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INTERNATIONAL INSTITUTE FOR THE UNIFICATION OF PRIVATE LAW
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JOINT AMERICAN LAW INSTITUTE / UNIDROIT WORKING GROUP
ON
PRINCIPLES AND RULES OF TRANSNATIONAL CIVIL PROCEDURE

Fundamental Principles of Transnational Civil Procedure: Remarks and Comments
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INTRODUCTORY REMARKS

A. Genesis of the Principles

A first draft of principles was discussed in Rome last year. The reporters made a second revised draft which changed and supplemented the text mainly on the basis of the contribution of members of the Unidroit working group. The most recent version of the ALI-draft No. 2, which was published in April 2001, is the excellent work of Geoffrey Hazard, Michele Taruffo and Antonio Gidi, who integrated many contributions of ALI-members and members of the ALI-working groups. An intensive discussion between the reporters was not possible because the draft had to be published before the annual meeting of ALI in May 2001. The following remarks intend to prepare the further discussion in Rome.

B. The Purpose of Principles and the Relation Between Principles and Rules as the Basic Problem of the Further Work

The basic problem of the further work is the purpose of the drafted principles. As an introductory chapter for a code of detailed rules they are now perhaps too long, though I suggest to strike out some paragraphs and to shorten the text. If we need only a first introductory chapter for a code about ten or fifteen more general principles would be enough. On the other side the very detailed code of rules may be a problem too. In my eyes a full code with many detailed rules has no good chance to be adopted or to be a real guideline for new codifications or for reforms of existing codes all over the world. It is true that the present draft of the code of rules has many continental European features and seeks often for compromises between different procedural cultures. But the present code cannot deny its American origin because the terminology, the structure and many more technical details are strongly influenced by patterns of the Federal Rules of Civil Procedure.

If we decide to draft a real code the need for regulations of many technical details is a consequence which may be not very helpful for a worldwide acceptance of our product. A code describes not only principles, it codifies the full organization of the ongoing proceeding; this detailed organization depends on many local circumstances, which can never be harmonized. A detailed code leaves no leeway for national features and demands for an exactly defined structure of the proceeding with too less tolerance for variations.

Another and in my eyes preferable way to go on is to take the drafted principles as a basis and to supplement them by the most important and remarkable rules of the drafted code. The results of the work on the code, which are in many aspects excellent and remarkable, would not be lost and we would have a good chance to draft principles which are not so detailed as the drafted code but more detailed than our present draft of principles.

1. Jurisdiction

- (1) Jurisdiction over foreign parties should be exercised within the limits of generally recognized bases of jurisdiction such as physical presence, domicile or residence, corporate presence, place where goods or services are provided or supplied, property located within the forum, place of tortious act or injury and consent.**
- (2) Jurisdiction over foreign parties is only permissible when and in so far as the connections between the forum state and the action in dispute are substantial and sufficient.**

Comment:

The proposed reference to recognized principles and conventions is not very helpful; the negotiations on a Hague Jurisdiction and Recognition Convention have nearly died. An enumeration of generally recognized bases of international jurisdiction should be supplemented by special rules describing the grounds for jurisdiction in a more detailed way. Subject matter jurisdiction should not be mentioned; it is a special American category (federal and state court jurisdiction etc.) and is often mixed up with questions of personal jurisdiction and conflict of laws. The differentiation between personal and in rem jurisdiction or jurisdiction over parties and over property seems to be also very Anglo-American. For the rest of the world property located in the forum state is a ground for – normally limited – personal jurisdiction.

2. Independence, Neutrality and Competence of the Court

Comment:

This principle seems to be well formulated. It is important that it avoids a requirement of professional judges because many judges in commercial courts are laymen judges and in France even the presiding judge is a layperson – despite the high quality of the judgments of French commercial courts.

3. Equality of the Parties and Right to Be Heard

Comment:

My recommendation is to strike out 3.2, 3.3 and 3.6.

The security deposit for costs by nondomiciliaries is not always an infringement of equality of the parties (3.2). If a foreign claimant sues the defendant in the forum of his or her domicile, the claimant can execute a favourable judgment, which grants the reimbursement of costs, in the forum state without any difficulties; if the claimant loses his or her case and the defendant is entitled to full reimbursement of costs, enforcement in a foreign country is

necessary and it could be that the foreign state will not recognize the title for reimbursement. Many European civil procedure laws want the claimant to bear the financial risks of his or her procedural attack, an idea which is strange to Americans because of the American rule of costs. Equality means that equal cases should be treated equally but also that different cases should be treated in a different way so that a fundamental rule against security deposits for costs could be an infringement of the principle of equality too. The text is not short and point and leaves leeway, but perhaps the problems of security deposits need more detailed rules; in my eyes it is not convincing to argue that the requirement of a security deposit should be a rare exception.

Venue problems (3.3) have no substantial significance in international cases. If for example a Japanese party sues a German party, German venue rules are no substantial elements of a fair procedure, because all courts in Germany are reasonably accessible to both parties and the same is true for all countries all over the world.

Justice within a reasonable time (3.6) is a fundamental principle which should not only be mentioned in connection with the right to be heard or the court's responsibility to manage the litigation (9.1). I propose to add a special "principle of justice within reasonable time". Speedy justice includes duties of the court and obligations of the parties. The right of amendment is an exception to this important principle and should be mentioned here (see comment 12).

My proposal:

(new) Justice within a Reasonable Time

- (1) The court and the parties cooperate to dispose of the dispute within reasonable time.**
- (2) Procedural rules or court orders may establish time schedules for the progress of the case. Sanctions will be imposed on parties who do not comply with the time limits.**
- (3) A party should have the right to amend statements and contentions of law if the party shows a good reason to do so and if the right of amendment is necessary in the interest of justice.**
- (4) The court may grant accelerated justice by provisional measures.**

4. (old) Right to Assistance of Counsel

No comment.

5. (old) Due Notice

No comment.

6. (old) Choice of Law

Comment:

We should strike out this principle. In most cases a choice of procedural law is not possible; civil procedure in state courts is governed by the *lex fori*. The choice of substantive law is no procedural question and is governed by national or contractual rules of conflict of laws. “Generally recognized principles” are not existing or unclear.

7. Structure of the Proceeding

- (1) **The proceeding should be organized into three stages: pleading phase, instruction phase (“pre-trial” in common law terminology), and final hearing (“trial” in common law terminology).**
- (2) **In the instruction phase the court should consider preliminary objections and substantive legal contentions, review the availability of evidence and possibilities for disclosure and discovery, and establish schedules for further proceedings. The court may also order the taking of evidence.**
- (3) **In the final hearing the parties and their counsels give their final arguments. Evidence not taken in the instruction phase should be presented in a concentrated sequence.**

Comment:

It could be discussed whether the structure of the proceeding is really a principle. But I think that it is necessary to say – in principle – something about the basic organization of the proceeding.

It is true that nearly all civil procedure laws know the described stages. The purpose and content of the first stage (pleading phase) is, generally, the same all over the world. The description of the second and third stage is completely correct for the Anglo-American and German civil procedure. The Romanic procedural tradition (e.g. France, Italy) stands for the taking of all evidence within the “instruction phase”, the plenary or final hearing is mainly dedicated to the final arguments of the parties, the taking of evidence in this final stage is a very rare exception. In many countries it is mostly the single judge who hears and decides the case and it is not sure whether a panel with three judges will be accepted for international disputes so that the term “plenary hearing” seems to be misleading. The proposed version is an attempt to avoid these weak points and to be more open.

8. Party Initiation of the Proceeding and Control of Its Scope

No comment.

9. Responsibility of the Court for Direction of the Proceeding

No comment.

10. Judicial Powers of Control

No comment.

11. Responsibility of the Parties

No comment.

12. Right of Amendment

My recommendation is to strike out this principle.

Comment:

The right of amendment is in some aspects an exception from the principle of justice within a reasonable time and the obligation to comply with time schedules established by rules or judicial orders. In my opinion it would be a serious mistake to describe a right of amendment as a principle and to omit the more fundamental principle of speedy justice, to which the right of amendment is an exception. I suggest to strike out the special right of amendment and to mention it in principle 4 (new) which deals with justice in reasonable time.

13. Access and Right To Evidence and Duties to Disclose Evidence

13.1 The court and the parties have, generally, unrestricted access to all relevant evidence and information.

Admissible means of evidence are the testimony of witnesses and parties, testimony by experts, documents, inspection of things and entry upon land.

Comment:

There are two possibilities to initiate the taking of evidence: the parties may present their evidence (11.3) or the court may take evidence on its own motion (19.4 old or 19.3 new). Unrestricted access to all evidence should therefore be granted for the parties and the court – perhaps a strange idea for lawyers accustomed to Anglo-American civil procedure, where the court initiated taking of evidence is a rare exception. It is not necessary to mention privileges because of the following special principle (14). But it is helpful to give an enumeration of admissible means of evidence. Party statements with evidentiary effect are a written form of party testimony (16.2) and should not be specially mentioned.

13.2 The parties have the right to give relevant evidence by all means of evidence and should have fair and reasonable opportunity for adequate presentation.

Comment:

The right to evidence includes all means of evidence. In my opinion it could be misleading to mention party statements or expertises and to say nothing on the other means of evidence.

13.3-13.5

No comment.

13.6 The court and the parties should have reasonable access to admissible and strictly relevant evidence from third parties.

Comment:

It is important to describe the obligation of third parties to cooperate. But this obligation should be more limited than proposed in the ALI-draft. In most countries of the world third parties are only obliged to cooperate for the taking of evidence when the court orders to do so. They have normally no obligation to give discovery when it is the purpose of discovery proceedings to prepare only the taking of evidence in the court. Preparatory discovery by third parties is probably not acceptable for many countries. Even the English civil procedure is reluctant to establish for third parties in the pre-trial stage a general duty to cooperate, it is a rather limited obligation in special cases. Voluntary cooperation of third parties is undoubtedly always permissible. When the court takes evidence in the instruction stage, full cooperation of third parties should be mandatory.

13.7

No comment.

14. Evidentiary Privileges and Immunities

14.1 The court should take into consideration reasonable grounds for a party's failure to produce evidence, such as protection from self-incrimination, the protection of confidentiality of professional communications with legal counsel, the protection of privacy or the protection of confidentiality in the interest of third parties (persons).

14.2 The court should give reasonable effect to privileges of third parties (persons), such as privilege against self-incrimination, privileges protecting the confidentiality of professional communications, privileges of spouses and family members.

Comment:

It is a characteristic feature of Anglo-American civil procedure that parties and third persons have to give testimony under the same rules and that a failure to produce evidence can be punished by contempt sanctions. An important consequence of the identity of

enforcement measures and sanctions for parties and third persons is the identity of privileges, which are very rare exceptions.

The rest of the world, in principle, does not provide for direct sanctions against parties who refuse to give testimony or to produce documents. The court draws adverse inferences from a party's refusal and through lack of direct sanctions there is no need for real party privileges. A party's ground for the refusal to produce evidence is taken into consideration when the court draws its inferences, but those grounds are never hard privileges. Even the protection from self-incrimination or the protection of communications with legal counsel are no real privileges of the parties to litigation. If for example a party argues that the production of evidence could create a danger of self-incrimination, the court will normally draw negative inferences. A real hard privilege of parties seems not to be acceptable for the rest of the world. Therefore we should prefer a more gentle and soft wording on party privileges.

The enumerated privileges of third persons, for whom the litigation between foreign persons should not be too burdensome, are very common and usual all over the world. The Anglo-American reluctance is a consequence of the identity of party and third person testimony. But even American courts take these privileges into consideration and decide on a case-by-case basis or on the basis of different state law. It would be a good compromise to enumerate the most important privileges and to give them "reasonable" effect, which leaves some leeway for the judge.

It is necessary to mention privileges as fundamental principles because they are deeply rooted in the fundamental values of our common legal culture.

15. Joinder of Parties and Claims

- (1) The parties are, in principle, free to join claims in a single law suit.**
- (2) Third parties that have an interest substantially connected with the claims or defences of the original parties should have the opportunity to join in the original litigation.**
- (3) The court may order the joinder or separation of claims for more efficient processing.**

Comment:

Civil procedure laws know many forms of joinder of parties or claims (party joinder, claim joinder, counterclaims, cross-claims, impleader, intervention, etc.). It would be not convincing to describe only the right of third parties to join in a litigation. The freedom of the original parties to join claims is a fundamental principle of modern civil procedure and this principle is supplemented by the right of third parties to participate in the original litigation. My suggestion is to give no detailed description of the rights and obligations of third parties. The text of the ALI-draft seems to be far too broad; a possible limitation of the rights and obligations of third parties depends on the exact form of joinder.

The court's possibilities to join or separate claims for more efficient processing is a nearly uncontested and worldwide accepted power which is a counterweight to the freedom of the parties and third parties; it is necessary to mention this power of the court as a limitation of the freedom of joinder in the interest of efficient proceedings.

16. Oral and Written Presentation

- (1) **Pleadings, motions and legal argument should be presented in writing, but the parties should have the right to present oral argument on important substantive and procedural issues.**
- (2) **Testimony of witnesses, parties, and experts should be received orally, except as the parties, with the consent of the court, may otherwise agree.**
- (3) **Oral testimony may be limited to supplemental questioning following presentation in written form of a witness's principal testimony or of an expert's written report.**

Comment:

The order of the rules on oral and written presentation should be adapted to the order of the proceeding. Principle 16.4 of the ALI-draft is deleted; it establishes a very broad *amicus curiae* practice as a principle and increases the possibility of foreign influence on private dispute which could be a very strong argument to avoid disputes in state courts and to prefer arbitration.

17. Public Hearings

- (1) **Hearings should be open to the public.**
- (2) **The court may order that a part or all of a hearing may be closed when the protection of confidentiality is necessary in the interest of justice.**

Comment:

The public hearing is a fundamental human right (Art. 6 European Convention of Human Rights). An extension of the principle of public hearing to public records will not be accepted in many countries of the world which regard this intensification as an infringement of the right of privacy. Public records of court proceedings are not seldom and important motivation for arbitration clauses. Publicity should be extended to all hearings; it is – for example – not convincing that witness examinations in the main hearing are public but not examinations in special hearings.

Exceptions from publicity of hearings should not be limited to cases where there is a real “right” of confidentiality. It should be enough that the protection of confidentiality is in the interest of justice.

19. Burden and Standard of Proof

- (1) **It is the burden of the parties to prove the facts necessary to the success of their respective cases.**
- (2) **Asserted facts are proved when the court is convinced of their truth without reasonable doubts.**

Comment:

The distribution of the burden of proof should be described in a more general way than in the ALI-draft. The text of the ALI-draft does not take into consideration the burden of proof for replications to affirmative defences or the defendant's duplicatio to the plaintiff's answer or the shifting of the burden of proof, etc.

It is not very convincing to refer to the standard of proof of the forum law. In practice the difference between the Anglo-American "preponderance of evidence" and the continental "full conviction" of the court is not great. The proposed formulation is a compromise between both concepts.

19. Judicial Responsibility for Determinations of Law and Facts

19.1 No comment.

19.2 The court may invite the parties to amend contentions of fact and to give further and better evidence.

Comment:

Continental civil procedure does not allow, in principle, the court to rely on facts not advanced by the parties. Continental civil procedure is not inquisitorial, and therefore the text of the ALI-draft is too broad for continental and Anglo-American understanding of judicial responsibility. It is only the duty of the judge to give hints and feedback in case of insufficient assertion of facts or in case of a lack of evidence.

19.3 The court may order the taking of evidence on motion of the parties or on its own motion.

Comment:

The text is the same as in the ALI-draft, but the power of the court to take evidence by its own motion should be described after its duty to give hints in case of insufficient evidence. The court has the choice to give a hint or to order directly the taking of evidence, when it knows means of evidence from the records or the content of the hearings.

19.4 The court should determine factual issues according to the principle of free evaluation on the basis of evidence received in the proceeding.

Comment:

The text is the same as in the ALI-draft under 19.6.

19.5 The court may delegate the taking of evidence to one of its members or, in case of necessity, to a suitable delegate.

Comment:

The text is nearly the same as in the ALI-draft 19.3. The “delegation” of decisions of issues of law should not be mentioned here. It is a question of the composition of the court whether a single judge could decide issues of law and give summary judgments, etc.

19.6 The final hearing should be held before the judge or judges who are to give the judgment.

Comment:

Same text as in the ALI-draft; but “main hearing” is replaced by “final hearing” (see 7(3)).

The suggestion is to strike out 19.5, 19.7, 19.8 of the ALI-draft.

Comment:

19.5 is only a repetition of 13.1 and therefore not necessary.

19.7 is in some aspects a repetition of 9.2 and 9.3 and therefore not necessary. In my opinion it is far too broad because the court should have no power to limit relevant evidence.

19.8 is not necessary. 13.2 describes the right of the parties to give relevant evidence and 19.3 the taking of evidence on the courts on motion. Special rules for court experts are not necessary and the exclusion of the testimony of a party’s expert is normally a clear infringement of the right to give evidence described under 13.2. Our principles should not reproduce the curious English discussion on single joint experts and experts of parties.

20. Decision and Reasoned Explanation

No comment.

21. Settlement

No comment.

22. Costs

No comment.

23. Finality and Enforceability

- (1) **Subject to the right of appeal, a judgment should be final.**
- (2) **Final judgments should be immediately enforceable. In case of opportunity of appellate review an order for stay of execution or security deposits may protect the obligor from unjustified loss.**

Comment:

The text is similar to the ALI-draft. Immediate enforceability without a security deposit or stay in case of opportunity of appellate review would be too rigid and dangerous.

24. Appeal

- (1) No comment.
- (2) **The right to appellate review should be limited to claims, defences, counterclaims, and evidence adduced in the first instance. The court may permit the assertion of new facts and the presentation of new evidence when it is necessary in the interest of justice.**

Comment:

The limitation of the appellate review in the ALI-text is too strict. The proposed text is a compromise between procedural cultures which know only appeals on law and those which practice appeal on facts and law.