agreement, the parties shifted their focus. In 2005, they eventually settled on a very narrow facet of the original project: the treatment of choice of court agreements in business transactions.[45] The Hague Choice of Court Convention entered into force on 1 October 2015. Parties to the convention are the European Union (except Denmark), Mexico, and Singapore, while China, Ukraine, and the United States signed the convention, but did not yet ratify it.

While this rather modest work product cannot be considered a success in light of the original ambitions, the intense dispute and discourse accompanying the original project yielded other benefits. Even though the disagreements proved insurmountable at the time, they triggered a great deal of attention as is evident from the numerous publications on the subject.[46] This extensive exchange in itself constitutes a comparative exercise and sensitizes the participants on all sides of the controversy to the need to identify common ground and recognize its limits.

The ensuing academic discourse may have played a role in the decision to relaunch the work on the judgment project in 2012,[47] which led to the production of a draft convention (p. 1321) in February 2017.[48] Some of the draft articles sensibly replicate the rules of the Choice of Court Convention of 2005, eg on punitive damages (Art 11) and judicial settlements (Art 13), while the contentious issues regarding jurisdiction, eg exorbitant grounds and *lis pendens*, have been deferred to a future meeting. It remains to be seen whether these and other conflicts from the past can be settled this time. The authors of the draft point out that its adoption would offer several advantages

because it would provide parties in cross-border transactions with a simple, efficient, and predictable regime for recognising and enforcing judgments.[49]

## (b) The American Law Institute's Judgment Recognition Initiative

Several private law-making projects, already initiated prior to the recent relaunch of the judgment project, could also be seen, optimistically, as a corollary of the transnational discourse that occurred during the decade-long discourse over the original Haugue Convention project. Assuming that the Hague Judgment Convention would be concluded as planned, the American Law Institute (ALI) commissioned a draft text of a federal statute that would have been submitted as a proposal for legislation transposing the Convention into domestic law. The work on this statute continued even after it became clear that the project at the Hague would fail. The final ALI-workproduct is entitled 'Recognition and Enforcement of Foreign Judgments: Analysis and Proposed Federal Statute'. It embraces some solutions that respond positively to foreign concerns. The underlying principle of the draft legislation—to create a uniform body of federal law replacing the variety of currently governing state practices—is squarely in line with the outcome for which the non-American negotiators at The Hague had bargained. The draft establishes original, albeit concurrent (with state courts), jurisdiction for federal courts in foreign judgment recognition cases and the right of the defendant to remove such cases from state to federal court (§ 8). The preference for a uniform national approach in this area of the law is apparent in other provisions as well. Even the controversial reciprocity requirement (§ 7), which precludes recognition of foreign judgments in American courts if the foreign court will not recognize a comparable American judgment, is premised on a uniform standard designed to prevent forum shopping and uncertainty.

Furthermore, the draft statute precludes, in principle, the recognition of a judgment if personal jurisdiction was based on service of process on a defendant who was only transitorily present in the forum (§ 6 a iv). This stance against 'tag jurisdiction', though aimed at foreign judgments and subject to an exception in cases of human rights violations in which no other adequate forum is available, reflects an international standard that is contrary to long-established American practice.[50]

In arriving at these and other rules, the authors of the draft statute drew substantially on international scholarship and jurisprudence.[51] In several instances, they adopted foreign positions and thus engaged, at least to some extent, in the kind of 'borrowing' that marks (p. 1322) the conclusion of a successful comparative exercise. To be sure, the reporters in charge of drafting the statute still represent only a small, cosmopolitan elite of American legal thinkers. There are many sceptics among ALI members, whether professors or practitioners, and there is opposition voiced by interest groups which adhere to a traditional, more insular outlook. In fact, as matters stand now, it is highly unlikely that the statute will be enacted.[52] That, however, is not the point. History has shown that practitioners, judges, and lawyers alike can mount considerable opposition to change.[53] In fact, anecdotal evidence suggests that the revised rules of English procedure have resulted in less change than expected, largely due to the resistance of practitioners to employ them as intended. But changes do occur if they make (eg commercial) sense and if those who advocate them gain enough momentum.[54] While it has now become very doubtful whether that will actually be the case for the ALI Foreign Judgment Statute, this project is at least evidence that American scholarship increasingly exhibits an interest in foreign or transnational law alternatives. There have also been institutional and organizational settings that reflect a new, non-isolationist mindset. For example, the group of reporters and advisors working on a subsequent ALI cross-border procedural project included representatives from several countries.[55] Twenty years ago, this type of drafting exercise would have been essentially an exclusively American enterprise.

## (c) The Joint ALI/UNIDROIT Project

Even more remarkable is the first joint project of the ALI and UNIDROIT which resulted in 'The Principles of Transnational Civil Procedure'.[56] For the ALI, which traditionally concerns itself with the approximation of domestic legal rules in the various states, this undertaking marked its first attempt to harmonize a body of law on an international scale. Notably, the law at issue, civil procedure, has been universally considered the most difficult candidate for worldwide harmonization. That these difficulties do exist is manifested in two aspects of the final work product. First, the Principles consist of rather broad statements. What began as an attempt to agree on relatively detailed rules, was subsequently reduced to the formulation of broader principles that could win approval by both sides. Second, the Principles were drafted for purely commercial disputes to be decided by judges or arbitrators, not by juries. No legal regime, whether consisting of rules or principles, could gain worldwide approval if it provided for jury trials and American-style discovery. Conversely, rules (or principles) that excluded these two prototypical procedural features of American personal injury cases and other non-commercial litigation would not be acceptable in the United States.

(p. 1323) Despite their limited scope and overall lack of specificity, the Principles suggest that the potential for a common core of procedural law is more substantial than expected. The inclusion of a modest version of *forum non conveniens* as a means of declining jurisdiction is a concession by the European side,[57] as is the acceptance of transient jurisdiction as *ultima ratio* in cases in which 'no other forum is reasonably available'.[58] Other Principles are evidence of American flexibility. One vests party agreements to exclusive jurisdiction with preclusive effects, that is, to oust the jurisdiction of any other court.[59] Another is the inclusion of a *lis pendens* concept that, subject to limited exceptions, requires courts 'to decline jurisdiction or suspend the proceeding, when the dispute is previously pending in another court competent to exercise jurisdiction'.[60] These and other jurisdictional principles mirror in part the draft rules of the Hague Jurisdiction and Judgment Convention project and thus provide a late vindication for the efforts to arrive at compromises which had been unsuccessful in their original context.

There are other pronouncements in the Principles, outside the jurisdictional sphere, that rise above generalities and indicate potential for harmonization where there seemed to have been little of it before. The most important area is that of obtaining evidence , a subject that is particularly conflict-laden when transnational litigation is pending in the United States. Here, the Principles seek to strike a balance between the invasive American discovery practice and the more narrowly circumscribed evidence -gathering procedures that prevail elsewhere. On the one hand, courts and litigants are entitled 'to relevant and non-privileged evidence ';[61] on the other, the Principles impose the strictures of fact-pleading to the effect that 'the parties must present in reasonable detail the relevant facts … and describe with sufficient specification the available evidence to be offered in support of their allegations'.[62] Although this specificity requirement is subject to an exception when the party is unable to meet it,[63] transnational evidence taking procedures emanating from American courts under this principle would be freed of much of their potential to cause conflict with other systems. The emphasis is on 'would', because it is far from certain whether, where, and to what extent the non-binding Principles will be adopted. The experience that even binding instruments do not necessarily achieve their intended purpose also cautions against too much optimism. In the field of obtaining evidence abroad, for example, the Hague Evidence Convention was thought to provide a body of binding international law aimed at reducing the tensions between the United States and its trading partners.[64] By and large, however, American courts have applied domestic law instead, holding that the Hague Evidence (p. 1324) Convention is merely an optional instrument that does not preclude parties who seek access to evidence located abroad from employing the farreaching Federal Rules of Civil Procedure.[65] The Principles, on the other hand, are a recent work product, built on decades of experience with judicial conflicts between the United States

and its trading partners and thus reflect a much deeper understanding about the forces that drive procedural systems than did the Hague Evidence Convention.[66]

In the end, of course, the limited scope of the Principles, as well as the built-in exceptions and omissions, require few sacrifices by either side and do not really generate approximation where basic similarity did not already exist. It may thus be doubtful whether the Principles, as they stand now, actually present an adoptable body of law, prove inspirational for future legislative processes, or simply represent a kind of restatement of the law of civil procedure.[67] Indeed, during the thirteen years since publication, the practical significance of the Principles has been relatively low as only few legislators and courts have referred to them expressly. Nevertheless, as one of the authors of the Principles points out, there are various developments in international civil procedural law that reflect the standards contained in the Principles.[68] Furthermore, the Principles may have an impact on pending procedural law reforms in a number of emerging legal systems such as those in China and Vietnam. The Principles also seem to have acted as a catalyst for further harmonization within the European Union, where the European Law Institute and UNIDROIT are preparing model rules for European civil procedure and where the European Commission is promoting the development of minimum standards in procedural law.

As far as international arbitration is concerned, it actually appears that the rules generated through such proceedings influenced the formulation of some of the Principles, particularly those dealing with evidence -taking procedures.[69] On the other hand, the Principles may have reverberating effects on the further development of arbitration proceedings. It would not be the first time that a reform effort drawn from an existing set of rules influences those rules in turn.[70] Be that as it may, from a comparative perspective, which is less concerned with instant practical utility, this private law-making effort, undertaken by two of the most influential non-governmental organizations in the field of legal harmonization, offers valuable insights. The rigorous intellectual effort, sustained over many years with input from dozens of individuals, to comprehend foreign procedural settings in their various contexts and to ascertain the extent of rule compatibility, reveals the maximum degree of harmonization that civil procedure can undergo at this point in time.

The reporters in charge of the ALI/UNIDROIT project worked hard to ensure its high visibility. They commissioned the translation of the text of the Principles into ten languages. (p. 1325) Abundant resources allowed them to go on a veritable road tour with stops in several continents to solicit more input and to showcase the project as a means of broadening the base of support. This tremendous marketing effort may indeed turn out to be a real asset for future transatlantic and transpacific cooperation in this area, which might eventually manifest itself in the formulation of more concrete rules.

## (d) Procedural Harmonization through International Arbitration

A great majority of international commercial disputes are resolved through arbitration. One of its attractions is the neutrality of the forum that most, though certainly not all, parties associate with this type of dispute settlement. Among other things, neutrality refers to a procedural framework that does not represent the procedural ‘home turf’ of either party. Neutrality in this sense is unavailable in domestic courts for they will always apply the procedural law of the forum. Arbitration proceedings, by contrast, allow for the use of customized rules or the choice of institutional arbitration rules that offer the desired procedural equilibrium and may be tailored to the specific needs and expectations of the parties. The emergence of these ‘private’ norms is directly related to the high degree of party autonomy that prevails in this area. The freedom of parties (or arbitrators) to shape the procedures is, in turn, often state-sanctioned. That arbitration procedure is primarily a matter for party stipulation is already implicit in the rules of the widely adopted 1958 New York Convention.[71] The UNCITRAL Model Law on International

Commercial Arbitration[72] affirms this freedom and provides that the parties are in principle 'free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings'.[73] Further, in the absence of such an agreement, the tribunal may conduct the arbitration in such a manner as it considers appropriate, and that power includes the determination of admissibility, relevance, materiality, and weight of any evidence .[74]

More than other legislative acts that reform domestic law by borrowing from foreign legal regimes, the widespread adoption of the Model Law was driven by obvious competitive strategies.[75] The German government, for example, advocated its adoption by expressing in no uncertain terms the desire to bring German procedural law in line with modern international standards thus making Germany a more attractive venue for the rendering of valuable arbitration services.[76] As of 2017, legislation based on the UNCITRAL Model Law has been adopted in seventy-five countries. While this regime has been a principal force behind the approximation of arbitral proceedings, additional catalysts had a role in this development. Among them are the UNCITRAL Arbitration Rules of 1976 and institutional arbitration regimes, such as the Rules on Arbitration of the International Chamber of Commerce (ICC) in Paris as well as the Rules of the London Court of International Arbitration. Particularly instrumental in the growing standardization (p. 1326) of evidence taking in international commercial arbitration are the IBA Rules,[77] which strike a successful balance among the various legal traditions in this area. Thus, contrary to the view prevailing in some civil law jurisdictions, these rules start from the premise that discovery is an important tool. For example, a party is, in principle, under the obligation to produce documents requested by the other party.[78] Yet, the IBA rules preclude US-style fishing expeditions by imposing rather rigid specificity and relevancy requirements on the requesting party. These include a description of the document, or a description in sufficient detail (including subject-matter) of a narrow and specifically requested category, as well as a description of how the documents requested are relevant to the outcome of the case.[79] Furthermore, the tribunal exerts much more control over the discovery process than do American courts.[80] In light of these and other dispute resolution features dominating international arbitration, the once popular assumption that international commercial arbitration proceedings are largely Americanized[81] has turned out to be unfounded. In fact, this quasi-system-neutral model of carefully calibrated and controlled access to evidence proved inspirational to the drafters of the Principles of Transnational Civil Procedure,[82] who sought to find a compromise between the American practice and its foreign counterparts.

The main actors in arbitration proceedings, that is, counsel and the tribunal, often adopt the IBA rules or other institutional guidelines in whole or, in some instances, draw on them selectively. As stated earlier, such reliance introduces neutrality, minimizing the frictions among representatives of different legal traditions. While this generality is historically correct, one might add that these rules probably do meet the expectations of the (Western) professionals involved in this process. After all, the rules were largely drafted by international practitioners for international practitioners who operate in venues like London, Geneva, Stockholm, and New York. Some of these individuals are becoming cosmopolitan representatives of their profession. Although the legal culture in which they were educated is likely to generate some distinct expectations and legal styles, an increasing number of individuals in this group are less committed to a particular domestic legal background than were their predecessors of a few decades ago. Multilingual and often holding degrees from elite universities in several legal systems,[83] the leading members of this group have become transcultural agents for an emerging transnational legal regime.[84]

This development, among others, has lead to pressing, and not yet fully resolved, questions centred on the status and legitimacy of the rules that this new '*homo arbitrator*' generates and applies in arbitral disputes. For example, have these rules evolved into a *lex digitalis* or (p. 1327) *lex mercatoria*, bodies of transnational procedural and substantive legal regimes that are largely independent of state input and control?[85] To what extent is this private

norm production a reflection of an overall shift away from top-down regulation towards self-regulation and privatization; a shift that is noticeable in many areas of state governance structures?[86] What is the role of the international arbitration regime in disputes involving parties from developing nations on one side and opponents from the Western world on the other?[87] While each of these questions lends itself to comparative inquiry by examining, for example, the relationship between globalization and comparative law, any elaboration in this direction would exceed the scope of this chapter. However, there are some readily available answers to the more mundane inquiry that forms the heading of this sub-section. It is fair to say that, overall,[88] international arbitral procedure is subject to increasing standardization, that statesanctioned party autonomy is at the heart of this development, and that the resulting rules, though handled with some flexibility, are considered binding by those who adopt and operate under them.

It could hardly be claimed by extension, however, that state procedural systems show significant signs of corresponding developments. To the extent that the phrase ‘state procedural systems’ refers to domestic arbitration proceedings, harmonization trends are conceivable, but not likely. Some countries, such as Paraguay, have adopted the UNCITRAL Model Law for both international and domestic arbitration thus opening the door for the introduction of international standards into the domestic realm.[89] But then, the actors in strictly domestic arbitration are, for the most part, representatives of the same legal system. They come to a dispute with similar, domestically coined preconceptions and tend to import familiar domestic litigation patterns into the arbitration process. If there is a general trend among different state procedural systems, it is one towards ‘privatizing’ justice by having disputes settled outside overburdened court systems so as to avoid a further drain on already scarce state resources. In addition to arbitration, other, non-binding alternative dispute resolution (ADR) mechanisms, such as mediation and conciliation, are gaining in importance world-wide. However relevant this world-wide trend towards self-governance of this variety may be, it does not speak at all to the content of such alternative dispute resolution proceedings.[90] They are driven by the specific needs that prevail in distinct ‘dispute cultures’. These may vary widely, particularly with respect to the expectations and strategies brought to the consensus-building process even within identical structures of the negotiation process. (p. 1328) However, alternative dispute resolution techniques in the commercial arena may be subject to greater approximation. Since the approval of the UNCITRAL Model Law on International Conciliation in 2002, legislation based on or influenced by the Model Law has been adopted in sixteen States.[91] In the European Union, national mediation legislation with certain harmonized features was enacted as a result of the Mediation Directive.[92] The EU also adopted a directive on alternative dispute resolution for consumer disputes[93] as well as a regulation on online dispute resolution for consumer disputes.[94]

## 3. Some Principles Regarding the Scope of and Limits to Procedural Harmonization

General state procedural regimes concerned with domestic litigation are not likely to be influenced by rules that emerge from transnational dispute resolution. To be sure, a common core of procedural values has evolved in most procedural systems, irrespective of the developments occurring in the world of international dispute resolution. As with arbitration, this common core revolves around personal liberties manifested in procedural party autonomy. Entering into a binding forum selection clause is one example. The principle of party disposition, mentioned earlier, provides another important illustration: in every mature procedural regime, the parties are entitled to determine the beginning, scope, and even the end of the proceedings if they determine to settle or abandon them. But compared to the institutions of arbitration which cater to corporate interests in the global market-place, state procedural systems are subject to additional political, constitutional, and ideological restraints. Consider the

example of contractual forum selection: many state law systems contain restrictive rules that protect systemically weaker parties, such as consumers or workers, from having to litigate away from home. The underlying policy concerns can be so strong that the rules which embody them may be non-negotiable.[95] If these policy concerns also manifest themselves in substantive law, as they do in legislation to protect consumer interests, the procedural rules serving these interests will be resistant to change until and unless the underlying substantive norm is subject to change as well.

Thus, while state systems are competing individually through rule adaptations that may occur from above or from below, as well as collectively through harmonization projects for the sake of greater regional prosperity, these processes do not necessarily entail the erosion or approximation of the central procedural features of a given system. Furthermore, some procedural rules and institutions are, in and of themselves, considered central principles of a judicial system. On a continuum that reflects vulnerability to change, these rules or institutions sit at one end and might be called core elements of a procedural system (though (p. 1329) matters are rarely static and this status may be downgraded over time). Whether by historical accident or conscious design, many of these rules are entrenched in their respective systems, sometimes even constitutionally mandated, and common sense suggests that these core elements will not be sacrificed lightly. At the other end of the spectrum are norms that embody either insignificant or universally acknowledged values, such as certain procedural time limits, that aim at the speedy disposition of a dispute. These rules can be easy targets of harmonization, particularly when market integration strategies so demand.[96]

This still leaves us with the question as to when and why a particular rule can be considered a core element of a procedural system. In looking for an answer, the usual approach today is to examine political traditions, philosophical underpinnings, and cultural roots.[97] Such research is almost always enlightening in some respect, but not always entirely successful in identifying the conditions necessary for the evolution of procedural rules and their dynamics. To illustrate this point, let us consider the two core elements of American civil procedure—jury participation and discovery—which have been subject to thorough examination. As we will see immediately below, the political and cultural roots of jury trials are readily identifiable and are undeniably strong, while matters are not so simple with respect to the American variant of discovery.

The institution of lay juries is said to reflect fundamental American cultural and political values, such as egalitarianism and populism.[98] This observation is an old one and shared by many, even non-American, observers. As long ago as 1835, the travelling Frenchman Alexis de Tocqueville saw the jury as a key ingredient of American democracy when he stated that '… the jury, which is the most energetic means of making the people reign, is also the most efficacious means of teaching them to reign'.[99] Even if one did not agree with him on this particular point, a quick (and legalistic) reference to the Federal Constitution (sixth and seventh Amendments), and to its counterparts in the various states, demonstrates that trials by jury represent a fundamental value that is here to stay. Of course, the fact that the institution is constitutionally anchored does not necessarily reflect its present status in American contemporary political, cultural, and legal thought. Dozens of books and law review articles published even within a single decade reveal a great deal of controversy over, and pride in, this institution that sets America so far apart from every other legal system in the Western world.

American pre-trial discovery may also be an expression of cultural preferences. Perhaps it reflects a profound American interest in transparency although that virtue is embraced elsewhere as well, without American-style discovery. Perhaps the procedure is rooted in what has been termed 'competitive individualism',[100] although it is not quite clear what that is and why the obligation to disclose evidence would foster individualism. Also,

individualism, while widespread, is not necessarily ubiquitous in the American justice system. American judges who certify class actions essentially endow a few with the representation of the many, thus effectively pre-empting the individual pursuit of claims unless opt-out rights are exercised. (p. 1330) Nevertheless, even if 'culture' as an explanation is found to be somewhat persuasive, one might add—or content oneself with—the observation expressed earlier,[101] which is that jury trials very much lend themselves to pre-trial discovery of evidence . Recall that jury participation entails the single event concept and that, in turn, calls for comprehensive, pre-trial prove-taking proceedings so as to avoid irremediable surprises for either party at trial.

On the other hand, this finding still does not explain the amazing breadth of discovery, its intrusiveness, and the relative absence of judicial oversight in this process. What then are the forces at work here? An honest response would admit that we don't really know. Of course, it is as accurate to describe America as 'a society profoundly rooted in law'[102] as it is to conclude that that law is premised on 'Adversarial Legalism'.[103] Also, the legal *Weltbild* of law as a means of change through individual action does have peculiar connotations including the aggressive and far-reaching search for evidence that is dominated by lawyers rather than judges. But what caused this procedural device to become so different from its foreign, including other common law, counterparts? It is often claimed that the reasons lie in 'broader American traditions … and interest group pressures'.[104] But these traditions are probably not that old, and interest group pressures aim in more than one direction. American discovery as we know it is a creature of the twentieth century and there is no evidence that this system, with all its idiosyncrasies, was the inevitable consequence of something inherent in older structures or beliefs. As far as the impact of interest groups is concerned, one only has to recall that these include businesses and business lawyers and that in these circles American-style discovery appears to be dispensable, at least for purposes of international arbitration. Further, the relative weight of these factors (as well as others including feeble governmental structures and mistrust towards governmental action) that are frequently cited to describe the dynamics at work in the American judicial system and to explain the forces that resist change is unclear. In short, political traditions and legal culture do not satisfactorily explain why this particular procedural device developed the way it did. Perhaps, this finding confirms a more general observation that, 'it is dubious whether systems of procedure fit particular cultures so snugly …'.[105]

In any event, while it is not entirely clear why discovery seems immune to reform through adaptation, borrowing, or harmonization, it is certain that change, if any, will come slowly. Over the past thirty years, discovery rules have been revised at both the federal and state levels, but these revisions were quite limited and seldom inspired by comparative thought. This is all the more surprising because the goal of finding the truth in the course of judicial proceedings is a universal one. Surely, there are conflicting interests at work, raising questions that may lead to different responses in different legal systems. How invasive may this process be? To what extent do we entitle litigants and/or courts to obtain information held by the opponent, or by non-parties? What weight do we attribute to concerns regarding unrestricted access to facts controlled by others such as privacy interests, professional privileges, and commercial and trade secrets? Considering, furthermore, that greater access to evidence entails a greater investment of time, where is the breaking point between finding the truth and wasting resources? And finally, who should pay for what is being spent in the course of this process? Because every judicial system must ponder and decide these questions, (p. 1331) it would seem only natural to take cognizance of responses developed elsewhere and to examine them with a view towards improving justice at home.

Although this type of comparative thought is not widespread in American legal literature, it is not altogether absent. The most prominent example is contained in John Langbein's 1985 law review article entitled 'The German Advantage in Civil Procedure'.[106] If the title of the article was provocative, its content proved explosive,

sending shockwaves through American legal academia and beyond. In essence, the author argued that discovery wastes public and private resources, does not generate truthful fact-finding, and entails lopsided access to justice, limited to those who can afford lawyers. By contrast, the more judge-centred procedure in Germany would help avoid most of these shortcomings. While not all of the immediate reactions were entirely negative,[107] most were critical,[108] perhaps not so much because of the criticism of the American system but because the suggested remedy, to take lessons from a foreign model, did not sit well with a majority of American scholars at that time. While the debate probably did not change the mindset of the participants,[109] many of the immediately published responses to this article have proved quite inspirational for subsequent reflection on American civil procedure, comparative inquiry, and procedural transplants.[110]

# IV. Access to Justice

An important practical reason for comparing procedural regimes is the search for the best tools to improve civil justice at home. For example, every judicial process is geared towards seeking the truth in a given conflict and yet, as we just saw, the approaches to meeting that goal may differ significantly. There is agreement, too, that the effort to attain truth must be embedded in a rational process that provides access for those with meritorious claims (and defences), avoids delay, utilizes resources proportionately, and protects other legitimate interests of the parties and of society as a whole. There is a growing sense, however, that a number of procedural regimes do not meet these goals. Some even perceive the current state of affairs as 'Civil Justice in Crisis'.[111] That this is not just a catchy title aimed at promoting (p. 1332) a book is illustrated in Italy where the proverbial admonishment 'justice delayed is justice denied' has long been a sad reality. At the end of June 2011, the average length of adjudication was estimated at seven years and three months[112] and the final disposition of civil cases often takes ten years or more.[113]

## 1. Financing Litigation

Even if one considers legal reform, it is often difficult to achieve the goals set out earlier simultaneously because they require choices among competing concerns. Take the example of contingency fee arrangements under which American attorneys are entitled to remuneration only if they obtain a favourable decision for their client. Coupled with the rule that each party pays its own costs regardless of the outcome of the litigation, these '*quota litis*' contracts enable indigent plaintiffs to pursue their claims. In addition to lowering access barriers for many prospective plaintiffs, this system encourages early settlements, which, in principle, is desirable, too.[114] Among other things, it reduces the delay associated with lengthy proceedings and enforcement efforts, and helps minimize the impact on already clogged court dockets. On the other hand, this allocation of litigation costs has serious undesirable side-effects. Litigation without financial risks to plaintiffs encourages the pursuit of unwarranted and frivolous claims, provided, of course, that an attorney is willing to assume the risk; in that case, defendants may be forced into early settlements that do not necessarily reflect the merits of the case. Defendants with valid defences but no prospect of recouping their costs tend to refrain from going to trial because a victorious outcome is often more expensive than settling the case.

Furthermore, the above-described dynamics tend to benefit only plaintiffs whose stakes in a given dispute are high enough to attract an attorney. By contrast, the absence of cost-shifting in American litigation operates as a prohibitive barrier in cases with small sums in controversy, regardless of the likelihood of success.[115] Prospective

litigants have difficulty finding a lawyer willing to enter into a risk-shifting contingency fee contract if his prospective fee is at or below the value of the time he is likely to invest in the case. The alternative, to pay the lawyer an hourly rate not linked to the outcome of the litigation, likewise operates as a bar to those with small claims. Here, too, the cost-benefit relationship (p. 1333) between a small amount to be gained through litigation and significant, non-recoverable legal fees prevents many potential plaintiffs from seeking redress through the court system.

Pursuing the same goal of providing reasonable access to courts, a goal that is often constitutionally mandated, a majority of legal systems favour a less entrepreneurial method of financing litigation by allocating costs differently. These systems often prohibit contingency fee arrangements and require the loser to pay all expenses, including those incurred by the prevailing party. In contrast to the American rule, this solution tends to deter prospective plaintiffs, particularly those with limited means and claims whose merits are uncertain. Over-deterrence in some, but not all, of these systems is avoided by the availability of legal expense insurance policies and publicly financed legal aid and (perhaps surprisingly) private funding of litigation through third-party investment.[116] Of course, such financial assistance may create the mirror image problem, that is, it may promote litigiousness. But where institutional and financial assistance is poorly developed, as in Italy, for example, litigation is often not an option at all. It is noteworthy that, while the population in Italy doubled from 1894 until 1994, the number of claims fell by roughly one half.[117]

## 2. Mass Claims

Conflicting interests and dynamics present themselves in other areas of procedure as well. The occurrence of multiple related claims constitutes a challenge to every judicial system. The need to address the problems associated with mass claims has led to comparative inquiries with a view towards the adoption of foreign procedural law. The feasibility of legal ‘transplants’ has been a focus of comparative research for some time, and this section illustrates that ‘borrowing’ foreign procedural law is possible, that it actually occurs, but that it occurs with modifications so as to avoid compatibility problems with pre-existing domestic procedural structures and preferences.

Mass claims can arise in several settings. For example, a single incident, such as a catastrophic accident that injures many individuals, or fraudulent corporate conduct such as large-scale misrepresentations on capital markets, causes losses to numerous investors. Every justice system is under pressure to process mass claims and complex litigation efficiently, that is, in a way that guarantees the continued functioning of the justice system. On the other hand, the procedural rights and freedoms of all participants must be guarded. Those rights and freedoms, in turn, reside in two basic, but potentially conflicting, principles: The first is party disposition, that is, the freedom to largely control how, and to some extent when and where, a claim will be asserted for judicial resolution. The second principle is to provide reasonable access to justice which, as we have seen, is often largely unavailable (p. 1334) to individuals with small claims. Aggregating claims can be one way of providing affordable access to the legal system. But access to justice does not only impact the individual dimension of this right; the ability to bring mass claims also promotes state interests in regulating conduct through the threat of effective law enforcement.

This mixture of interests and objectives regarding the degree and method of claim aggregation has generated different policy choices in different systems. All procedural regimes originally focused on the resolution of disputes between two individual parties, with the exceptional inclusion or joinder of third parties under certain

circumstances. That model remains, of course, at the heart of every procedural system, because most disputes are bilateral.

With the advent of the consumer protection movement and the nowadays widespread perception that mass injuries are the result of some corporate or governmental wrongdoing, the demand arose to accommodate multilateral settings more effectively. Many legislatures have long resisted these pressures, and refused to add procedural instruments to the existing arsenal, while in other systems, group litigation was not unknown but was often quite restrictive. Several systems still limit it, for example, to representative suits aimed at the vindication of group interests in fields such as consumer protection and environmental law.[118] The standing requirements tend to be strict and successful litigants are often limited to obtaining injunctive relief. Based on the understanding that every legal dispute should, in essence, be treated like a bilateral dispute, with *res judicata* effects only extending to the immediate parties, group litigation mechanisms to pursue monetary claims for individual damages either did not exist at all or were available only in exceptional circumstances. The respective legislatures' failure to change that situation was due not only to inertia, but reflected ideological preferences to preserve the status quo which limited the exposure of corporate defendants.

The traditionalist view has been changing in a number of jurisdictions over time, however. New methods of procedural aggregation have become available, with the most far-reaching approach embodied in the American class action. This procedural device avoids a multitude of two-party suits by enabling one or more persons (the class representative) to litigate as plaintiffs or as defendants on behalf of themselves and those absent members who share a common interest. Historically, class actions were intended to provide redress for parties with small claims who otherwise could not—or would not want to—afford litigation. Thus, when taxis or gas stations systematically overcharge their customers, for example, American courts will certify a plaintiffs' class. However, contrary to a common preconception, American courts have been reluctant to certify classes in mass tort settings.[119] The reason for this reluctance lies in the legal requirements that the questions of law or fact common to the class members *predominate* over questions affecting only individual members and that the class action be *superior* to alternative methods of adjudicating the controversy.[120] In mass (p. 1335) injury cases, such as drug liability disputes, these requirements are difficult to meet.[121] The courts tend to emphasize the interest of the claimants to control the prosecution of their claims individually in this setting.

If a suit is allowed to proceed in the United States as a class action, a judicial ruling binds the representatives and absent class members alike, unless the latter exercise their opt-out rights. This presents a striking departure from the traditional model of individual dispute resolution and highlights the increased responsibility assumed by judges in multi-party litigation. Courts that decide to certify a class must act as quasi-fiduciaries for the class whose members have only limited control over the disposition of their claims. Particular scrutiny is necessary when class actions are concluded by settlements, as is the rule. They frequently occur immediately after class certification because both sides have an incentive to avoid full-blown litigation. The defendant faces the risk of a verdict awarding an exorbitant amount of damages. The class representatives—and particularly their lawyers, who often act as entrepreneurs by pooling resources to 'find' cases and move them towards certification—are motivated to settle the case early so as to avoid additional expenses and contingencies and thus secure the return on their investment. That return, in the form of 'reasonable attorney fees'[122] as determined by the court, can be substantial and, in large cases, may amount to millions of dollars. Given these potential conflicts of interest, settlements after certification require the approval by the court.[123] Once approved, however, the result confers *res judicata* effects on all class members, including the great majority who are absent. From a broader perspective, then, class actions

epitomize the tension that may arise between the objective of efficient case administration and the interests of individual litigants to pursue their claims in the manner they wish.

Outside the United States, legal reform introducing new methods to aggregate claims has been slower and, overall, more cautious. In several systems, it is still a work in progress, in others the prospect of changing the status quo remains low or unclear.[124] Regardless of the content of the reforms that have occurred or are being discussed, the American model has prompted, or at least inspired, the debate over greater group litigation rights everywhere in the world. Resulting reform legislation is a good example of successfully transplanting foreign legal ideas—by processing and customizing them so as not to upset the host system.

A primary concern in these reform efforts is the scope of the *res judicata* effect produced by a court decision in group litigation. One alternative to the American opt-out solution is to adhere to the traditional *res judicata* principle by extending the effects of the judicial decision only to those parties that undertook the affirmative step to become a class member. The first continental European group litigation procedure, enacted by the Swedish legislaturein 2003 (‘*om Grupprättegang*—LGR’) illustrates this opt-in concept by permitting group actions (‘*Grupptalan*’) while avoiding the sweeping effects of the American opt-out concept of the model. To become a member of the class, the prospective plaintiff must join it within (p. 1336) a certain period fixed by the court.[125] As in American law, contingency fee arrangements (‘*riskavtal*’) are an option in Sweden. Although the number of such actions was initially rather modest, it has risen over the years thus verifying the practical need and relevance of this group litigation model.[126] Nonetheless, several factors will likely prevent future litigation rates from coming close to American levels including the modest remuneration of lawyers in Sweden, the lower damages amounts, and the absence of other American procedural devices, such as juries and discovery.

These factors are likewise absent in other legal systems which, more recently, have introduced group litigation proceedings in an effort to aggregate small/mass claims which tend to remain without redress in the traditional bilateral lawsuit model. Since 2016, specified qualified consumer organizations (*tekikakushou hishadantai*) in Japan, have standing to sue collectively on behalf of similarly affected consumers for certain types of damages.[127] The procedure provides for a two-step approach. In the first stage, initiated by the qualified consumer organization, the court will hand down a declaratory judgment concerning those issues that are common to the class. If that decision is one in favour of the class, then the second procedural stage is for consumers to opt in and join the proceedings, where the scope of recovery of each cosumer will be determined individually.

In Germany, the Capital Markets Model Case Act (*Kapitalanleger-Musterverfahrensgesetz* - KapMuG) provides for a similar, bifurcated procedure since 2005. The Act allows a court-appointed class representative to pursue his or her claims for false or misleading capital market information. The court’s findings in this first litigation stage—e g that the contested information was actually false or misleading—are binding for the second stage in which courts determine the individual damages of similarly situated investors.[128] Different from the American class action, however, members of that class are only those claimants who affirmatively joined it (‘opt-in’).

In the Netherlands, there are two types of collective procedures: First, certain foundations and associations created to protect the interests of similarly affected parties may bring a collective action.[129] However, this collective action only provides for remedies other than monetary relief, such as injuctive relief and declaratory judgments. Futher weakening the effectiveness of this type of action is its limited *res judicata* effect: it only binds the very organization and the defendant but does not prevent individuals from pursuing their claims on an individual basis. Second, the Dutch legislature enacted rules aiming at collective settlements of mass damage claims (‘*Wet Collectieve Afwikkeling Massaschade*’, WCAM).[130] Under the WCAM, an organization qualified to represent

victims on one hand and the alleged wrongdoer on the other may enter into a settlement agreement and apply jointly to the court to declare it binding upon all affected persons. Claim holders in this group who want (p. 1337) to avoid the binding effect of the settlement must opt out from the settlement proceedings and may then pursue their claims independently.[131]

In contrast to these more recently developed claim aggregation models, a 1992 reform[132] in Australia appears to have stimulated the initiation of America-style class action suits more closely. This reform applies to suits brought before the Australian federal courts where they are governed by the opt-out concept. Although contingency fee arrangements are more restricted in Australia, there are a number of procedural factors that make class actions even more likely to occur than in the United States. Perhaps most important is the absence of a certification requirement which derails many potential mass torts class actions in the United States. In Australian federal courts, the onus is instead on the defendant to convince the court that the proceedings should be deemed inadmissible.[133]

At the end of this brief survey of jurisdictions that have adopted the class action device with modifications that reflect domestic preferences, Brazil must be mentioned because it adopted yet another particular rule to regulate the *res judicata* effect of consumer class actions. The pertinent provision, Art 103 of the Brazilian Consumer Code, differentiates among various types of group rights and operates as follows: If the class representatives prevail on the merits, the result will inure to the benefit of all members, absentees included. If the case is lost, the *res judicata* effect bars the relitigation of the case as a class action. However, the adverse decision does not bar absent class members from pursuing their individual damages claims.[134] An even more radical departure from traditional modes of litigation is the rule that a dismissal in certain types of class actions has no *res judicata* effect if it was due to insufficient evidence . Provided the cause of action is not time barred, the same case may thus be relitigated, perhaps years after the initial decision was rendered, if new evidence surfaces subsequent to that decision.[135] The main rationale behind this striking legislative decision to undermine the finality of judgments is to compensate for the lack of effective Brazilian discovery proceedings (as gauged, apparently, by American standards).[136]

To conclude, the foreign adoption of some American class action features, and the exclusion or modification of others, illustrates the viability of partial ‘transplants’ of legal institutions that meet local needs without compromising local policy objectives. At times, as in the Brazilian example, internal changes (to the effects of *res judicata*) that do not represent a reception of foreign law (discovery) may effectively emulate its effects.

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## Notes:

([1]) On the theoretical shortcomings in comparative law generally, see Mathias Reimann, 'The Progress and Failure of Comparative Law in the Twentieth Century', (2002) 50 *AJCL* 671, 685 ff.

([2]) See eg Konrad Zweigert and Hein Kötz, *Introduction to Comparative Law* (3rd edn, 1998), 63 ff.

([3]) See eg Benjamin Kaplan, 'Civil Procedure—Reflections on the Comparison of Systems', (1959) 9 *Buffalo LR* 409, 414–21.

([4]) See eg Practice Direction 31A supplementing Part 31 of the English Civil Procedure Rules, available at <https://www.justice.gov.uk/courts/procedure-rules/civil/rules/part31/pd_part31a>

([5]) Rolf Stürner, ‘Inaugural Speech: Procedural Law and Legal Cultures’, in Peter Gilles and Thomas Pfeiffer (eds), *Prozeßrecht und Rechtskulturen—Procedural Law and Legal Cultures* (2003), 18.

([6]) For details on the impact of the European Convention for the Protection of Human Rights and Fundamental Freedoms and the American Convention of Human Rights, see Mauro Cappelletti and Briant G. Garth, ‘Civil Procedure’, Ch 1 in *International Encyclopedia of Comparative Law* (vol 16, 2014).

([7]) See Mirjan R. Damaska, *The Faces of Justice and State Authority: A Comparative Approach to the Legal Process* (1986).

([8]) Stürner (n 5), 26–7.

([9]) Damaska (n 7), 11.

([10]) Damaska (n 7), 12.

([11]) For a detailed critique of this part of Damaska’s model, see Markovits, ‘Playing the Opposite’s Game: On Mirjan Damaska’s The Face of Justice and State Authority’, (1989) 41 *Stanford LR* 1313, 1328 ff.

([12]) Markovits, (1989) 41 *Stanford LR* 1313, 1334.

([13]) With respect to public interest litigation in the United States, see Damaska (n 7), 238.

([14]) More generally on American *exceptionalism* as such, see Seymour Martin Lipset, *American Exceptionalism: A Double-Edged Sword* (1996).

([15]) It is true, however, that American judges have become more managerial, if not activist, in complex litigation. See eg below with respect to their special role in class action, nn 107–8 and accompanying text.

([16]) Joachim Zekoll, ‘Liability for Defective Products and Services’, (2002) 50 (Supp) *AJCL* 121, 150.

([17]) John A. Jolowicz, ‘On the Comparison of Procedures’, in James A. R. Nafziger and Symeon C. Symeonides (eds), *Law and Justice in a Multistate World, Essays in Honor of Arthur T. von Mehren* (2002), 721, 727.

([18]) Ada P. Grinover and Kazuo Watanabe, ‘Brazilian Report’, in Masahisa Deguchi and Marcel Storme (eds), *The Reception and Transmission of Civil Procedural Law in the Global Society* (2008), 223, 233–4.

([19]) Marcel Storme (ed), *Rapprochement du Droit Judiciaire de l’Uion Européenne—Approximation of Judiciary Law in the European Union* (1994).

([20]) See eg Haimo Schack, *Internationales Zivilverfahrensrecht* (7th edn, 2017), § 35.

([21]) See eg Directive 98/27/EC of the European Parliament and of the Council of 19 May 1998 on injunctions for the protection of consumers’ interests.

([22]) See eg *van Schijndel and van Veen v SPF*, joined cases C–430, 431/93 [1995] ECR I–4705, and *Asturcom Telecomunicaciones*, case C-40/08 [2009] ECR I-9579.

([23]) Ioannis S. Delicostopoulos, ‘Towards European Procedural Primacy in National Systems’, in *Festschrift für Kostas E Beys* (2003), 229.

([24]) *Zivilprozessreformgesetz*, *Regierungsentwurf Bundestags-Drucksache* 14/4722, p 70.

([25]) Art 220(4) and later Art 293(4) called for negotiations with a view towards the 'simplification of formalities governing the reciprocal recognition and enforcement of judgments of courts or tribunals and of arbitration awards'.

([26]) Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, 27 September 1968, 1972 OJ L 299/32, as amended by 1990 OJ C 189/1; in force since 1973.

([27]) Twenty years later, in 1988, the EC member states and the members of the European Free Trade Association (at the time Austria, Finland, Iceland, Norway, Sweden, and Switzerland) entered into the so-called Lugano Convention, which contains, for the most part, provisions that are identical with those of the Brussels Convention. See Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, 16 September 1988, 1988 OJ L 319/9.

([28]) It should be noted, though, that prior to the entering into force of the Brussels Convention, there were already a number of bilateral treaties within and outside Europe that facilitated the mutual recognition and enforcement of judgments.

([29]) Art 28 of the Brussels Convention; Art 35 of the Brussels Regulation (now Art 52 of the Recast Brussels Regulation).

([30]) Art IV, § 1 of the US Constitution, as implemented in the Full Faith and Credit Statute, 28 USC § 1738.

([31]) Art 234 of the EC Treaty, now Art 267 TFEU.

([32]) Council Regulation 44/2001 on Jurisdiction and the Recognition of Judgments in Civil and Commercial Matters; OJ L 12/1 (16 January 2001); not applicable in Denmark.

([33]) Regulation (EC) No. 805/2004 of the European Parliament and of the Council of 21 April 2004; OJ L 143/15.

([34]) Regulation (EU) No. 1215/2012 of the European Parliament and of the Council of 12 December 2012; OJ L 351/1.

([35]) Council Regulation (EC) No. 1348/2000 of 29 May 2000; OJ L 160/37; replaced by Regulation (EC) No 1393/2007 of the European Parliament and of the Council of 13 November 2007; OJ L 324/79.

([36]) Council Regulation (EC) No. 1206/2001 of 28 May 2001; OJ L 174/1.

([37]) Council Regulation (EC) No. 1346/2000 of 29 May 2000; OJ L 160/1; replaced by Regulation (EU) No 2015/848 of the European Parliament and of the Council of 20 May 2015; OJ L 141/19.

([38]) Regulation (EC) No 1896/2006 of the European Parliament and of the Council of 12 December 2006; OJ L 399/1.

([39]) Regulation (EC) No 861/2007 of the European Parliament and of the Council of 11 July 2007; OJ L 199/1.

([40]) Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008; OJ L 136/3.

([41]) UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 10 June 1958, 21 UST 2517, 330 UNTS.

([42]) *Frummer v Hilton Hotels Int'l, Inc* (NY 1967) 227 NE 2d 851; *Burnham v Superior Court of California* (1990) 495 US 604.

([43]) Arthur T. von Mehren, 'Recognition and Enforcement of Foreign Judgments: A New Approach for the Hague Conference?', (1994) 57 *Law & Contemporary Problems* 271, 283.

([44]) Joachim Zekoll, 'The Role and Status of American Law in the Hague Judgments Convention Project', (1998) 61 *Albany LR* 1283, 1291.

([45]) Convention on Choice of Court Agreements of 30 June 2005, available at <http://www.hcch.net/index_en.php?act=conventions.text&cid=98>

([46]) The Conflict of Laws Section of the American Association of Law Schools even sponsored a Symposium on the topic under the heading: 'Could a Treaty Trump Supreme Court Jurisdictional Doctrine?' The papers were published in (1998) *61 Albany LR* 1159 ff.

([47]) For an account of recent developments see the judgment project's homepage <https://www.hcch.net/en/projects/legislative-projects/judgments>

([48]) Text of the February 2017 Draft Convention available at <https://www.hcch.net/en/projects/legislative-projects/judgments/special-commission1>

([49]) Overview of the Judgments Project, available at < https://assets.hcch.net/docs/905df382-c6e0-427b-a5e9-b8cfc471b575.pdf>

([50]) See *Burnham v Superior Court of California* (1990) 495 US 604.

([51]) As is evident from the extensive Reporters' notes accompanying every draft rule.

([52]) The US Congress even chose to enact a law that actually clashes with some of the liberal-minded approaches that the draft statute espouses. That law is the 'Securing and Protection of our Enduring Constitutional Heritage Act' of 2010, 28 USC §§ 4101–05 (in short: the SPEECH Act). Congress provided in that Act that no court—state or federal—may recognize or enforce a defamation judgment that was rendered in a foreign court system with free speech protections less favorable than those under the federal Constitution or the relevant enforcing-state constitution.

([53]) Lawrence M. Friedman, *A History of American Law* (2nd edn, 1985), 393 ff.

([54]) See Friedman (n 53), 396.

([55]) *Intellectual Property: Principles Governing Jurisdiction, Choice of Law, and Judgments in Transnational Disputes*; available at <https://www.ali.org/>.

([56]) Available at <https://www.ali.org/>.

([57]) Principle 2.5.

([58]) Principle 2.2.1.

([59]) Principle 2.4.

([60]) Principle 2.6, which goes on to provide an escape clause by stating: '… unless it appears that the dispute will not be fairly, effectively and expeditiously resolved in that forum'. To agree that the first chosen forum generally pre-empts jurisdiction of courts chosen later by the opponent is easy for Europeans who embrace a rigid *lis pendens* concept for, among other things, purposes of legal certainty; see Art 27 Brussels Regulation. For the American side, this rule is more difficult to accept because other, or at least additional, factors besides the 'race to the forum' should count in the final determination of whether to exercise or decline jurisdiction.

([61]) Principle 16.1.

([62]) Principle 11.3.

([63]) See ibid.: 'When a party shows good cause for inability to provide reasonable details of relevant facts or sufficient specification of evidence , the court should give due regard to the possibility that necessary facts and evidence will develop later in the course of the proceeding'.

([64]) Hague Convention on the Taking of Evidence Abroad in Civil and Commercial Matters, 23 UST 2555, 847 UNTS 241 (in force for the United States since 7 October 1972).

([65]) *Société Nationale Industrielle Aerospatiale v US District Court* (1987) 107 S Ct 2542.

([66]) Particularly unattractive from the American perspective proved Art 23 of the Convention, which enables member states to exclude the discovery of documents, a quintessential element of the American discovery process. All but three states exercised this option.

([67]) These appear to be the main goals. See Rolf Stürner, 'The Principles of Transnational Civil Procedure', (2005) 69 *RabelsZ* 201, 209 ff.

([68]) Rolf Stürner, 'Principles of Transnational Civil Procedure am Anfang einer Wirkungsgeschichte?', (2015) 20 *Zeitschrift für Zivilprozeß International* 409 ff.

([69]) See n 78.

([70]) Friedman (n 53), 397 (with reference to Field's procedural code and the English Judicature Act of 1873).

([71]) Art V(1)(d) permits the refusal of the foreign award if '… the arbitral procedure was not in accordance with the agreement of the parties …' , see n 41.

([72]) UNCITRAL Model Law on International Commercial Arbitration of 1985, <http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration.html>.

([73]) See ibid., Art 19(1).

([74]) Ibid., Art 19(2).

([75]) See Christopher R. Drahozal, 'Regulatory Competition and the Locations of International Arbitration Proceedings', (2004) 24 *International Review of Law and Economics* 371 ff.

([76]) BT-Drucks 13/5274 of 12 July 1996 *Gesetzentwurf der Bundesregierung Entwurf eines Gesetzes zur Neuregelung des Schiedsverfahrensrechts* (*Schiedsverfahrens-Neuregelungsgesetz—SchiedsVfG*).

([77]) IBA Rules on the Taking of Evidence in International Commercial Arbitration adopted 1 June 1999 and revised 29 May 2010, <https://www.ibanet.org/ENews_Archive/IBA_30 June_2010_Enews_Taking_of_Evidence_new_rules.aspx>

([78]) See ibid., Art 3(4).

([79]) Ibid., Art 3(3).

([80]) For more details, see Gabrielle Kaufmann-Kohler, 'Globalization of Arbitral Procedure', (2003) 36 *Vanderbilt Journal of Transnational Law* 1313, 1327–8.

([81]) See eg Nicolas C. Ulmer, 'A Comment on "The 'Americanization' of International Arbitration?" ', (2001) 16 *Mealey's International Arbitration Reports* 24.

([82]) See Stürner (n 68), at 213 n 54.

([83]) On the background of arbitrators, see Yves Dezalay and Bryant G. Garth, *Dealing in Virtue: International Commercial Arbitration and the Construction of a Transnational Legal Order* (1996), 18 ff.

([84]) For a recent account of this development, see Joshua Karton, *International Arbitration Culture and Global Governance*, in Walter Mattli and Thomas Dietz (eds), *International Arbitration and Global Governance* (2014), 74, 78.

([85]) Regarding the evolution of transnational non-state procedural law, see Joachim Zekoll, *Jurisdiction in Cyberspace*, in Günther Handl, Joachim Zekoll, and Peer Zumbansen (eds), *Beyond Territoriality—Transnational Legal Authority in an Age of Globalization* (2012), 341–69.

([86]) For an overview, see Orly Lobel, 'The Renewal Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought', (2004) 89 *Minnesota LR* 342.

([87]) See Dezalay and Garth (n 83), 93–5; A perceived bias of arbitrators against developing nations and in favour of the economic interests of rich, developed states is the main reason behind the current backlash against investment treaty arbitration, see Thomas Schultz and Cédric Dupont, 'Promoting the Rule of Law or Over-Empowering Investors?', (2014) 25 *European Journal of International Law* 1147.

([88]) There are exceptions. For example, the question is unsettled whether substantive law must be treated like facts to be proven by one or the other party or whether it is for the tribunal to ascertain the content of the applicable norms.

([89]) Jan Kleinheisterkamp, *International Commercial Arbitration in Latin America* (2005), 10.

([90]) On this subject, see Joachim Zekoll, Moritz Bälz, and Iwo Amelung (eds) *Formalisation and Flexibilisation in Dispute Resolution* (2014).

([91]) Available at <http://www.uncitral.org/pdf/english/texts/arbitration/ml-conc/03-90953_Ebook.pdf>.

([92]) See n 40; the EU Directive aims at facilitating the mutual recognition and enforcement of mediated settlement agreements in line with the procedure governing the recognition and enforcement of court judgments (Art 6).

([93]) Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013; OJ L 165/64.

([94]) Regulation (EU) No 524/2013 of the European Parliament and of the Council of 21 May 2013; OJ L 165/1.

([95]) Indeed, in the European Union they became a uniform benchmark applicable to all disputes to which the (Recast) Brussels Regulation applies.

([96]) Konstantinos D. Kerameus, 'Angleichung des Zivilprozeßrechts in Europa', (2002) 66 *RabelsZ* 1, 4–9.

([97]) For an account of legal culture see Roger Cotterell, *Comparative Law and Legal Culture*, Mathias Reimann and Reinhard Zimmermann (eds), *The Oxford Handbook of Comparative Law* (2018), Ch 25.

([98]) Oscar Chase, 'American "Exceptionalism" and Comparative Procedure', (2002) 50 *AJCL* 277, 289.

([99]) Alexis de Tocqueville, *Democracy in America* (orig 1835) (2000), 264.

([100]) De Tocqueville (n 99), 295.

([101]) Section II.3.

([102]) See Lipset (n 14), 270.

([103]) Robert A. Kagan, *Adversarial Legalism: The American Way of Law* (2001).

([104]) Kagan (n 103), 15.

([105]) Friedman (n 53), 396.

([106]) John H. Langbein, (1985) 52 *University of Chicago LR* 823 ff.

([107]) Herbert L. Bernstein, 'Whose Advantage After All?: A Comment on the Comparison of Civil Justice Systems', (1988) 21 *University of California at Davis LR* 587 ff.

([108]) Samuel R. Gross, 'The American Advantage: The Value of Inefficient Litigation', (1987) 85 *Michigan LR* 734 ff.

([109]) Those include Ronald J. Allen, Stefan Köck, Kurt Riechenberg, and D. Toby Rosen, 'The German Advantage in Civil Procedure: A Plea for More Details and Fewer Generalities in Comparative Scholarship', (1988) 82 *Northwestern University LR* 763; John Reitz, 'Why We Probably Cannot Adopt the German Advantage in Civil Procedure', (1990) 75 *Iowa LR* 987; and Ernst Stiefel and James Maxeiner, 'Civil Justice Reform in the United States—Opportunity for Learning from "Civilized" European Procedure instead of Continental Isolation', (1994) 42 *AJCL* 147 ff.

([110]) See eg Amalia D. Kessler, 'Our Inquisitorial Tradition: Equity Procedure, Due Process, and the Search for an Alternative to the Adversarial', (2005) 90 *Cornell LR* 1181 ff.

([111]) Adrian A. Zuckerman (ed), *Civil Justice in Crisis—Comparative Perspectives of Civil Procedure* (1999); Donald Campbell, 'The Sky is Falling (Again): Evaluating the Current Crisis in the Judiciary', (2013) 47 *New England Law Review.* 571.

([112]) Elisabetta Silvestri, *Italy: Civil Procedure in Crisis*, C. H. van Rhee and Yulin Fu (eds), Civil Litigation in China and Europe (2014) 235, 237.

([113]) See Zuckerman (n 111), 23.

([114]) See eg Federal Rules of Civil Procedure Rule 16(a)(5), which declares settlement to be one of the objectives of pre-trial conferences.

([115]) One study showed that about one-fifth of all claimants seeking legal representation were turned away by attorneys. Cost considerations and small sums in controversy were among the reasons for refusing to represent the claimants. See Deborah R. Hensler, M. Susan Marquis, Allan F. Abrahamse, Sandra H. Berry, Patricia A. Ebener, Elizabeth G. Lewis, E. Allan Lind, Robert J. MacCoun, Willard G. Manning, Jeannette A. Rogowski, and Mary E. Vaiana, *Compensation for Accidental Injuries in the United States, Rand The Institute for Civil Justice* (1991), 133; See Marie Gryphon, 'Assessing the Effects of a "Loser Pays" Rule on the American Legal System' (2011) 8 *Rutgers Journal of Law and Public Policy* 567, 584 ('the American rule bars court access for small but strong claims').

([116]) Two comprehensive studies take stock of these as well other factors and evaluate their impact on litigation dynamics in a multitude of legal systems. The studies even undertake the effort to define groups and compartmentalize cost/fee allocation regimes. See Mathias Reimann (ed), Cost and Fee Allocation in Civil Procedure—A Comparative Study (2012) and Christopher Hodges, Stefan Vogenauer, and Magdalena Tulibacka (eds), (2010). The Costs and Funding of Civil Litigation—A Comparative Perspective.

([117]) Sergio Chiarloni, 'Civil Justice: An Italian Perspective', in Zuckerman (n 111), 267; Elisabetta Silvestri, *Goals of Civil Justice When Nothing Works: The Case of Italy*, Alan Uzelac (ed), Goals of Civil Justice and Civil Procedure in Contemporary Judicial Systems (2014) 79, 100–01 ('the Italian legal aid schemes are so outdated and ineffective as to make the right to a fair trial just a chimera for a growing number of Italians').

([118]) Catherine Kessedjian, 'L'action en Justice des Associations de Consommateurs et d'Autres Organisations Représentatives d'Intérêts Collectifs en Europe', (1997) 33 *Rivista di Diritto Internationale Privato e Processuale* 281; Tiana Leia Russel, 'Exporting Class Actions to the European Union', (2010) 28 *Boston University International LJ* 141, 168.

([119]) Courtland H. Peterson and Joachim Zekoll, 'Mass Torts', (1994) 42 (Supp) *AJCL* 79, 108; Morris A. Ratner, 'Class Conflicts', (2017) 92 *Washington LR* 785, 846–7.

([120]) FRCP Rule 23(b)(3). Several state procedural codes are more generous, but the 2005 federal Class Action Fairness Act (CAFA) ensures that class action certification will increasingly be gauged by federal standards. The primary provisions of the Class Action Fairness Act are contained in 28 USC 1332(d).

([121]) Predominance is often lacking because questions of causation vary among individual victims and cannot be resolved on a class-wide basis. Furthermore, courts have denied the superiority of the class action device when individual plaintiffs seek high damage awards for personal injuries.

([122]) FRCP Rule 23(h).

([123]) FRCP Rule 23(e).

([124]) An overview of the status of group proceedings in 2003 is provided by Mathias Reimann, 'Liability for Defective Products at the Beginning of the 21st Century: Emergence of a Worldwide Standard?', (2003) 51 (Supp) *AJCL* 751, 819–22. For a more recent account, see Russel (n 118), 168–78.

([125]) § 14 LGR.

([126]) Janet Walker, 'Who's Afraid of U.S.-Style Class Actions?', (2012) 18 *Southwestern Journal of International Law* 509, 517 ("although only twelve actions have been commenced in the decade since its introduction, the SGPA has had considerable effect by increasing the number of claimants, improving the impact of litigation, and broadening access to justice").

([127]) Michael J. Madderra, 'The New Class Actions in Japan', (2014) 23 *Pacific Rim Law and Policy Journal* 795.

([128]) Christian Koller, *Civil Justice in Austrian-German Tradition*, Alan Uzelac (ed), *Goals of Civil Justice and Civil Procedure in Contemporary Judicial Systems* (2014) 35, 51–2.

([129]) Introduced by the Act on Collective Action of 1994.

([130]) Introduced by the Collective Settlement of Mass Damage Act of 2005.

([131]) Bart Krans, 'The Dutch Act on Collective Settlement of Mass Damages', (2014) 27 *Pacific McGeorge Global Business and Development LJ* 281.

([132]) Federal Court of Austalia Amendment Act 1991 (No. 181, 1991), inserting a new Part IVA on Representative Proceedings into the Federal Court of Australia Act 1976.

([133]) S. Stuart Clark and Christina Harris, 'Multi-plaintiff Litigation in Australia: A Comparative Perspective', (2001) 11 *Duke Journal of Comparative & International Law* 289; Vince Morabito and Jane Caruana, 'Can Class Action Regimes Operate Satisfactorily Without a Certification Device? Empirical Insights from the Federal Court of Australia', (2013) 61 *AJCL* 579.

([134]) For details see Antonio Gidi, 'Class Actions in Brazil—A Model for Civil Law Countries', (2003) 51 *AJCL* 311, 388–99; Teresa Arruda Alvim Wambier, 'Judicial Activism as Goals Setting— Civil Justice in Brazil', Alan Uzelac (ed), *Goals of Civil Justice and Civil Procedure in Contemporary Judicial Systems* (2014), 245, 247–50.

([135]) See Gidi (n 134), 392.

([136]) See Gidi (n 134), 394–95.

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