

FUNDAMENTAL PRINCIPLES AND RULES OF TRANSNATIONAL CIVIL PROCEEDINGS

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ABSTRACT: *The ALI / UNIDROIT Joint Project "Cross-Border Procedures and Principles" aims to combine the approaches of the continental and common law systems to judicial and extrajudicial cases in the commercial and civil fields. The overall purpose of drafting a "soft law" union of civil procedure rules under the continental and common law system was preceded by Marcel S. in 1994 in his innovative project in Europe based on the combination between the two systems and the experience respective of each of them. The principles of ALI / UNIDROIT provide a balanced distillation of best practices, especially in the area of cross-border trade justice issues. The difficulty of overall harmonization of the civil procedure lies precisely in the differences, but it should be noted that all civil procedural systems have their similarities. Reducing changes in legal systems is the harmonization of laws. Some of the similarities relate to rules of jurisdiction, notification and recognition of decisions. Rules for drafting a claim are more or less the same as regards parties, competencies, time and factual evaluation.*

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Fundamental principles and rules of transnational civil proceedings.

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The differences between the two systems are as follows:

- A lawyer in the continental system, like a lawyer in the common law system, has primarily the responsibility in the process of proving and articulating the legal concepts that should be part of the decision. However, there is a difference between the continental system itself in the manner in which the above-mentioned responsibility is exercised, and undoubtedly among the judges in each of the systems;
- The judgment in the continental system in many cases passes through a series of short, sometimes less than one hour hearing sessions, for the taking of evidence, which are handled in dossiers until a final process of analysis and decision-making. On the other hand, in the common law system, a preliminary hearing session (sometimes more than

one) is held and then a court hearing in which all the evidence will be taken and administered.

Reconsideration in the continental system relies on facts as far as the law;

- Judges in the continental system serve for a long period of time in the profession of judge while in the common-law system generally are elected from the ranks of the lawyer. So many judges in the continental system lack the work experience as a lawyer and this conveys its consequences.

However, differences are not just between the continental and common law systems, but also between the states belonging to the same system.

States generally tend to add rules, sub-rules to their internal procedural systems. This could result in more detailed and systematic civil procedural regulation. This tendency can only be balanced by reference to the generally recognized principles of civil procedure. In this way legal systems can approach each other by referring to "best policies".

In Europe, harmonization can be perceived at two levels:

- (i) regulating internal systems in such a way as to be fully aligned with procedural guarantees under Article 6 (1) of the ECHR
- (ii) regulations to ensure the European Union's approach to a number of specific institutions and specific procedural practices.

As stated above, ALI / UNIDROIT is not the first attempt to break the division between the continental and the common law systems in terms of civil procedural legislation, but it manages to identify the most common points between the two systems.

The basic principles according to ALI / UNIDROIT are as follows

- (i) The preparatory phase does not occupy much space, but refers mostly to the taking of security measures and safeguards in emergency cases (Article 8.2 of the Principles and Rule 17.2 of the Rules).
- (ii) The composition of the panel: it is required to consider independence, impartiality, professionalism and experience, equal treatment, legal notification, public hearings and open-air proceedings (articles 1, 3, 5 of the Principles and 3, I, 7, 10, 24 of the Rules).
- (iii) The judicial process is divided into three phases: the initial phase of filing searches and rejections; preparatory and final phase (Article 9 of the Principles).
- (iv) Making the Movement of the Court by the Parties (Article 10.1 of the Principles); jurisdiction is defined in Article 2 of the Principles and Article 4 of the Rules; the notice service is regulated by Article 5 of the Principles and Article 7 of the Rules; the merger and interference issue or the amicus curiae are governed by Articles 12 and 14 of the Principles and Articles 5 and 6 of the Rules.
- (v) The filing of searches and defense shall be governed by Article 11. 3 of the Principles and Articles 11, 12 and 13 of the Rules; increase / decrease of lawsuit (Article 10.4

of the Principles and Article 14 of the Rules); judgment in absentia and failure to protect (Article 15 of the Rules); dismissal of the lawsuit or indefinite lawsuits (Article 15.1 and 19 of the Rules).

- (vi) Administration of the case by the Court (Articles 7, 2, 9, 3, 11, 2, 14 and 17 of the Principles and Article 18 of the Rules); encouragement to use alternative means for resolving disputes (Article 24.2 of the Principles and Article 18.5 of the Rules); division of cases (Article 12.5 of the Principles and Article 5. 6 of the Rules).
- (vii) Sanctions against parties, lawyers and other persons who are not party to the proceedings (Article 5.1.15, 21.2 of the Principles and Article 35.2 of the Rules).
- (viii) Prepare evidence, including access to information regarding the right of the court to obtain evidence or obligation of institutions to issue documents and information (Article 9.3.9.4.16.18.19, 22 of the Principles and Articles 20, 21, 23, 25, 27, 28 of the Rules).
- (x) The opinion of the expert, whether in the case of a decision by the party himself, or in the case of a court-appointed expert (Article 22.4 of the Principles and Article 26 of the Rules).
- (xi) "Early Court Determinations", "Absence Judgment" and "Taking Security and Defense Measures" (Article 2, 3, 5, 8, 9, 3, 9, , 15 of the Principles and Articles 15, 17, 19, 36, 2 of the Rules).
- (xii) Hearing or obtaining evidence at the final stage of the judicial process (Article 19 of the Principles and Articles 29, 30 and 31 of the Rules, the obligation of the court to enforce the law (Article 22 of the principles, the reasoning of the judicial decision (Article 23 of the Principles and Article 31.2 of the Rules).
- (xiii) Res judicata (Article 28 of the Principles).
- (xiv) Cost Decision (Article 25 of the Principles and Rule 32 of the Rules); (Article 3. 3 of the Principles and Article 32. 9 of the Rules, expenses in case of settlement by agreement (Article 1 6 of the Rules).
- (xv) Appeal to a court decision (Article 27 of the Principles and Articles 33, 34 of the Rules).
- (xvi) Implementation of the Decision (Articles 26, 29 of the Principles and Rule 39 of the Rules).
- (xvii) Recognition of foreign judicial and arbitral decisions and international judicial cooperation (Articles 30, 31 of the Principles and Rule 36 of the Rules).

Basic Principles and Civil Procedure Rules will serve mainly in resolving trade disputes. Mainly these principles and rules will apply if a commercial or civil dispute between two persons belonging to different nationalities is settled, cases of disputes over a material object of movable or immovable property when the two parties to the trial were belong to different nationalities in cases where persons of different nationalities party to a contract have foreseen the settlement of disputes through international arbitration.

The principles of cross-border civil procedure, Article 1 clearly stipulate that these principles should be taken into account in both commercial and civil matters and may serve as a basis for undertaking future initiatives in the reform of civil proceedings. States that will have the will to implement these principles will make it possible by setting up an internal legal system or an international instrument. Disputes, which are the focus of the principle model, are mainly trade transactions between nationals of different states, or trade transactions carried out in one state by a national of another country which may include sales, loans, leases, investments, ownership, banks, insurance or other businesses or various financial transactions. In pursuance of these principles, an individual is considered to belong to the country in which he is a citizen, but also to his residence. While a legal person is considered to belong to the state in which it is registered or has its center.

In the case of lawsuits or parties between whom there are no such principles, the judge shall assess whether the model of principles and rules will apply. However, these principles do not apply without proper modification in the case of collective lawsuits. These principles also apply to cases of international arbitration, unless they conflict with the arbitration rules chosen by the parties to an agreement.

In any case, judges are independent from within and outside the exercise of their functions in dealing with the cases in which these principles and rules they are aware of.

Indeed, the model of the rules above is not clear enough as long as it is oriented towards trade dispute disputes, including various transactions or business scope, but on the other hand allows states to make use of these rules and in settling civil disputes in general. The rules shall be interpreted by reference to the basic principles of cross-border civil proceedings and shall not in any case be interpreted in accordance with the domestic law of the States which they apply as appropriate.

The judge, who will apply these rules, must present three features:

First: Article 3. 1 and 3. 2 of the Rules provides, inter alia, and competent specialized court, which will apply these rules.

Second: The judge must be competent in the commercial field. Mostly, the courts will have the trade section and deal with trade issues or cover transactions in the business field, referring, in any case, to territorial and subject matters.

Third, the judge must be efficient. Regardless of the domestic rules that the States have with regard to the composition of the panel, such as a single judge, three judges or a jury, the principle of independence and impartiality of a judge or a panel of judges who has the competence to resolve disputes type, which are subject to the rules in question. This court has an obligation to enforce orders as to the assistance of a court in another state, which is considering the matter of the case.

The principles that govern the model of the Rules of the Transnational Civil Procedure can be compared to the latest modern legislation of different states as well as to the European Convention on Human Rights as far as Article 6 1 is concerned. The rights of the parties to be tried by a competent independent and impartial tribunal are confirmed by Article 1.1 of the Model of the Principles of Civil Cross-Border Procedure, as well as in Article 6.1 of the ECHR. All legal systems require judges to be independent. However, in many systems there is no procedure in which a party during a dispute may seek exclusion of a judge due to his or her

disability. The exclusion of a judge must be done for strong reasons and should be done immediately; otherwise, through this right, parties may abuse at any stage of the process and use it as a reason to oppose procedures that are not in their favor. Judges are forbidden to communicate separately not only with the parties and with the lawyers of the parties, but also with other state officials who may be involved in the process.

CONCLUSIONS

Other legal instruments such as regulations and directives gave rise to the implementation of the provisions of the Basic Conventions, further going beyond the scope of this cooperation, other than civil and commercial.

Considering the fanaticism of the member states of Europe in protecting the "sovereignty" and the fixed rules set out in their national legislation as regards the procedure for the recognition and enforcement of judicial decisions, the ambition went further in creating the so-called "European executive title".

But there were other ambitions that were never accomplished or seemingly premature, such as the European Civil Procedure Code (Unique Law) or the ALI / UNIDROIT project on the fundamental principles of cross-border civil proceedings, which required the establishment of rules uniform of civil proceedings throughout the world.

ALI / UNIDROIT is the result of a world effort of lawyers of two systems to identify the fundamental principles on which a judicial process is being built in the case of cross-border trade disputes, but also civil. The basic principles of civil status are laid down on four axes, called civil justice trials: (i) regulation of access to court and justice, (ii) securing a fair trial, (iii) providing a timely and effective judicial process (iv) achieving fair and effective results.