

Comparative Civil Procedure

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RESEARCH HANDBOOKS IN COMPARATIVE LAW
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Introduction – comparative civil procedure: power, authority and culture in dispute resolution

Margaret Y.K. Woo and Cornelis Hendrik van Rhee

As observed by C.J. Hamson, legal procedure is:

a ... ritual of extreme social significance. If we can appreciate the meaning of this ritual in the case of our own and even one other community, we obtain a remarkable insight into the fundamental and largely unformulated beliefs accepted by, and acceptable to, these societies; we begin to understand their collective and perhaps contrasted social sense of what is just and fair.¹

Every society has disputes. With disputes comes a need for dispute resolution. Foundational to resolving disputes are the rules delineating how to decide such disputes. Often, it is as much the process of dispute resolution as the resolution itself that legitimizes the outcome. Procedure's perceived fairness is critical to the acceptance of outcome, even when the outcome may be adverse to the disputant's interest.² Decisions produced using procedures promulgated in advance of disputes are said to be fair since arguably it takes the particular and the personal out of the equation. Indeed, procedural law, or procedural justice, acquires its legitimacy precisely from its claim of neutrality, rationality and ability to curb individual and political discretion.

But we know perceptions of fairness and rationality, and in turn, civil procedure rules and their implementation are often wedded to the political and social system from which they derive. Like substantive law, procedural law and the process of disputing can be 'cultural behavior, informed by participants' moral views about how to fight'.³ Disputing and the process of dispute resolution unveil 'the meaning participants attach to going to court, [as well as] social practices that indicate when and how to escalate disputes to a public forum'.⁴ Legal procedure is then not simply the practical way of enforcing substantive rights. Legal procedure reflects the collective sense of justice in society.⁵ Theories of justice are embedded in legal procedure ranging from notions of contractual justice to conciliatory justice to adjudicatory justice.

This book examines civil procedure rules from a comparative perspective – that is, the rules that dictate how a civil dispute is initiated, processed, decided and enforced in a court of law.

¹ Charles John Hamson, *In Court in Two Countries: Civil Procedure in England and France*, THE TIMES OF LONDON, November 15, 1949.

² John Thibaut & Laurens Walker, *A Theory of Procedure*, 66 CALIF. L. REV. 541 (1978); E. ALLAN LIND & TOM R. TYLER, *THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE* (1988); OSCAR CHASE, *LAW, CULTURE AND RITUAL: DISPUTING SYSTEMS IN CROSS-CULTURAL CONTEXT 1 et seq.* (2005).

³ *Ibid.*

⁴ Sally E. Merry, *Disputing without Culture*, 100 HARVARD L. REV. 2057, 2063 (1987).

⁵ LOÏC CADIET, JACQUES NORMAND & SORAYA AMRANI MEKKI, *THÉORIE GÉNÉRALE DU PROCÈS esp. Part I*, 45 *et seq.*: 'Les sens de la justice' (2nd edn. 2013).

2 Comparative civil procedure

Where the administration of justice is often less a matter of deciphering an objective truth than a decision made on legal facts⁶ determining who, what, where and how these legal facts are fashioned from a messy dispute is the crux of civil procedure. In examining civil procedure comparatively, this book fills the gap related to our understanding of the process of resolving civil disputes, disputes constituting a large part of claims heard by courts around the world.⁷

Ultimately, this book acknowledges that almost all procedural systems have rules governing how a dispute is to be litigated and resolved. Professor Dworkin said it well at the beginning of *Principle, Policy, Procedure*: ‘Nothing is of more immediate practical importance to a lawyer than the rules that govern his own strategies and maneuvers; and nothing is more productive of deep and philosophical puzzles than the question of what those rules should be.’⁸ These rules include the organization of the civil courts, the extent of the court’s jurisdiction and the independence of the decision-maker. They also include comparable rules governing the formulation of claims, and the relative responsibility of the various players in the investigation of the claim and in the structuring of the lawsuit. Finally, every system has rules determining the finality and the enforcement of decisions, recognizing that constant relitigation of issues would undermine legitimacy for the legal system as a whole.⁹ The structure of the book follows these features accordingly.

Several themes underlie this book and should be kept in mind when reading the various chapters. First, despite the claim to neutrality, civil procedure rules are rules distributing power. In regulating how a dispute is brought in court, how it is investigated, how it is argued, how it is decided and how the decision is enforced, civil procedure rules distribute power amongst the actors involved – parties, the judges, the lawyers and the political authorities that house the courts.¹⁰ As a driving force behind the civil justice system, procedure acts as a lever of power.

At a basic level, civil procedure rules distribute power among the players (the judge, the parties and their lawyers) in determining who gets to do what in a lawsuit. By turning disputes over to a neutral third party for resolution, the litigating parties give up their control of the dispute in exchange for peace and resolution. In some instances, these rules restore power disparities; in others they preserve existing power hierarchies.¹¹ How the control of the dispute is allocated amongst the players tells volumes about whom the system trusts and the purposes litigation serve.

At a systemic level, establishing who gets to make these rules and who gets to enforce them involves a delicate allocation of powers among different branches of government (parliament,

⁶ CLIFFORD GEERTZ, *LOCAL KNOWLEDGE* 173 (1983).

⁷ It must be noted that comparative civil procedure has been considerably expanded during the last three decades, whereas it was not established as a self-standing branch of comparative law for a long time, OSCAR CHASE & HELEN HERSHKOFF (EDS.), *CIVIL LITIGATION IN COMPARATIVE CONTEXT* (2nd edn. 2017); COLIN B. PICKER & GUY I. SEIDMAN (EDS.), *THE DYNAMISM OF CIVIL PROCEDURE – GLOBAL TRENDS AND DEVELOPMENTS* (2015).

⁸ RONALD DWORKIN, *A MATTER OF PRINCIPLE*, at 72 (1982).

⁹ Geoffrey C. Hazard, *Federal Practice and Procedure. Symposium Honoring Charles Alan Wright: From Whom No Secrets are Hid*, 76 *TEX. L. REV.* 1665, 1670 (1998).

¹⁰ PAUL OBERHAMMER (ED.), *RICHTERBILD UND RECHTSREFORM IN MITTELEUROPA* (2001).

¹¹ This is particularly true in consumers’ complaint proceedings organized and controlled by businesses.

government agencies or the courts themselves). In reading these chapters, one must keep in mind power distribution and how different societies allocate such power. Considering these possible similarities or differences, a comparative study of even just one system's civil procedure rules other than our own would add vastly to our understanding of how legal norms are established and enforced, and of the role of courts and legal systems in society.¹²

A second theme to consider is whether civil procedure itself stands as a right on its own.¹³ An outcome-based theory behind civil procedure rules would justify reforms based purely on utilitarian principles. In other words, if civil procedure rules are only to ensure an accurate outcome – that is an outcome that enforces the substantive law – then, reforms that would maximize accuracy using the least amount of costs, would always carry the day. But if, as Ronald Dworkin has argued, procedure itself is related to the foundational values of human dignity, liberty and equality, then we would have to consider under what circumstances procedural rights of an individual could trump utilitarian principles of the greatest good for the greatest number.¹⁴

Some scholars have argued that a right to participate is required to respect the dignity of those who are bound or otherwise seriously affected by a decision, and civil procedure must ensure such right. Still other scholars have argued that participation is essential to the legitimacy of adjudication as a source of binding judgments, just as participation is essential to the legitimacy of legislation and other government action in a liberal democracy.¹⁵ If indeed, there is an inherent right to procedure (such as in preserving participation and dignity), some aspects of procedure cannot be short-changed in the name of efficiency and social wellbeing.

If procedure is a fundamental right, what are the parameters of this right and how do countries ensure such right? Is it through a country's constitution and/or by reference to international norms? Or is it strictly a statutory norm granted by the state (overriding principles, overarching principles, *principes directeurs*)?¹⁶ The idea of procedure is often captured in state constitutions in its most general terms. For example, a right to a fair trial is embedded in almost all national constitutions as well as codified in, amongst others, Article 10 of the 1948 Universal Declaration of Human Rights and Article 6 of the European Convention on Human Rights. In the US, procedure is incorporated in the US constitution under the 'due process' clause of the 14th Amendment. Other countries, as for example European countries, have also recognized the value of procedure and have incorporated such a right in their constitutions, often in the form of a right of access to justice. Mostly, however, the details of such a right are defined by civil procedure rules that are subconstitutional.

¹² For example, in some legal systems, the courts have greater responsibility to oversee the litigation than the parties. ALAN UZELAC & C.H. VAN RHEE (EDS.), *PUBLIC AND PRIVATE JUSTICE – DISPUTE RESOLUTION IN MODERN SOCIETIES* (2007).

¹³ Robert G. Bone, *Procedure, Participation, Rights*, 90 BOSTON UNIVERSITY LAW REVIEW 1011 (2009).

¹⁴ RONALD DWORKIN, *A MATTER OF PRINCIPLE* 84–6 (1982).

¹⁵ Jerry Mashaw, *Administrative Due Process: The Quest for a Dignitary Theory*, 61 B.U.L. REV. 885 (1981).

¹⁶ In Europe, the case law of the European Court of Human Rights to Art. 6 ECHR has shaped the constitutionalization of civil procedure, cf. ALAN UZELAC & C.H. VAN RHEE (EDS.), *REVISITING PROCEDURAL HUMAN RIGHTS* (2017).

More importantly, what is the parameter of this right? For example, how should a hearing be structured to ensure that all relevant parties' voices are heard?¹⁷ In the US, 'due process' in the civil context is limited to the concept of 'notice and an opportunity to be heard' with the notice and opportunity to be heard conscribed and balanced by consideration of the particular context. Most often, due process includes the right to file a complaint, be notified of a lawsuit brought against you, and the right to be heard in the sense of presenting evidence and making legal arguments.

Defining the parameters of procedure as a fundamental right can further become a relying cry for federalization. The 'due process' clause of the US constitution, for example, served to support the expansion of federal governmental powers. At its core, procedure as a fundamental right will have greater authority to contest procedural reforms based primarily on utilitarian principles, and serve as a staunch weapon to redistribute authority. High costs of procedure would not necessarily always be sufficient for limiting procedure. But admittedly, in all countries, procedure as a basic right will inevitably be tempered by considerations of cost and efficiency.

A third theme to consider is whether procedure serves purposes other than to enforce substantive law. Some societies see civil litigation as simply a dispute resolution method between individuals. Others, such as China and Japan, see it as one way of preserving social harmony. Yet still other societies such as the US see procedure as related to the concept of 'rule of law,' that is, as protection of the individual against abusive governments. To the extent that procedure rules are understood to operate beyond specific time and place and to be binding even on the political authorities that enacted the law, procedural rules are part and parcel of a democratic government. According to Hayek, the rule of law means that the government in all its actions is bound by rules announced and fixed beforehand – rules that make it possible with fair certainty to foresee how the state will use its coercive powers in a given circumstance.¹⁸

Indeed, some nations see the role of litigation as limited to resolving individual disputes, other nations carry the view that litigation can serve to restructure broader social norms and is an important protector of democracy.¹⁹ Civil procedure rules, such as the ones regulating who is best placed to take charge of a lawsuit – the disputants, the lawyers or the judges – or how easy it is to file a complaint, or whether there are special rules when state interests are involved, will vary accordingly. Some systems will give greater authority to state actors such as the judiciary, while others will give greater power to individual litigants and their representatives. Where a country stands in this spectrum is often a product of historical, political and social forces, which in turn determine how civil litigation rules are configured.

Of course, ever present in the study of comparative law is the tension between global norms with local legal values, between the task of explaining differences with the goal of finding similarities, and the oscillation between legal harmonization and rising nationalism.²⁰ Today's globalization may mean that domestic law is responding more to top-down pressures of

¹⁷ Remo Caponi, *Transnational Litigation and Elements of Fair Trial*, in *PROCEDURAL JUSTICE* 493 *et seq.* (Peter Gottwald & Burkhard Hess eds., 2014).

¹⁸ FREDERICK A. HAYEK, *ROAD TO SERFDOM* 74 (1944).

¹⁹ Cf. OTHMAR JAUERNIG & BURKHARD HESS, *ZIVILPROZESSRECHT* § 1, paras 11 *et seq.* (30th edn. 2011).

²⁰ Margaret Woo, *Comparative Law – A Plurality of Methods*, in *APPROACH TO PROCEDURAL LAW* 47, 49 *et seq.* (Loïc Cadiet, Burkhard Hess & Marta Requejo Isidro eds., 2017).

international institutions than from cross fertilization between nations. Final chapters in this book will examine the relationship between international organizations and institutions with domestic legal norms. Importantly, how has the growth of transnational commerce impacted the changes in civil litigation?²¹

Adjacent to these questions is the inquiry on whether procedural laws have ‘converged’ and what kinds of legal transplantation have taken place in the recent years. Maximo Langer, in his article ‘From Legal Transplantation to Legal Translation’ argues that ‘legal translation’ may be a more accurate term to describe the circulation of legal ideas between legal systems.²² Rather than the ‘cut and paste’ implied by legal transplantation, legal translation recognizes cultural differences and the importance of adaptation in this process. In an era of globalization and transnational conflicts, there is a need for legal translation and adaptation as well as harmonization of domestic procedural rules.

We need to understand better how this process of legal translation has operated and how judges will cooperate in these ‘equal but distinct legal spheres, to the presumption of an integrated global legal system’.²³ Indeed, many of the legal systems discussed in this book are themselves the product of legal transplantation (legal translations) in procedural law. Notably, in recent years, the European Union has harmonized otherwise conflicting or inconsistent procedural rules among its member states. And global movements such as alternative dispute resolution, spread of commercial arbitration courts and collective litigation have infiltrated domestic legal systems. Any effort to understand civil procedure must acknowledge these interactions between global movements, legal translation and the assertion of local culture and national sovereignty.

The volume thus has five parts, beginning with Part I focusing on foundational issues such as the relevance of comparative methodology and the historical studies of civil procedure. This section will also look at the fundamental principles said to underlie civil procedure. Part II focuses on the beginning of the lawsuit from how jurisdiction distributes power amongst the courts to what rules regulate who and what can come into court. Part III centers on how a litigation is managed and/or processed through the court system including the shaping of the lawsuit such as joinder rules, how evidence is accessed, which substantive laws to apply and the various roles of lawyers, parties and the courts. Part IV deals with the decision-makers, and how decisions are enforced and what their effects are. Finally, in Part V, the volume looks at future trends, from digitization of court process to convergence of civil and arbitral procedures, to new transnational courts, to finally, how the court process has integrated the traditional method of settlement and conciliation.

²¹ Mara Requejo Isidro, *International Commercial Courts*, MPI Lux Research Paper 2/2019, ssrn.com/abstract=3327166 (accessed June 5, 2024).

²² Maximo Unger, *From Legal Transplantation to Legal Translation: The Globalization of Plea Bargaining and the Americanization Thesis in Criminal Procedure*, 45 HARVARD INTERNATIONAL LAW JOURNAL 1 (2004).

²³ Anne-Marie Slaughter, *Judicial Globalization*, 40 VIRGINIA J. INT’L L. 1115 (2000).

PART I: COMPARATIVE LAW AND FUNDAMENTAL PRINCIPLES

The volume opens with a rich discussion by Alan Uzelac on the trajectory of comparative civil procedure, noting that ‘while comparative law dates back to the 16th century, the systematic scholarly and academic study of various national civil justice systems is essentially the product of the late twentieth century’. Beginning with initial singular explorations and thick descriptions of national procedural laws, the discipline of comparative civil procedure has moved from the ‘great divide’²⁴ of common and civil law systems (with their binaries of adversarial/inquisitorial; orality/writing; immediacy/mediacy; publicity/privacy) to a focus on ‘mixed jurisdictions’ whose historical origins combined various sources. Comparative law methodology for civil procedure also developed from historical and evolutionist approaches to prominent alternative typologies such as that introduced by Mirjan Damaška’s matching judicial proceedings and their purpose within particular state organizations (conflict resolution or implementation of state policies).

Professor Uzelac notes that comparative civil procedure remains relevant in the twentieth century as procedural scholarship strives to find singular guiding principles and the possibility of harmonization and unification of procedural systems, resulting in projects such as the ELI/UNIDROIT Model European Rules of Civil Procedure. Most recently, comparative civil procedure has moved to the transnational arena with studies that focus on quantitative data, inspired by technology, and influenced by global and international ‘soft’ norms.

In his chapter, Cornelis Hendrik van Rhee discusses the birth and development of modern European civil procedure from the late 11th century until the 19th century. His conclusion is that the Romano-canonical model of civil procedure, which served as the basis of civil procedural law in many parts of Europe, was not adopted *in toto*, but in a piecemeal manner with procedural styles characteristic for specific courts as a result. The codification of civil procedure was not complete until the end of the 19th century with such national models as the French 1806 *Code de procédure civile*, and the 1895 Austrian *Zivilprozessordnung*. From this history, one can trace the origins of present-day characteristics such as concentration and judicial case management, and the emergence of the principle of cooperation as a fundamental procedural principle.

An economic and outcome-based theory of procedural rules on how to litigate is more likely to be driven by constraints of costs and efficiency. John Sorabji and Hector Cao in their chapter ‘Principles of Civil Procedure’ examine Jeremy Bentham’s three-part utilitarian typology as a way of understanding fundamental principles of civil procedure such as transparency and accuracy, economy and efficiency, proportionality and settlement. Where Sorabji applies the typology to the Anglo common law system, Hector Cao, meanwhile, applies the same typology to the vastly different context of Chinese civil procedure. Whether this is a testament to global forces, or the conclusion that all procedural systems follow the same fundamental principles, their conclusions demonstrate that concerns of efficiency and accuracy certainly appear to be at the forefront of procedural reforms around the world.

In contrast, Tom R. Tyler focuses his chapter on the psychology of civil disputes. Rather than the economic view of the individual as rational actors who are motivated by anticipated

²⁴ See NICOLETTA BERSIER ET AL. (EDS.), *COMMON LAW – CIVIL LAW: THE GREAT DIVIDE?* (2022).

gains and losses, Tyler points out that litigants sue for non-economic reasons and that often, procedure drives disputants' acceptance of decisions. Indeed, Tyler challenges the instrumental perspective and the assumption that litigation cost and delay in case resolution drive public reactions to the legal system. Economic perspectives, Tyler points out, do not take into account the psychology of disputes and the importance of procedure to disputants' acceptance of decisions to resolve the dispute.

Counterpoised to the outcome-based theory of procedure, one that is driven solely by efficiency and accuracy, is a chapter by Xandra Kramer, Carlota Ucin and Adriani Dori, 'Challenges to Access to Civil Justice in Europe'. In their chapter, Kramer et al. address the importance of procedure as a human right and as an important component to the rule of law. Procedure ensures access to justice, and access to justice is now recognized in the Universal Declaration of Human Rights, the European Convention on Human Rights as well as in many state constitutions. Access to justice encompasses different rights, including the right to a fair and public hearing by an independent tribunal, effective and equal access to court, legal counsel and legal aid.

Importantly, their chapter examines the above-mentioned developments and how access to justice, conceived as a human right, can and has played out in EU policy and legislation. Additionally, Kramer et al. note that recent privatization has meant a new role for the state, and a new definition of access to justice with private actors and the development of private means of dispute resolution such as arbitration, mediation and other forms of alternative dispute resolution (ADR) methods. All these changes have led to a redefinition of the content of access to justice, including new forms of procedure such as collective actions, special procedure for certain kinds of cases and specialized courts such as international commercial courts.

PART II: BEGINNING OF THE LAWSUIT

The first issue to be addressed in any litigation is the jurisdiction of the court to hear and to adjudicate the case.²⁵ Courts are authorized, and simultaneously constrained, by jurisdictional rules that prescribe when a court can assert power over a person or property in adjudicating a civil dispute. The organization of the courts as well their jurisdictional rules delicately balance the sovereignty of the state, the power of the court and the right of the individual against state's infringement. Rules on jurisdiction are often further complemented by rules on venue distributing cases geographically within a particular court system. A related topic addresses parallel litigation and rules like pendency, *forum non conveniens* and the possibility of transferring cases to other courts.

Scott Dodson and Sebastian Spinei in their chapter 'Judicial Jurisdiction and Competence' compare jurisdiction allocation focusing on the longstanding distinctions between civil law and common law systems. They examine both *vertical structure* allocations among courts at different levels, such as between first-instance (trial) and second-instance (appellate) courts as well as *horizontal structure* which allocates authority among courts at the same hierarchical level. Some considerations in the latter instance are subject matter specializations that can gen-

²⁵ Different concepts of jurisdiction have been largely explored, cf. Ralf Michaels, *Two Paradigms of Jurisdiction*, 27 MICHIGAN J. INT'L L. 1003 (2006).

erate more efficient and accurate results and geographic restrictions that ensure proceedings are kept close to where the parties, witnesses and evidence are located, and where the court sits in a locality with a connection to and an interest in the case.

Ultimately, Dodson and Spinei conclude that the civil law approaches reflect their traditional emphases on top-down codification, predictability, efficiency and order, while the common law approaches reflect their traditional emphases on bottom-up judicial development, flexibility, judicial discretion and party autonomy. While there are differences (such as the common law retention of tag jurisdiction that the civilians reject), there are nevertheless commonalities in which most court systems exhibit the common three-tiered hierarchical structure of first-instance courts, intermediate courts and a supreme court; subject matter specialization shows widespread agreement on certain kinds of specialization; and geographic allocation has universally converged on the defendant's domicile as a key basis for territorial judicial authority.

Margaret Y.K. Woo in her chapter 'The Politics of Pleadings' looks at changing pleading standards – that is, rules defining when a complaint is sufficient to stay in court – in China and the US. Along with jurisdiction rules, she concludes that rules about who and what can be brought to court can also be the result of political forces²⁶ and debates about a nation's identity. While these changes in pleading rules are often said to be based on principles of efficiency and economy, pleading rules serve as gatekeepers to the court and are often synonymous with the assertion and growth of governmental powers.

Thus, in critical periods of US federalization and national state building, jurisdiction of US federal courts have similarly been expanded to empower the courts, and a parallel course can be seen in pleading standards. Indeed, a comparative look at the latest trend of retrenchment in both countries reveals a similar strategy of closing the courthouse gates in recent years, rendering it more difficult for litigants to bring cases to court.

Meanwhile, Mohamed Paleker in 'The Initiation of Civil Suits – A Comparative Perspective' delves into the detailed rules for initiation of suits in multiple jurisdictions. Taking a broad look at service and complaint rules from African countries such as Nigeria, Ghana, South Africa to common law countries such as England and Wales and the US as well as European countries such as the Netherlands, Belgium, France, Germany, Italy and Sweden, Paleker takes a sweeping look at distinctions between an *action* or *claim* and *applications*,²⁷ within different service of process, preaction procedure, court fees, summons and the differentiation between facts vs. evidence required in a complaint. Where applications are primarily questions of law or minimal disputes of facts, actions or 'claims' are usually brought in matters where there are factual and evidential disputes or where the dispute involves illiquid claims, requiring

²⁶ Of course, the fact that the rule-making process is one of political bartering has been documented by Steve Subrin, *How Equity Conquered the Common Law*, 135 UNIVERSITY OF PENNSYLVANIA LAW REVIEW 909 (1987); Paul D. Carrington, *Politics and Civil Procedure Rulemaking*, 60 DUKE LAW REVIEW 597 (2010).

²⁷ For example, see Supreme Court Civil Procedure Act 1932 (Tasmania), s 3; SA: r 51.1; South Africa, URC 1 where 'action' is defined as a 'proceeding commenced by a summons' and 'application' is defined as 'proceedings commenced by a notice of motion ...'. See also Ghana: CI, Ord 9; Nigeria: OSHCR, Ord 3 r 1.

evidence to prove the quantum of damages.²⁸ Much of the rules for starting a lawsuit depend on this distinction.

To start a civil lawsuit, it is common to have to send written demands and notices beforehand. However, these rules are often different from procedural rules and are regulated by different statutes, including substantive law, such as contract law. Different types of service, such as personal service, service on an agent or a company official are quite similar in their content across countries. Some countries have more options for service compared to others. Countries are slowly beginning to explicitly permit electronic service of an initiating process by parties without the help of a process server.

Finally, in her chapter ‘Why Civil Procedure Matters: How Jurisdiction and Forum Selection Impact the Liability of Multinational Corporations to Marginalized People in the Global South,’ Lucy Williams discusses the doctrines of *forum non conveniens* and international jurisdiction, and how these doctrines may be used against individuals living in extreme poverty in the Global South seeking to hold multi-national corporations (MNCs) accountable for their actions. The doctrine of *forum non conveniens* in civil procedure allows courts to dismiss a lawsuit if they determine that it would be more appropriate for the case to be tried in a different forum. *Forum non conveniens* applies only where the court already has subject matter jurisdiction over the case and personal jurisdiction over the defendants.

While *forum non conveniens* has often been criticized as subject to manipulation by forum shopping parties in international disputes, Williams sees *forum non conveniens* as a potential weapon against poor litigants by abusive defendants. Williams compares the US doctrine of *forum non conveniens* with new legal developments in the United Kingdom and in the Netherlands under the doctrine of international jurisdiction – such evolving case law that has resulted in holding MNCs accountable for actions of their subsidiaries. Ultimately, Williams urges us to recognize that civil procedure, like all legal discourses and practice arenas, is not a neutral field but rather, legal rules and principles that can produce substantive consequences for social and economic practice.

PART III: MANAGING THE LAWSUIT

We next take a look at the structure of litigation. Every system needs a method for finding out the ‘truth’. Some countries place more responsibility on the judges, or on the state prosecutors, while other systems rest the responsibility on the litigants, believing that an adversary contest between the parties would be the best way to unveil the truth.²⁹ Some systems rely on the idea of an ‘objective’ truth that can be discovered while others believe more in a ‘legal truth’ that is presented and proven by the parties. In some jurisdictions the lawsuit is above all a vehicle for bringing attention to an injustice, and the starting point of a process of negotiation for changes in the social norm. The differing ideas of ‘truth’ will define who controls the litigation: the lawyers, the parties or the decision-makers.

²⁸ See for example, Singapore, Ord 6 r 5(2).

²⁹ Thomas Weigend, *Should We Search for the Truth, and Who Should Do It*, 36 NORTH CAROLINA JOURNAL OF INTERNATIONAL LAW 389 (2010), available at: <https://scholarship.law.unc.edu/ncilj/vol36/iss2/6> (accessed June 5, 2024).

In a party-controlled system, then, the procedural rules must figure out a way to balance unequal resources and access to information between the parties – or more accurately, the lawyers who represent them. In a state/judicial-controlled system, the rules must compensate for potential bias of an investigator who also serves as the final decision-maker. An often-quoted arch-typical example of this divide is that of the civil law (inquisitorial) system as opposed to the common law (adversarial) system.³⁰

However, two global trends concerning the structure of litigation have evolved to challenge this divide. As the chapters contained in this section demonstrate, ever-increasing caseloads and delays across legal systems have resulted in many systems turning to greater judicial management of how facts and evidence are uncovered and presented in court. Judicial management of litigation to answer the needs of efficiency and cost has appeared to be the latest convergence of civil litigation worldwide.

Richard Marcus in ‘Managing the Lawyers’ begins this section by evaluating the present-day managerial reality in the common law and civil law systems. He starts by surveying the 19th century *laissez-faire* judicial attitude to the ‘activist’ attitude widely seen today. Professor Marcus argues that the day of the passive judge has ended, even for the common law adversarial system, at least so far as the conduct of the litigation is concerned. He explores the stimuli that underlie the shift, including policy issues highlighted in the 1980s by Professor Damaška’s distinction between the ‘activist’ and ‘reactive’ styles of procedure. Finally, Professor Marcus considers issues raised by the trend of ‘managerial’ judging, which includes the potential of abuse of authority with minimal procedural safeguards, the preoccupation with output rather than quality and the strong pressure and emphasis on settlement.

But does case management include the judge finding the appropriate law for the litigation? What is the obligation of a judge in finding the appropriate law for a lawsuit even if the parties themselves have not raised it? Emmanuel Jeuland in ‘Judicial Case Management: *iura novit curia?*’ follows Professor Marcus’ chapter on the historical shift from passive to active judges. Professor Jeuland takes up the principle of *iura novit curia* (the judge knows the law) and its relationship to today’s global trend of judicial case management. The application of *iura novit curia* coincides with the principle of cooperation between parties and judges on procedure, fact and law. Yet, considerations of the imbalance of power between judge and parties has led to variations in how this adage is applied. Jeuland separates out three classes of countries: countries that respect the adage to the point of imposing an obligation on the judge to apply the law (the judge’s obligation system), countries that do not respect the adage except in exceptional cases (the judge’s autonomy system), and countries that respect the adage with many limitations (the intermediate system). The ELI-UNIDROIT rules seem to be a mixture of these three systems.

Despite the convergence of ‘managerial judging’ globally, Magne Strandberg in ‘Access to Evidence in the US, Germany, and Norway’ sees variation in a party’s responsibility for producing evidence and how such evidence is accessed for civil litigation in the US, Germany and Norway. He concludes that the Anglo-American legal family remains famous for its well-established rules on discovery or disclosure giving each party a right to access all relevant

³⁰ J.A. Jolowicz, *The Adversarial and Inquisitorial Models of Civil Procedure*, 52 JOURNAL OF INTERNATIONAL AND COMPARATIVE LAW QUARTERLY 281 (2003).

and non-privileged evidence under the control of the opposite party or third parties, while the civil law families are known for not granting parties a general right of access to evidence.

As compared to all other jurisdictions, American discovery is at one end of the spectrum both in its broad and open criteria, the privatized mode of proceedings, the hard sanctions and especially the fact that pre-trial discovery has served a far more important role than simply preparing for trial. German law is on the opposite end of the scale; parties do not have an obligation to disclose evidence unless there (exceptionally) is a basis for that in substantive law, and claims based on the modest procedural rights of access to evidence must normally be in the form of a request for a court order. Norway, meanwhile, has opted for a combined solution: Parties have a right to access evidence if certain criteria are met, and the rules are a mix of inter-parties' obligations and requests for court orders.

Finally, the other global trend in the structure of civil litigation is the enlarged tendency to move from individual lawsuits to group-based litigation. Joinder of parties and claims rules are based on efficiency and accuracy concerns. After all, lawsuits can be expensive, and group litigation helps to alleviate the cost of litigation on individual litigants. And so, one goal served by group litigation is access to justice.

But the goal of today's massive joinder rules resulting in large scale group litigation has also been used to address the failure of the political branch to recognize and respond to a substantial social harm. In some nations, group litigation serves to secure global remedies for substantial social harm. In those countries, group-based litigation is the private enforcement of public norms. And so, are group litigations indicative of the changing role of litigation from simply settling individual disputes to the broader tasks of changing social norms? Or is it a matter of efficiency as global economies have led to mass injuries requiring mass litigation and settlement?

Linda S. Mullenix and Stefaan Voet in their chapter, 'Joinder of Parties and Group Litigation' look at joinder of claims and parties as rules enhancing judicial efficiency and economy. More specifically, their chapter emphasizes group litigation as a mass form of joinder, and an emerging worldwide tool to access to justice. Professors Mullenix and Voet compare joinder rules of common law countries such as the US, Canada, Australia and England and Wales with the joinder rules of continental European countries. They conclude that joinder rules in both systems arose out of a concern for group members' protection in collective litigation. More expansive concepts of common interests in collective litigation would result in a lesser requirement to show predominance of common interest. This collective interest is balanced against the rights of the individual litigant. Thus, in many common law jurisdictions, judicial officers will examine the adequacy of representation in proposed class litigation, and as an ongoing matter. Most common law jurisdictions provide for notice to class members, and many will oversee the fairness and adequacy of proposed class settlements to provide judicial approval. Many common law jurisdictions (with a few exceptions) follow an opt-out regime for damage class actions.

PART IV: DECIDING THE LAWSUIT

Next, this volume takes a comparative look at decision-makers and examines how many countries are taking on lay jurors. As all comparative procedural lawyers may know, the jury in England has all but disappeared from civil trials, while the jury trial remains a constitutional

right in the US for civil cases at law. The jury system has been criticized for being inefficient and biased, but in America it has been preserved as the ultimate protector of democracy, in lending ordinary citizens a voice in enforcing legal norms. In Europe, lay justices have been criticized for a lack of legal knowledge and (local) partiality (bias). In the US, the balancing of professional state decision-makers with lay participation gets at the heart of democracy. Lay citizens can soften the harshness of law and bring in changes of the community's norms.

Are legal systems converging into a 'soft, pluralized, participative and expansive law,' with lay persons more integral to decision-making?³¹ Several countries in Asia (notably, China, Japan, Korea) have experimented with some version of the lay assessors system to involve the participation of ordinary citizens in the court decision-making process. Valerie P. Hans takes a comparative look at the adoption of lay jurors in various legal systems. In her chapter, 'The Landscape of Lay Decision-Making in Civil Litigation', Professor Hans reviews the landscape of lay participation in civil justice, describing the extent of citizen deployment in different countries, and evaluating arguments that support or critique the use of lay legal decision-making in civil litigation.

Using data from Jérémy Boulanger-Bonnely's study, Hans concludes that approximately two-thirds of the world's countries (125 out of a total of 195 countries included in the analysis) use some form of lay legal decision-making, but of that only 21 jurisdictions currently rely upon a jury to resolve civil disputes. Australia, Canada, England and Wales, New Zealand, the US, along with certain countries in the Caribbean, Africa and Asia that were often under British colonial rule, continue to use the civil jury. Hans also concludes that since civil juries more frequently decide cases between private parties rather than government actors, the argument that civil (as opposed to criminal) juries guard against arbitrary government actions is less potent. Yet, there are still multiple reasons underlying the value of lay citizen fact-finding in civil disputes, including community and specialist knowledge, the fact-finding benefits of diverse decision-making bodies and the educational and motivational impact of lay participation.

Once a decision has been reached, whether by judges or a jury, it must be enforced, and litigation must come to an end. Every functioning legal system must balance the tension between the quest for finality with the search for justice in the case at hand. Part IV examines this final phase of litigation in assessing when a judgment is considered final, how binding is a final judgment and how that final judgment is enforced.³² By producing binding decisions and preventing inconsistent outcomes, *res judicata* principles (rendering matters that have been judicially decided binding on the parties) ensure finality and increase reliability, predictability and consistency in the judicial system.³³ And yet, legal systems vary in the parameters of *res judicata* and reopenings of final judgments. They also differ in enforcement mechanisms. How

³¹ Marc Galanter, *Predators and Parasites: Lawyer-Bashing and Civil Justice*, 28 GA. L. REV. 633, 680 (1994).

³² Albrecht Zeuner & Harald Koch, *Effect of Judgments*, in INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW Vol. XVI, Chap. 9 (2012).

³³ Christoph Kern & Karol Weitz, *Appeal and Third Instance*, in IMPEDIMENTS OF NATIONAL PROCEDURAL LAW TO THE FREE MOVEMENT OF JUDGMENT 163 *et seq.* (Burkhard Hess & Pietro Ortolani eds., Luxembourg Report on European Procedural Law, Vol. I, 2019).

do enforcement and *res judicata* uphold the legitimacy of the legal system and what values do these procedures reflect?³⁴

Two chapters – one by Elisabetta Silvestri and the other by Yulin Fu – examine the parameters of finality and concepts of *res judicata* in Europe and Asia. Elisabetta Silvestri in ‘Finality of Judgments and its Effects’ begins by unearthing the values of finality, and the importance of legal certainty. She also notes while finality is needed for preclusion, the two terms are not necessarily interchangeable. In some jurisdictions, a decision that is yet to be appealed may be deemed final for preclusion because it has concluded the current proceedings on the merits. In other jurisdictions, finality for preclusion is only when the current proceedings have been concluded on the merits and all appeals have been exhausted or waived.

Yulin Fu in ‘The Law of Preclusion in China and Japan’ details how the principle of *res judicata* (preclusion) operates in China and Japan. In both Japan and China, as in most civil law countries, claim but not issue preclusion is adopted, and claim preclusion does not apply until all appeals have been exhausted or waived. Finality of judgments is determined more by a respect for judicial hierarchy than the decision’s effect on the parties. Fu also notes how in China the desire for correct outcomes has meant another form of review beyond the appeal – that of trial supervision. The constant reopenings of judgments under trial supervision for erroneous decisions can undermine any finality and preclusion.

Ultimately, the legitimacy of a legal system commands that its judgments, once final, be obeyed and enforced. How do legal systems ensure that court decisions are complied with? Questions include the kind of powers and mechanisms a court has to ensure that its decisions are enforced – attachment of the defendant’s assets, garnishment and injunctive relief.³⁵ Additionally, it is equally important to include different ways and forms of enforcement of monetary and non-monetary judgments. Enforcement systems are differently structured (centralized, decentralized) and there are important limits to enforcement imposed by the social protection of the debtor (and his or her family).

Wendy Kennett, in her chapter ‘Comparative Enforcement Law’ examines how states distribute power in the context of enforcement. At the macro-level, this includes the question of who makes the rules on civil enforcement and who implements those rules (including the extent to which enforcement institutions are regulated and the mechanisms for regulation). The focus is on the allocation of power among different branches of government; between the judiciary and executive; and between central government and regional or local entities, and professional organizations who may assume certain obligations with respect to the regulation and discipline of enforcement agents. At the micro-level, power is distributed in the individual case between the potential participants in an enforcement action: notably the creditor, the courts and (other) enforcement institutions.

Professor Kennett is particularly concerned with sensitivity to the fundamental rights of citizens in enforcement proceedings and the power of the digital governance of enforcement. Sophisticated IT solutions to enforcement problems have emerged in the form of architecture for accessing information about debtors and the creation of enforcement registers. As a more comprehensive picture of the situation of debtors has emerged, so too have initiatives to

³⁴ JACQUES VAN COMPERNOLLE & ACHILLE SALETTI (EDS.), *LE DOUBLE DEGRÉ DE JURISDICTION* (2010); ALAN UZELAC & C.H. VAN RHEE (EDS.), *PUBLIC AND PRIVATE JUSTICE* (2007).

³⁵ Jay L. Westbrook, *Systems for the Enforcement of Debt*, in *A GLOBAL VIEW OF BUSINESS INSOLVENCY SYSTEMS* (Jay L. Westbrook ed., 2009).

develop links between enforcement agents and organizations with responsibility for providing advice and assistance to debtors.³⁶ As more potent integrated approaches to the ‘management’ of debtors emerge, Kennett advises that it will be important to find an appropriate balance between the needs of individual creditors and policies relating to the social and financial inclusion of debtors that will contribute to a state’s overall economic health.

PART V: FUTURE TRENDS

In all procedural systems, the digital revolution is creating fundamental changes. Digitalization permits the modernization and acceleration of civil proceeding such as the electronic service of documents, the hearing of witnesses via video-conference, and the online inspection of documents. In a second step, the digital revolution entails that judgments can be predicted³⁷ and that proceedings can unfold in ‘cybercourts’ without the physical presence of the parties in the (virtual) courtroom. In some areas, procedures are framed according to the needs of information technology and artificial intelligence (AI) may replace (to some extent) the human decision-maker in the proceedings.³⁸ It seems important to include in the comparative research these technical changes and the impact of the information technology revolution on civil procedure.³⁹

In ‘Digitization of Judicial Procedure: AI, ODR, Blockchain and E-Justice’ Professors Peter C.H. Chan and Antonio Cabral explore theoretical issues and specific topics arising from the application of technology in judicial procedure. From the use of AI in dispute resolution, to online dispute resolution, Blockchain and e-justice, Chan and Cabral trace the development of technology in the courts and assess their contribution and pitfalls. Their chapter takes a global look at e-justice policies in Europe with a special focus on France and Italy, as compared with Brazil and China. While technology reduces the complexity of the tasks performed by civil servants of the judiciary, Chan and Cabral warn there could be contrary negative repercussion for the parties of judicial procedures. Problems with improper algorithms and faulty designs of online dispute resolution (ODR) as well as overall unequal internet access, could mean deprivation rather than protection of fundamental rights. Transparency as well as better regulation and oversight are needed to ensure a proper balance between efficiency and fundamental due process.

³⁶ See for the developments in the Netherlands and the broad responsibilities of the Swedish Enforcement Authority, WENDY KENNETT, *CIVIL ENFORCEMENT IN A COMPARATIVE PERSPECTIVE: A PUBLIC MANAGEMENT CHALLENGE* (2021).

³⁷ Antoine Garapon, *Les enjeux de la justice prédictive*, *LA SEMAINE JURIDIQUE* 31; Basil Darmois, *Digital Justice and the Risks of ‘Predictive justice’*, in *VARIA AUTOUR DE JUSTICE DIGITALE* (Samuel Benisty ed., 2022); see also, Council of Europe, *Justice of the Future: Justice and Artificial Intelligence* (June 27, 2018) at <https://www.coe.int/en/web/cepej/justice-of-the-future-justice-and-artificial-intelligence> (accessed March 24, 2024).

³⁸ An early example of information technology in civil procedure are payment order procedures based on forms which are processed by computer programs.

³⁹ ANTOINE GARAPON & JEAN LASSÈGUE, *JUSTICE DIGITALE* (2018); DORY REILING, *TECHNOLOGY FOR JUSTICE* (2009); BASTIAAN VAN ZELST, *THE END OF JUSTICE(S)* (2018).

Not to be ignored is the trend of all systems to move away from the monopoly of court adjudication and allow for mediation, arbitration and other ADR mechanisms.⁴⁰ The underlying idea is that arbitration and other ADR methods represent a less expensive, quicker and more conciliatory route to resolution. Still, while ADRs share a common attribute of resolving civil disputes, they ultimately remain under the shadow and/or supervision of the court system.⁴¹ In addition, the form of ADR varies greatly amongst and within the headings of arbitration, mediation or conciliation.⁴² What are the implications of ADR for courts as a democratic form of social norm enforcement? How far shall the privatization of civil justice go?⁴³ And how has alternative dispute resolution impacted the development of law when such resolutions are often rendered private and not subject to public information and scrutiny?⁴⁴

Pamela K. Bookman in ‘Cross-Border Disputes: Arbitration, Courts, and “Arbitral Courts”’ looks at the growth of what she calls ‘arbitral courts’ globally. ‘Arbitral courts’ are commercial dispute courts established by states that bear features and procedures of arbitration but wield the power of the state. Decisions from arbitral courts have legal force, are enforced by the state, and in common law systems these decisions can even have precedential values. Professor Bookman examines the procedures and structures of arbitral courts in the Netherlands (2019), Singapore (2015) and Dubai (2004), concluding that they reveal a level of harmonization across procedures that blurs the public/private distinctions between traditional arbitration and courts. Ultimately, Professor Bookman warns of undue catering to the adjudication ‘market’ pressures and the parties’ preferences for control and confidentiality. More than arbitration, she emphasizes that arbitral courts have responsibility as a public court, in having the opportunity to develop law and shape global governance.

Meanwhile, the chapter by Marco de Benito shows how dispute resolution mechanisms are converging through *harmonization* and *approximation* in both the legal framework of international legal cooperation and in the domestic procedural principles, laws and practices of litigation, arbitration and, to a lesser extent, mediation. The convergence of the legal instruments that structure international dispute resolution is essentially the result of a process of deliberate approximation. The convergence of the rules and practices of civil litigation and arbitration, on the other hand, is primarily a process of spontaneous approximation, which is then reflected or embodied in harmonization efforts, first in the form of soft law and then – eventually – in codes.

Finally, there is the role of mediation in adjudication. Where mediation may be less costly, and social cohesion is more important than a declaration of legal norms, mediation with its

⁴⁰ PAOLA CECCHI-DIMEGLIO & BÉATRICE BRENNEUR (EDS.), *MANUEL INTERDISCIPLINAIRE DES MODES AMIABLES DE RÉOLUTION DES CONFLITS/INTERDISCIPLINARY HANDBOOK OF DISPUTE RESOLUTION* (2015). See e.g. EU: Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on alternative dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC, OJ L165, 18.6.2013. The NYC 1958 on the recognition of foreign arbitral awards has been ratified by 156 states.

⁴¹ In some systems, the supervision is mainly exercised by administrative authorities.

⁴² Cf. KLAUS HOPT & FELIX STEFFEK (EDS.), *MEDIATION* (2008).

⁴³ HAZEL GENN, *JUDGING CIVIL JUSTICE* (2010); LOÏC CADIET, BURHARD HESS & MARTA REQUEJO ISIDRO (EDS.), *PRIVATIZING JUSTICE AND ITS LIMITS* (2019).

⁴⁴ Judith Resnik, *The Function of Publicity and Privatization in Courts and their Replacements*, in *OPEN JUSTICE* 177 *et seq.* (Burkhard Hess & Ana Koprivica Harvey eds., 2019).

focus on negotiated settlements between parties is the preferred method of dispute resolution. In almost all countries there are now efforts to coordinate mediation with adjudication as an integrated model of trial process. Shahla Ali, in 'Deciding Lawsuits Outside of Court: Mediation in Hong Kong' examines how Hong Kong has integrated mediation into the courts with comparative features from the US, China and England. While the level of integration between mediation approaches and the civil justice system in China is notably high, the US maintains institutional separation between adjudication and mediation within its state and federal court systems, with mediation primarily occurring pre-trial outside of the courtroom. Hong Kong, meanwhile, made available court connected mediation to all cases with legal representation. Even though mediation is voluntary, any denial of mediation must be supported by reasons for unwillingness to mediate. Adverse costs may be assessed against a party who unreasonably refused to mediate. To date, Hong Kong touts a ranking of second out of 138 countries in the efficiency of its legal framework in settling disputes.

These are rich chapters that have captured the highlights of comparative civil procedure. Not only do they help us gain insight about other legal systems, but these chapters also help us to reach a deeper understanding of our own legal system. In finding similarities and differences, comparative studies highlight underlying and unspoken assumptions and an improved understanding of problems across different systems. It renders the important task of shared legal reforms possible.

20. Untimely concordance: the discreet convergence of civil and arbitral proceedings

Marco de Benito

The purpose of this chapter is to show how dispute resolution mechanisms, particularly litigation and arbitration, are converging in several important ways.

Convergence is taking place through both *harmonization* and *approximation*. Although the dividing line is sometimes blurred, each of these terms denotes different realities. Generally, approximation may suggest a more precarious or imperfect level of alignment, while harmonization implies a more elaborate and advanced process, like different degrees along a continuum in which radical dissimilarity and complete unification would be the extremes.¹ More narrowly, each term may refer to a different agent of change: a higher, centralized body would generally harmonize laws – for example, the European Commission through directives in EU law – while representatives of the different legal systems would take steps to approximate laws, often in a coordinated effort.²

Perhaps we can even find more subtle shades of meaning. To harmonize is ‘to bring’ something ‘into consonance or accord’; to approximate is ‘to come near to or be close to’ something.³ People harmonize; things approximate. Harmonization thus emphasizes human action, while approximation focuses on the act of things coming closer or more like each other. Harmonization, therefore, is always intentional, while approximation says nothing about the cause of the alignment, whether it is the deliberate work of legislative bodies or a spontaneous process. Likewise, harmonization refers mainly to an intellectual endeavor, which may or may not be supported by an act of will on the part of the constituted powers, while approximation always carries the idea of a real convergence.

In this respect, this third term – *convergence* – may have a semantic space of its own.⁴ To converge is ‘to tend or move toward one point or one another’; interestingly, convergence is

¹ See, e.g., C.H. van Rhee, *Approximation of Civil Procedural Law in the European Union*, in FROM COMMON RULES TO BEST PRACTICES IN EUROPEAN CIVIL PROCEDURE 63–75 (Burkhard Hess & Xandra E. Kramer eds., 2018).

² See, e.g., Burkhard Hess, *Procedural Harmonization in a European Context*, in CIVIL LITIGATION IN A GLOBALISING WORLD 159–73 at 160 (Xandra E. Kramer & C.H. van Rhee eds., 2012); Geoffrey C. Hazard Jr., Michele Taruffo, Rolf Stürner & Antonio Gidi, *Introduction*, in PRINCIPLES OF TRANSNATIONAL CIVIL PROCEDURE 1–15 at 1 (ALI/UNIDROIT 2006).

³ Merriam-Webster dictionary.

⁴ See, e.g., Pierre Legrand, *European Legal Systems Are Not Converging*, 45(1) THE INTERNATIONAL AND COMPARATIVE LAW QUARTERLY 52–81 (1996); C.H. van Rhee, *Towards a Procedural Ius Commune?*, in REMEDIES IN ZUID-AFRIKA EN EUROPA 217–32 (Jan M. Smits & Gerhard Lubbe eds., 2003); H.P. Glenn, *The ALI/UNIDROIT Principles of Transnational Civil Procedure as Global Standards for Adjudication?*, 4 UNIFORM LAW REVIEW/REVUE DU DROIT UNIFORME 829–45 (2004); ARTHUR T. VON MEHREN, ADJUDICATORY AUTHORITY IN PRIVATE INTERNATIONAL LAW. A COMPARATIVE STUDY 353–76 (2007); Neil Andrews, *English Civil Justice*

defined as ‘the act of converging and especially moving toward union or uniformity’.⁵ On the one hand, the term says nothing about a centralized or coordinated activity, or a deliberate or spontaneous process, and thus naturally includes the outcome of both harmonization and approximation. On the other hand, it excludes purely academic exercises: convergence always denotes a phenomenon, something that happens (φαινόμενον comes from the verb φαίνομαι, ‘to show oneself, to appear’) and is therefore perceptible to the senses.

We could graphically express the idea as in Figure 20.1:

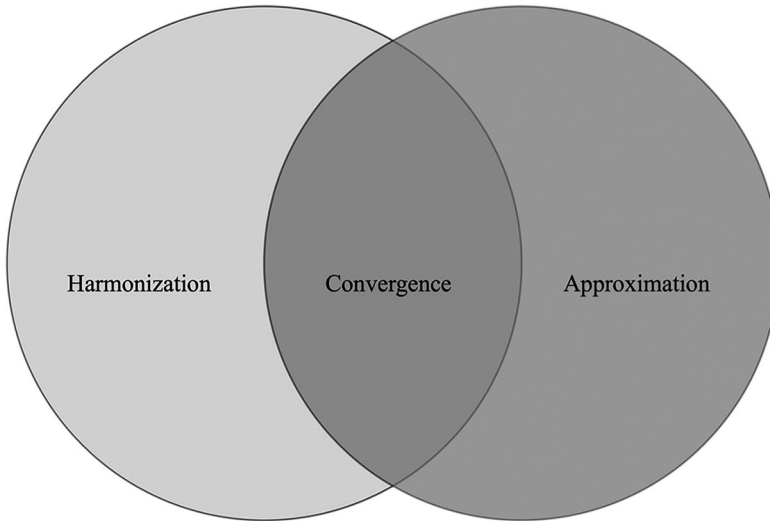


Figure 20.1 Harmonization, approximation, and convergence

The process of convergence that we briefly analyze here manifests itself in at least two broad areas. First, in the legal framework of international legal cooperation, which allows for the practical development of the various dispute resolution mechanisms. Second, in the procedural principles, laws, and practices of litigation, arbitration, and, to a lesser extent, mediation. To understand the distinction, it is important to consider that international treaties ‘say little or nothing about procedure’ as such.⁶ Treaties address procedural aspects only indirectly: They assume basic, prior notions of procedure,⁷ upon which they superimpose requirements relevant to their purpose and scope. In other words, international treaties do not tell judges or arbitrators *ex ante* how to do their work, but privilege some of their decisions *ex post*, giving them a pass

in the Age of Convergence, in *COMMON LAW, CIVIL LAW AND THE FUTURE OF CATEGORIES* 97–110 (Janet Walker & Oscar G. Chase eds., 2010).

⁵ Merriam-Webster dictionary.

⁶ Hazard et al., *supra* note 2, at 3.

⁷ ALBERT JAN VAN DEN BERG, *THE NEW YORK ARBITRATION CONVENTION OF 1958* 61 *et seq.* (1981).

or safe conduct only if they are the result of proceedings conducted in a certain way.⁸ For this reason, the legal framework of international legal cooperation and the procedural principles and rules as such must be examined separately. The former will be discussed in Section I and the latter in Section II of this chapter.

In the terminology we have coined above, the convergence of the legal instruments that structure international dispute resolution is essentially the result of a process of deliberate approximation.⁹ The convergence of the rules and practices of civil litigation and arbitration, on the other hand, is primarily a process of spontaneous approximation, which is then reflected or embodied in harmonization efforts, first in the form of soft law and then – eventually – in codes.

I REGULATORY CONVERGENCE: TOWARDS AN INTEGRATED LEGAL FRAMEWORK FOR INTERNATIONAL DISPUTE RESOLUTION

A Legal Framework for International Dispute Resolution

1 Arbitration

A limited number of states acceded to the 1923 Geneva Protocol on Arbitration Clauses and the 1927 Geneva Convention on the Execution of Foreign Arbitral Awards. Both treaties were generally considered inadequate to achieve the enforcement objectives for which they had been designed. An initiative therefore began to replace them. The International Chamber of Commerce (ICC) issued a draft convention in 1953, and efforts to amend the convention continued under the auspices of the United Nations (UN). As a result of these efforts, the Convention on the Recognition and Enforcement of Foreign Arbitral Awards was adopted by the UN on June 10, 1958, following a diplomatic conference held at UN headquarters in New York in May and June 1958 (the New York Convention, NYC).¹⁰ With over 160 contracting states, the NYC remains the most influential international dispute resolution instrument.

The NYC laid the groundwork for the international circulation of arbitral awards using a simple regulatory scheme: it provides a positive default rule for recognition of the foreign award, followed by a list of limited grounds for refusal that operate as exceptions to the rule. First, the default rule:

Article III

Each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon.

Second, the limited grounds for non-recognition:

⁸ MARCO DE BENITO, *EL CONVENIO ARBITRAL. SU EFICACIA OBLIGATORIA* 37–8, 62–3, 107–8 (2010).

⁹ See von Mehren, *supra* note 4, at 353–76.

¹⁰ See Pieter Sanders, *The History of the New York Convention*, in *IMPROVING THE EFFICIENCY OF ARBITRATION AGREEMENTS AND AWARDS: 40 YEARS OF APPLICATION OF THE NEW YORK CONVENTION* 11–14 (Albert Jan van den Berg ed., 1999).

Article V

1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:
 - (a) The parties ... were ... under some incapacity, or the said agreement is not valid ...;¹¹ or
 - (b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or
 - (c) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration ...; or
 - (d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law ...; or
 - (e) The award has not yet become binding on the parties, or has been set aside or suspended ...
2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:
 - (a) The subject matter of the difference is not capable of settlement by arbitration ...; or
 - (b) The recognition or enforcement of the award would be contrary to ... public policy ...

These grounds for refusal are designed as comprehensive: States may provide regimes with fewer grounds for refusal of recognition, and thus more favorable or conducive to the international circulation of arbitral awards,¹² but they may not create additional grounds for refusal.

Although not reflected in the title of the Convention,¹³ the NYC also guarantees the enforcement of arbitration clauses: the so-called negative effect of arbitration agreements, which gives the parties the power to veto any judicial proceedings in breach of the arbitration clause.¹⁴ The regulatory technique in this respect follows a similar pattern: the enunciation of the court's duty to dismiss proceedings in the face of an arbitration agreement, subject to limited exceptions.

Article II

3. The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.

¹¹ Only what is essential to the discussion is reproduced.

¹² Art. VII(1).

¹³ As explained by van den Berg, *supra* note 7, at 56, 'originally, it was the intention to leave the provisions concerning the formal validity of the arbitration agreement and the obligatory referral to arbitration to a separate protocol. At the end of the New York Conference of 1958, it was realized that this was not desirable. Art. II was drafted in a race against time.'

¹⁴ In the field of private law, the arbitration agreement has both positive and negative effects: positive because it creates an obligation to arbitrate disputes, negative because it allows the parties to veto the judicial process in favor of arbitration. In the field of procedural law, the effects of this act of party disposition are prorogation and abrogation: prorogation because it confers jurisdiction on the court, abrogation because it overrides the jurisdictional rules otherwise provided for by law. See de Benito, *supra* note 8; Marco de Benito, *El arbitraje y la acción*, 7(2) ARBITRAJE 409–20 (2014).

Because of the NYC, parties to international contracts know that their arbitration agreement will be upheld in court and that any resulting award will be enforced in most countries around the world.¹⁵ This is one of the main reasons why arbitration has become the preferred method of cross-border dispute resolution.¹⁶

Following the same regulatory impulse, the International Center for Settlement of Investment Disputes (ICSID) was established under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the ICSID Convention), adopted in Washington on March 18, 1965. ICSID provides for the settlement of disputes primarily through conciliation and arbitration. The ICSID process is designed to reflect the unique nature of international investment disputes and the parties involved, and to maintain a careful balance between the interests of investors and host states.

Also worth mentioning are regional instruments: in Europe, the European Convention on International Commercial Arbitration (Geneva, 1961); in the Americas, the Inter-American Convention on International Commercial Arbitration (Panama City, 1975); in the Middle East, the Arab Convention on Commercial Arbitration (Amman, 1987).

2 Litigation based on a choice of court agreement

For decades there was nothing like the NYC for international litigation (at least outside the EU). In 1996, the Hague Conference on Private International Law launched the so-called ‘Judgments Project’ to develop a multilateral treaty that would cover both international judicial competence and recognition and enforcement of judgments.¹⁷ Difficulties in reaching consensus led the Hague Conference to reduce the scope of the work to the recognition of judgments based on a choice of court agreement. After all, international dispute resolution in civil and commercial matters is often provided for by contract in the form of a negotiated agreement on the nature of the dispute resolution mechanism and the seat of the court: the arbitration agreement or the forum selection agreement. In view of this, and given the success of the NYC on arbitration, it was considered advisable to give priority to the international circulation of judgments based on this type of agreement. The result was the Convention on Choice of Court Agreements (Choice of Court Convention, CCC), concluded in The Hague on June 30, 2005.¹⁸ The CCC is already in force in the EU and the UK – as well as other jurisdictions such as Mexico and Singapore – and has been signed by the US and China.

¹⁵ For a valuable reference tool that brings together a wide range of decisions from many jurisdictions, see UNCITRAL, UNCITRAL SECRETARIAT GUIDE ON THE CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS (2016), <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/2016guideontheconvention.pdf> (accessed November 2024).

¹⁶ See the empirical studies conducted by the School of International Arbitration at Queen Mary University of London, particularly those of 2010, 2013, 2015, 2018, and 2021, <https://arbitration.qmul.ac.uk/research/> (accessed November 2024).

¹⁷ Arthur T. von Mehren, *Recognition and Enforcement of Foreign Judgments: A New Approach for The Hague Conference*, 57(3) *LAW & CONTEMPORARY PROBLEMS* 271–87 (1994).

¹⁸ See generally, inter alia, RONALD A. BRAND & PAUL M. HERRUP, *THE 2005 HAGUE CONVENTION ON CHOICE OF COURT AGREEMENTS. COMMENTARY AND DOCUMENTS* (2008); TREVOR HARTLEY, *CIVIL JURISDICTION AND JUDGMENTS IN EUROPE. THE BRUSSELS I REGULATION, THE LUGANO CONVENTION, AND THE HAGUE CHOICE OF COURT CONVENTION* (2023).

The CCC follows the same legislative technique as the NYC¹⁹ by providing a default rule for recognition of the judgment along with a list of limited grounds for refusal. A default rule:

New York Convention

Art. III

Each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon.

Choice of Court Convention

Art. 8. *Recognition and enforcement*

- (1) A judgment given by a court of a Contracting State designated in an exclusive choice of court agreement shall be recognised and enforced in other Contracting States ...

And a list of limited grounds for refusal:

New York Convention

Art. V

- 1. Recognition and enforcement of the award may be refused ... only if ...:
 - (a) The parties ... were ... under some incapacity, or the said agreement is not valid ...; or
 - (b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or
 - (c) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration ...; or
 - (d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law ...; or
 - (e) The award has not yet become binding on the parties, or has been set aside or suspended ...
- 2. Recognition and enforcement ... may also be refused if ...:
 - (a) The subject matter of the difference is not capable of settlement by arbitration ...; or
 - (b) The recognition or enforcement of the award would be contrary to the public policy ...

Choice of Court Convention

Art. 9. *Refusal of recognition or enforcement*

Recognition or enforcement may be refused [‘only’]²⁰ if –

- (a) the agreement was null and void ...;
- (b) a party lacked the capacity to conclude the agreement ...;
- (c) the document which instituted the proceedings or an equivalent document, including the essential elements of the claim,
 - (i) was not notified to the defendant in sufficient time and in such a way as to enable him to arrange for his defence ...; or
 - (ii) was notified to the defendant ... in a manner that is incompatible with fundamental principles ...;
- (d) the judgment was obtained by fraud in connection with a matter of procedure;

¹⁹ See, for a comparative overview of the two treaties, Lucas Clover Alcolea, *The 2005 Hague Choice of Court and the 2019 Hague Judgments Conventions versus the New York Convention: Rivals, Alternatives or Something Else?*, 6(6) MCGILL JOURNAL OF DISPUTE RESOLUTION 186–215 (2019–2020).

²⁰ Art. 8(1).

- (e) recognition or enforcement would be manifestly incompatible with the public policy ..., including situations where the specific proceedings leading to the judgment were incompatible with fundamental principles of procedural fairness ...;
- (f) the judgment is inconsistent with a judgment given in the requested State in a dispute between the same parties; or
- (g) the judgment is inconsistent with an earlier judgment given in another State between the same parties on the same cause of action ...

Again, as under the NYC, these grounds for refusal are designed to be exhaustive: states may provide regimes with fewer but not additional grounds for refusal of recognition.

The grounds on which enforcement of a foreign arbitral award or a judgment based on a choice of forum clause may be refused can be classified into substantive invalidity of the arbitration or prorogation agreement, procedural irregularities, and public policy considerations. Substantive invalidity may be based on incapacity or nullity of the agreement. Procedural irregularities include situations where the party against whom the decision is invoked did not have proper notice of the proceedings or was otherwise unable to present its case. Public policy grounds, although nebulous, relate to the violation of fundamental principles of justice or morality in the enforcing state. In both Conventions, as noted above, these grounds are exceptions, to be construed narrowly, and are primarily raised by the party against whom the award is invoked, although some – typically public policy – may be raised on the initiative of the court.

The main differences concern the formulation of public policy grounds, which are more detailed and nuanced in the CCC. For example, the CCC requires that recognition be refused based on *res judicata* not only in relation to a judgment given in the requested state but also in relation to a judgment given in another state.²¹ Although these provisions do not have a direct counterpart in the NYC, *res judicata* has been found to be included in the public policy to deny exequatur based on the NYC. Similarly, the CCC introduces a ground for refusal where ‘the judgment was obtained by fraud in relation to a matter of procedure’, a provision that is absent from the NYC but could fit into several other grounds.²²

With respect to the definition of the public policy ground, the CCC appears to be both narrower than the NYC, allowing refusal only if the judgment is ‘manifestly’ incompatible with the public policy of the requested state, and broader, including ‘situations where the specific proceedings leading to the judgment were incompatible with fundamental principles of procedural fairness’. Rather than raising the threshold of what constitutes public policy, however, the ‘manifest’ nature of the violation would seem to call only for responsibility or self-restraint on the part of the requested court;²³ and inconsistency with ‘fundamental principles of procedural fairness’ has been consistently affirmed as part of public policy, even under the NYC.

Perhaps the new language is a vague reflection of an increasingly *moralistic* approach to dispute resolution. I am referring not only to the long trend toward the use of constitutional

²¹ Art. 9, f and g.

²² As acknowledged by FRANCISCO GARCIMARTÍN & GENEVIÈVE SAUMIER, JUDGMENTS CONVENTION: REVISED DRAFT EXPLANATORY REPORT para. 284 (2018).

²³ Garcimartín & Saumier, *supra* note 22, para. 289, confirm that this is ‘a high threshold’, but clarify that the idea is to ensure that judgments are recognized ‘unless there is a compelling public policy reason not to do so in a particular case’.

terminology and reasoning in civil litigation and arbitration,²⁴ but also to the idea that any dispute resolution process incorporates public values, and therefore parties are expected to use it in good faith, cooperatively, and without abuse. And perhaps it simply reflects a crisis of legitimacy, an indefinable distrust of the old liberal paradigm based on the private vindication of rights as the only solid cornerstone to ensure justice and freedom.²⁵

In short, the differing formulations do not embody different principles, but simply reflect the *Zeitgeist* in which they were written.

In both arbitration and litigation, the enforcement of the arbitration or choice of forum agreement is considered as important as the enforcement of the judgment that is the outcome of the proceedings. It is at this early stage that parallel proceedings can be better avoided. For this reason, the CCC guarantees the enforcement of choice of forum clauses, just as the NYC guarantees the enforcement of arbitration clauses. Both uphold private autonomy in dispute resolution.²⁶ The regulatory technique in this respect is also similar, providing for the duty of any court ‘not chosen’ to dismiss proceedings in the face of an arbitration agreement or a choice of forum clause.²⁷

In both cases, the courts of the signatory states are obliged to enforce arbitration and choice of forum clauses, subject to limited exceptions.

New York Convention

Art. II

3. The court ... shall ... refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed

Choice of Court Convention

Art. 6. Obligations of a court not chosen

A court ... shall suspend or dismiss proceedings ... unless –

- (a) the agreement is null and void ...;
- (b) a party lacked the capacity to conclude the agreement ...;

²⁴ See Mauro Cappelletti & Bryant G. Garth, *Introduction. Policies, Trends and Ideas in Civil Procedure*, in *CIVIL PROCEDURE* (Mauro Cappelletti ed., Vol. XVI); in *INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW* 43–55 (Konrad Zweigert & Ulrich Drobnig eds., 1988); more recently, Dominik Dürsterhaus, *Constitutionalisation of European Civil Procedure as a Starting Point for Harmonisation?*, in *THE FUTURE OF THE EUROPEAN LAW OF CIVIL PROCEDURE. COORDINATION OR HARMONISATION?* 69–88 (Fernando Gascón Inchausti & Burkhard Hess eds., 2020).

²⁵ See Felix Koechel, *Harmonisation and Unification of Civil Procedural Law: Prospects for Further Development. Report on the Second Day of the Colloque Trilingue, 15 September 2015*, 6(1) *INTERNATIONAL JOURNAL OF PROCEDURAL LAW* 86–102 (2016).

²⁶ See Louise E. Teitz, *The Hague Choice of Court Convention: Validating Party Autonomy and Providing an Alternative to Arbitration*, 53(3) *AMERICAN JOURNAL OF COMPARATIVE LAW* 543–58, at 556 (2005); Francisco J. Garcimartín, *El Convenio de La Haya sobre acuerdos de elección de foro: autonomía privada y competencia judicial internacional*, 6 *ANNALS DE L’ACADÈMIA DE JURISPRUDÈNCIA I LEGISLACIÓ DE CATALUNYA* 189–206 (2014–2016).

²⁷ See Art. 6. The court cannot decline to hear the case based on the doctrine of *forum non conveniens* nor on the ground that the dispute is already pending before the courts of another state. Party autonomy thus prevails over *lis pendens*. See Garcimartín, *supra* note 26, at 7.

- (c) giving effect to the agreement would lead to a manifest injustice or would be manifestly contrary to the public policy ...;
- (d) for exceptional reasons beyond the control of the parties, the agreement cannot reasonably be performed; or
- (e) the chosen court has decided not to hear the case.

The differences in the regimes are due to the nature of the situation at issue. While the NYC establishes a confrontation between two different adjudicatory systems – arbitration and litigation²⁸ – the CCC regulates the concurrence of multiple courts within the same judicial sphere; therefore, the dividing line is more blurred and requires more detailed regulation to ensure adherence to the agreed forum.

In both cases, the court will decline jurisdiction: In the NYC, the court will ‘refer the parties to arbitration’, while in the CCC, the court will ‘suspend or dismiss’ the case, depending on the applicable internal procedural rules. The court will do so, in the NYC, ‘unless it finds that the said agreement is null and void, inoperative or incapable of being performed’, exceptions that also appear in the CCC, only with more detailed wording. What is different is the discretion given to the court to override the forum selection clause and assume jurisdiction to avoid ‘manifest injustice’ or ‘manifest’ violation of public policy. Courts thus retain a broader discretion to dismiss proceedings under the CCC than under the NYC, again perhaps reflecting the trend towards procedural *moralization*.

Both treaties already work together to further remove barriers to positive commercial relations by guaranteeing the effectiveness of both the agreement and the outcome of the proceedings, thereby increasing certainty and predictability.

3 Litigation generally

Not all disputes have a consensual basis. It was therefore necessary to resume work to facilitate the circulation of decisions in civil or commercial disputes more widely.

In Europe, harmonization efforts in this area date back half a century to the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, signed in Brussels on September 27, 1968 (together with the Lugano Convention of 1988). The Brussels Convention was later strengthened and adopted as Council Regulation (EC) 44/2001 of December 22, 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (followed by a revised Lugano Convention in 2007).²⁹ This gradual process of strengthening judicial cooperation within the EU was completed by a recast of the Brussels Regulation: Regulation (EU) 1215/2012 of the European Parliament and of the Council of December 12, 2012 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (recast).³⁰ The Brussels Regulation recast abol-

²⁸ Although both pertaining to the same ‘legal order’, a traditional dividing line between national courts and arbitral tribunals, on the one hand, and supranational courts and public international law tribunals, on the other. See Filip de Ly & Audley Sheppard, *ILA Interim Report on Res Judicata and Arbitration and ILA Final Report on Res Judicata and Arbitration*, 25(1) *ARBITRATION INTERNATIONAL* 35–66 and 67–82 (2009).

²⁹ See generally ANDRÉS DE LA OLIVA SANTOS (ED.), *EUROPEAN CIVIL PROCEDURE* (2011).

³⁰ See generally ANDREW DICKINSON & EVA LEIN (EDS.), *THE BRUSSELS I REGULATION RECAST* (2015); TREVOR HARTLEY, *CIVIL JURISDICTION AND JUDGMENTS IN EUROPE. THE BRUSSELS I REGULATION, THE LUGANO CONVENTION, AND THE HAGUE CHOICE OF COURT CONVENTION* (2023).

ished exequatur, making judgments immediately enforceable throughout the EU without the need for an intermediate procedure – a declaration of enforceability – in the enforcing state, although the debtor may oppose enforcement on the grounds of due process, *res judicata*, or public policy.³¹ It also strengthened choice of forum agreements and adapted *lis pendens* to avoid parallel litigation by requiring the courts of any member state to stay proceedings where there is a choice of forum agreement in favor of the courts of another member state, regardless of which court was first seized. In short, for decades in Europe it has been easier to have a judgment recognized and enforced than an arbitral award.

In the broader international arena, as noted above, the Hague Conference began in 1996 with the ‘Judgments Project’. The Conference later gave priority to the CCC, but as soon as the CCC was adopted, it resumed its work and new rounds of negotiations led to the conclusion of the long-sought multilateral treaty on recognition of judgments: the Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters, concluded in The Hague on July 2, 2019 (the Judgments Convention, JC).³² The JC has been signed by countries such as the US and Russia;³³ in the EU, with a few exceptions, it entered into force on September 1, 2023.

The JC contains something that neither the NYC nor the CCC required: a catalogue of indirect international rules of jurisdiction with which the judgment must comply to give rise to the obligation of signatory states to recognize it.³⁴ Only judgments rendered in the state of origin based on one of these jurisdictional criteria – the lowest common denominator in the field³⁵ – will circulate internationally under the JC. If this precondition is met, the JC follows the same legal technique as the NYC and the CCC by establishing a default rule for recognition along with a list of exceptions in the form of limited grounds for refusal. A default rule:

New York Convention

Art. III

Each Contracting State shall recognize arbitral awards as binding and enforce them ...

Choice of Court Convention

Art. 8. *Recognition ...*

(1) A judgment given by a court of a Contracting State designated in an exclusive choice of court agreement shall be recognised and enforced ...

Judgments Convention

Art. 4. *General provisions*

1. A judgment given by a court of a Contracting State ... shall be recognised and enforced ...

³¹ Art. 45.

³² See generally RONALD A. BRAND, MICHAEL S. COFFEE & PAUL M. HERRUP, *THE 2019 HAGUE JUDGMENTS CONVENTION* (2024).

³³ Interestingly, it was signed first by Ukraine in 2020, then by the Russian Federation in 2021, and then by the EU and the US in 2022. Perhaps a happy coincidence that bodes well.

³⁴ Art. 5(1). See, on the indirect nature of these rules of jurisdiction, Garcimartín & Saumier, *supra* note 22, para. 135.

³⁵ Sara Sánchez Fernández, *El Convenio de La Haya de reconocimiento y ejecución de sentencias: arquitectura y algunos problemas seleccionados*, 73(1) REVISTA ESPAÑOLA DE DERECHO INTERNACIONAL 233–51, at 239 (2021).

And a list of exceptional and comprehensive grounds for refusal:

New York Convention

Art. V

1. Recognition and enforcement ... may be refused ... only if ...:
 - (a) The parties ... were ... under some incapacity, or the said agreement is not valid ...; or
 - (b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or
 - (c) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration ...; or
 - (d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law ...; or
 - (e) The award has not yet become binding on the parties, or has been set aside or suspended ...
2. Recognition and enforcement of an arbitral award may also be refused if ...:
 - (a) The subject matter of the difference is not capable of settlement by arbitration ...; or
 - (b) The recognition or enforcement of the award would be contrary to the public policy ...

Choice of Court Convention

Art. 9. Refusal ...

Recognition or enforcement may be refused [‘only’]³⁶ if –

- (a) the agreement was null and void ...;
- (b) a party lacked the capacity to conclude the agreement ...;
- (c) the document which instituted the proceedings or an equivalent document, including the essential elements of the claim,
 - (i) was not notified to the defendant in sufficient time and in such a way as to enable him to arrange for his defence ...; or
 - (ii) was notified to the defendant ... in a manner that is incompatible with fundamental principles ...;
- (d) the judgment was obtained by fraud in connection with a matter of procedure;
- (e) recognition or enforcement would be manifestly incompatible with the public policy ..., including situations where the specific proceedings leading to the judgment were incompatible with fundamental principles of procedural fairness ...;
- (f) the judgment is inconsistent with a judgment given in the requested State in a dispute between the same parties; or
- (g) the judgment is inconsistent with an earlier judgment given in another State between the same parties on the same cause of action ...

Judgments Convention

Art. 7. Refusal ...

1. Recognition or enforcement may be refused [‘only’]³⁷ if –
 - (a) the document which instituted the proceedings ... –
 - (i) was not notified ... in sufficient time and in such a way as to enable them to arrange for their defence ...; or
 - (ii) was notified ... in a manner that is incompatible with fundamental principles ...;
 - (b) the judgment was obtained by fraud;
 - (c) recognition or enforcement would be manifestly incompatible with the public policy ..., including situations where the specific proceedings ... were incompatible with fundamental

³⁶ Art. 8(1).

³⁷ Art. 4(1).

- principles of procedural fairness ... and situations involving infringements of security or sovereignty ...;
- (d) the proceedings in the court of origin were contrary to an agreement ... under which the dispute ... was to be determined in a court of a State other than the State of origin;
 - (e) the judgment is inconsistent with a judgment given by a court of the requested State in a dispute between the same parties; or
 - (f) the judgment is inconsistent with an earlier judgment given by a court of another State between the same parties on the same subject matter ...
2. Recognition or enforcement may be postponed or refused if proceedings between the same parties on the same subject matter are pending ...

The three breathe an unmistakable *air de famille*, with the CCC and the JC like twin siblings revealing their shared Hague Conference motherhood – *mater semper certa est* – and NYC paternal DNA.

Since in the JC the decision is not based on a choice of court or arbitration agreement, the grounds for refusing recognition are limited to procedural irregularities and public policy considerations. Among the former, the special protection afforded to forum selection agreements is evidence of the complementarity of the JC and the CCC.³⁸ Of course, to be valid as a ground for refusal, the agreement must have been raised in a timely manner; otherwise, an implied choice of forum is likely to have overridden the prior express choice contained in the agreement.³⁹ Similarly, any decision on the validity or invalidity of such an agreement made in the forum of origin should be respected in the forum of destination based on the *res judicata* ground for non-recognition provided for in subparagraph (f).

This *res judicata* ground for non-recognition was introduced for the first time in the CCC, and the JC not only retained it, but added a *lis pendens* consideration in Article 7(2). Although both grounds – *res judicata* and *lis pendens* – had already been recognized by case law as part of the public policy ground for non-recognition under the NYC, their explicit inclusion shows a clear trend towards a reinforcement of these grounds in the international arena. Another sign of this trend towards strengthening public policy considerations is the fact that the JC not only retains the ‘judgment obtained by fraud’ ground for non-recognition first included in the CCC but goes a step further to include ‘situations involving infringements of security or sovereignty’. The *moralizing* trend thus deepens and adds a *raison d’état* element that further exposes the above-mentioned crisis of legitimacy of the system and perhaps heralds a paradigm shift.

Be that as it may, if the ratification process is successful, the three international treaties, together with the Brussels Regulation in Europe, will work together to increase legal certainty and predictability in cross-border transactions.

4 Mediation

An additional tool in this process towards a coordinated legal framework for international dispute resolution was provided by the UN Convention on International Settlement Agreements Resulting from Mediation, adopted in Singapore on December 20, 2018 (the Mediation Convention, MC). The MC is a multilateral treaty that offers a uniform framework

³⁸ Expressly proclaimed in the preamble of the JC.

³⁹ Cf. Art. 5(1)(f).

for the enforcement⁴⁰ of mediated settlement agreements in cross-border commercial disputes. Forty-six countries, including the USA, China, and India, signed the MC on the day it opened for signature, and ten more, among which Brazil, the UK, and Australia, have signed since then.

Lack of enforceability, particularly (but not only) in cross-border contexts, is a significant barrier to the use of mediation. Without enforceability, a successful mediation results in just another contract, which, if breached, requires ordinary contractual remedies, probably including declaratory relief.⁴¹ To compensate, parties sometimes feel compelled to go to arbitration after mediation to convert the settlement agreement into a consensual arbitral award that can then be enforced under the NYC. The MC eliminates this cumbersome process by facilitating the direct enforcement of international mediated settlement agreements, making them more like a judgment or award than a private contractual act.

The technique mirrors that of the other instruments. A default positive rule:

New York Convention

Art. III

Each Contracting State shall recognize arbitral awards as binding and enforce them ...

Choice of Court Convention

Art. 8. *Recognition and enforcement*

(1) A judgment given by a court of a Contracting State designated in an exclusive choice of court agreement shall be recognised and enforced ...

Judgments Convention

Art. 4. *General provisions*

1. A judgment given by a court of a Contracting State ... shall be recognised and enforced ...

Mediation Convention

Art. 3. *General principles*

1. Each Party to the Convention shall enforce a settlement agreement ...

And a list of limited grounds for refusal:

New York Convention

Art. V

1. Recognition and enforcement of the award may be refused ... only if ...:
 - (a) The parties ... were ... under some incapacity, or the said agreement is not valid ...; or
 - (b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or
 - (c) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration ...; or

⁴⁰ The term ‘recognition’ was avoided because it is understood differently in different jurisdictions, but this reluctance to use the word does not mean that the MC differs in this respect from other analogous texts. See Timothy Schnabel, *The Singapore Convention on Mediation: A Framework for the Cross-Border Recognition and Enforcement of Mediated Settlements*, 19(1) PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL 1–60, at 38–9 (2019).

⁴¹ Schnabel, *supra* note 40, at 2–4, 10–11.

- (d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or
 - (e) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority ...
2. Recognition and enforcement ... may also be refused if ...:
- (a) The subject matter of the difference is not capable of settlement by arbitration ...; or
 - (b) The recognition or enforcement of the award would be contrary to the public policy of that country.

Choice of Court Convention

Art. 9. Refusal ...

Recognition or enforcement may be refused [‘only’]⁴² if –

- (a) the agreement was null and void ...;
- (b) a party lacked the capacity to conclude the agreement ...;
- (c) the document which instituted the proceedings or an equivalent document, including the essential elements of the claim,
 - (i) was not notified to the defendant in sufficient time and in such a way as to enable him to arrange for his defence ...; or
 - (ii) was notified to the defendant ... in a manner that is incompatible with fundamental principles ...;
- (d) the judgment was obtained by fraud in connection with a matter of procedure;
- (e) recognition or enforcement would be manifestly incompatible with the public policy ..., including situations where the specific proceedings leading to the judgment were incompatible with fundamental principles of procedural fairness ...;
- (f) the judgment is inconsistent with a judgment given in the requested State in a dispute between the same parties; or
- (g) the judgment is inconsistent with an earlier judgment given in another State between the same parties on the same cause of action ...

Judgments Convention

Art. 7. Refusal ...

1. Recognition or enforcement may be refused [‘only’]⁴³ if –

- (a) the document which instituted the proceedings ... –
 - (i) was not notified ... in sufficient time and in such a way as to enable them to arrange for their defence ...; or
 - (ii) was notified ... in a manner that is incompatible with fundamental principles ...;
 - (b) the judgment was obtained by fraud;
 - (c) recognition or enforcement would be manifestly incompatible with the public policy ..., including situations where the specific proceedings ... were incompatible with fundamental principles of procedural fairness ... and situations involving infringements of security or sovereignty ...;
 - (d) the proceedings in the court of origin were contrary to an agreement ... under which the dispute ... was to be determined in a court of a State other than the State of origin;
 - (e) the judgment is inconsistent with a judgment given by a court of the requested State in a dispute between the same parties; or
 - (f) the judgment is inconsistent with an earlier judgment given by a court of another State between the same parties on the same subject matter ...
2. Recognition or enforcement may be postponed or refused if proceedings between the same parties on the same subject matter are pending ...

⁴² Art. 8(1).

⁴³ Art. 4(1).

Mediation ConventionArt. 5. *Grounds ...*

1. The competent authority ... may refuse to grant relief ... only if ...:
 - (a) A party ... was under some incapacity;
 - (b) The settlement agreement ...:
 - (i) is null and void, inoperative or incapable of being performed ...;
 - (ii) is not binding, or is not final ...; or
 - (iii) has been subsequently modified;
 - (c) The obligations in the settlement agreement:
 - (i) have been performed; or
 - (ii) are not clear or comprehensible;
 - (d) Granting relief would be contrary to ... the settlement agreement;
 - (e) There was a serious breach ... of standards applicable to the mediator or the mediation without which breach that party would not have entered into the settlement agreement; or
 - (f) There was a failure ... to disclose to the parties circumstances that raise justifiable doubts as to the mediator's impartiality or independence and such failure to disclose had a material impact or undue influence on a party without which failure that party would not have entered into the settlement agreement.
2. The competent authority ... may also refuse to grant relief if ...:
 - (a) Granting relief would be contrary to the public policy ...; or
 - (b) The subject matter of the dispute is not capable of settlement by mediation ...

Like the NYC, the CCC, and the JC, the grounds for refusal in the MC are comprehensive: Regimes with fewer grounds for refusal, and thus more favorable or conducive to the international circulation of mediated settlement agreements, are possible, but regimes with additional grounds for refusal are not.

Apart from the differences justified by the specific nature of the mediation process, the existence of the positive default rule, which places settlement agreements on the same international footing as court judgments and arbitral awards, is groundbreaking. Equally groundbreaking, in terms of legislative drafting technique, is the abandonment of the nationality requirement. Unlike the NYC and, of course, the CCC and the JC, there is no 'seat' under the MC. Mediated settlements are completely delocalized.⁴⁴ Finally, the MC guarantees an equivalent to the *res judicata* effect of judgments by allowing parties to 'invoke the settlement agreement' in court 'to prove that the matter has already been resolved', which must be understood as a full-fledged procedural defense and not merely as an opportunity to introduce the agreement as evidence.⁴⁵

On the other hand, unlike the other instruments regulating consensual forms of adjudication, the question of the negative effects of the agreement to mediate has been left fundamentally unresolved.⁴⁶ Moreover, the MC allows states to provide that the Convention does not apply to settlement agreements to which the state is a party – again, the comeback of *raison d'état*.

⁴⁴ Schnabel, *supra* note 40, at 13–14: 'The Working Group wanted to avoid replicating the problems that arbitration faced prior to the New York Convention – i.e., the Geneva Convention approach that required double exequatur for arbitral awards – due to the fear of creating a system that would be so burdensome that parties would not want to use it.'

⁴⁵ Schnabel, *supra* note 40, at 39–41.

⁴⁶ Schnabel, *supra* note 40, at 14: 'Although the Working Group briefly discussed whether the Convention should address agreements to mediate, it quickly decided that doing so would unnecessarily complicate the work. The Convention also does not require the disputing parties to have

States may also require the express consent of the parties to a dispute before the Convention can be applied, an opt-in procedure that may further limit the effectiveness of the MC.⁴⁷

Overall, if the MC can achieve a critical mass of signatory countries, it will provide significant support for mediation as an effective method of resolving cross-border commercial disputes alongside litigation and arbitration.

Within the EU, Member States have implemented Directive 2008/52/EC of the European Parliament and of the Council of May 21, 2008 on Certain Aspects of Mediation in Civil And Commercial Matters. Article 6 of the Mediation Directive sets out the positive default rule and the grounds for refusal in open-ended terms, in keeping with its legal nature as a European directive.⁴⁸

5 International business courts

If the oversimplification is at all meaningful, international actors tend to see arbitration as a transnational mechanism and litigation as a national reality. It is true that both need the international legal framework and, ultimately, the cooperation of courts to be fully effective; but, as the comparison of the NYC and the CCC suggests, either a distinctly delocalized or a distinctly local adjudicatory body issues the decision that is to be internationally recognized or enforced.

There is, however, a trend toward the creation of tribunals that, while remaining stately and non-private in nature, are at least partially international like arbitration. We see this clearly in two areas: the trend from investor-state arbitration to investment courts (in recent EU international trade and investment agreements),⁴⁹ and from general civil or commercial courts to specialized international commercial courts. Indeed, it might not be wrong to say that the renewed interest in international commercial courts in recent decades coincides with the impulse we have described above to facilitate and strengthen the international circulation of judicial decisions. Pamela Bookman explains this process in this volume (Chapter 19).

6 Judicial cooperation in civil proceedings

A legal framework for the circulation of decisions is not sufficient to ensure an effective dispute settlement system. Before a final decision can be reached, several aspects of the procedure itself need to be facilitated in a cross-border setting. The Hague Conference on Private International Law drafted several important texts to this end, including the Service Convention 1965,⁵⁰ the Taking of Evidence Convention 1970,⁵¹ and the Access to Justice Convention 1980.⁵²

had an agreement to mediate; the Convention applies regardless of whether the parties had a prior agreement or not.⁷

⁴⁷ Schnabel, *supra* note 40, at 56–8.

⁴⁸ See generally, on the nature of ADR promotion and its regulation throughout Europe, FELIX STEFFEK & HANNES UNBERATH (EDS.), *REGULATION DISPUTE RESOLUTION. ADR AND ACCESS TO JUSTICE AT THE CROSSROADS* (2013).

⁴⁹ To date, with Canada, Vietnam, and Singapore; negotiations are underway with Mexico.

⁵⁰ Convention of November 15, 1965 on the service abroad of judicial and extrajudicial documents in civil or commercial matters.

⁵¹ Convention of March 18, 1970 on the taking of evidence abroad in civil or commercial matters.

⁵² Convention of October 25, 1980 on international access to justice.

Some of these texts have had a strong influence on the EU, which has developed its own counterparts for use within the EU.⁵³ Initially outside the competence of the EU institutions, civil justice began to be understood as an essential part of the integration process in the Treaty of Maastricht (1992) and was finally adopted as a shared competence in the Treaty of Amsterdam (1997) and the Treaty on the Functioning of the EU (the name given in 2009 to the Treaty of Rome of 1957).⁵⁴ In addition to the Brussels Regulation and the Mediation Directive discussed above, the Service of Documents Regulation 2020⁵⁵ and the Taking of Evidence Regulation 2020⁵⁶ should be mentioned as constituting the basic legal framework for judicial cooperation in the EU. But the overwhelming normative action of the EU institutions in the area of civil procedure is much more pervasive, including the creation of special procedures directly applicable throughout the EU,⁵⁷ the establishment of procedural rules when regulating economic sectors (e.g., intellectual property),⁵⁸ and the harmonization of procedural rules

⁵³ See generally Peter Gottwald, *The European Law of Civil Procedure*, 22 RITSUMEIKAN LAW REVIEW 37–67 (2005); Burkhard Hess, *Procedural Harmonisation in a European Context*, in CIVIL LITIGATION IN A GLOBALISING WORLD 159–73 (Xandra E. Kramer & C.H. van Rhee eds., 2012).

⁵⁴ In accordance with Art. 67(1) of the Treaty on the Functioning of the EU, the EU ‘shall constitute an area of freedom, security and justice’, without prejudice to the ‘respect’ due for ‘the different legal systems and traditions of the Member States’. As such, the EU ‘shall facilitate access to justice, in particular through the principle of mutual recognition of judicial and extrajudicial decisions in civil matters’, according to Art. 67(4) of the Treaty. More broadly, under Art. 81, the EU ‘shall develop judicial cooperation in civil matters having cross-border implications’, including ‘the adoption of measures for the approximation of the laws and regulations of the Member States’, ‘effective access to justice’, ‘the elimination of obstacles to the proper functioning of civil proceedings, if necessary by promoting the compatibility of the rules on civil procedure’, and ‘the development of alternative methods of dispute settlement’. The shared competence to regulate the ‘internal market’ and ‘consumer protection’ pursuant to Art. 4(2)(f) of the Treaty has also justified extensive normative action in the field of civil procedure, even without cross-border implications. See FERNANDO GASCÓN INCHAUSTI, *DERECHO EUROPEO Y LEGISLACIÓN PROCESAL CIVIL NACIONAL: ENTRE AUTONOMÍA Y ARMONIZACIÓN* 11–14, 37, 64–72 (2018).

⁵⁵ Regulation 2020/1784 of November 25, 2020 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (recast), replacing Regulation 1393/2007 of November 13, 2007 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters, in turn replacing Regulation 1347/2000, on the same matter.

⁵⁶ Regulation (EU) 2020/1783 of the European Parliament and of the Council of November 25, 2020 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters (recast), replacing Regulation 1206/2001 on the same matter.

⁵⁷ E.g., Regulation 1896/2006 creating a European order for payment procedure; Regulation 861/2007 establishing a European small claims procedure; Regulation 655/2014 establishing a European account preservation order procedure to facilitate cross-border debt recovery in civil and commercial matters; Regulation 2015/848 on insolvency proceedings (replacing Regulation 1346/2000).

⁵⁸ E.g., inter alia, Council Regulation (EC) 6/2002 of December 12, 2001 on Community designs; Council Regulation (EC) 207/2009 of February 26, 2009 on the Community trade mark (codified version); Regulation (EU) 1257/2012 of the European Parliament and of the Council of December 17, 2012 implementing enhanced cooperation in the area of the creation of unitary patent protection.

for certain types of litigants (e.g., consumers),⁵⁹ or certain types of claims (e.g., competition law).⁶⁰ In addition, the European Court of Justice has strengthened its case law interpreting EU procedural instruments and also national procedures when EU law is applied by civil courts, thus increasingly harmonizing national procedures through judicial interpretation.⁶¹ The enormous effort, which has resulted in a large and complex *corpus iuris processualis europæum*,⁶² should justify a less fragmented, more structured approach, with fewer inconsistencies with national systems, fewer uncertainties that need to be constantly resolved by case law, and probably also, from a technical point of view, fewer *extravagantes* (norms adopted outside a minimally codified body of rules, *quasi vagantes extra corpus iuris*, like the constitutions of the popes after the decrees of Gratian).⁶³ For individuals, businesses, and even lawyers and judges, EU procedural law is therefore somewhat opaque. A more coherent and systematic approach, possibly through an ‘umbrella instrument’⁶⁴ consolidating procedural rules that apply generally and independently of substantive law or regulated economic sectors,⁶⁵ or some other technique that retains or at least evokes some of the virtues of the common codification tradition, would be desirable.⁶⁶

⁵⁹ E.g., Directive (EU) 2020/1828 of the European Parliament and of the Council of November 25, 2020 on representative actions for the protection of the collective interests of consumers and repealing Directive 2009/22/EC (replacing Directive 2009/22/EC of the European Parliament and of the Council of April 23, 2009 on injunctions for the protection of consumers’ interests, in turn replacing Directive 98/27/EC on the same matter). Similarly, regulating alternative mechanisms, Directive 2013/11/EU of the European Parliament and of the Council of May 21, 2013 on alternative dispute resolution for consumer disputes and amending Regulation (EC) 2006/2004 and Directive 2009/22/EC (Directive on consumer ADR); and Regulation (EU) No 524/2013 of the European Parliament and of the Council of May 21, 2013 on online dispute resolution for consumer disputes and amending Regulation (EC) 2006/2004 and Directive 2009/22/EC (Regulation on consumer ODR).

⁶⁰ E.g., Directive 2014/104/EU of the European Parliament and of the Council of November 26, 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union.

⁶¹ Hess, *supra* note 2, at 159–73; Stephanie Law & Janek T. Nowak, *Procedural Harmonisation by the European Court of Justice: Procedural Autonomy and the Member States’ Perspective*, in *THE FUTURE OF THE EUROPEAN LAW OF CIVIL PROCEDURE. COORDINATION OR HARMONISATION?* 17–68 (Fernando Gascón Inchausti & Burkhard Hess eds., 2020).

⁶² Fernando Gascón Inchausti, *Have the EU Regulations on Judicial Cooperation Fostered Harmonisation of National Procedures?*, in *THE FUTURE OF THE EUROPEAN LAW OF CIVIL PROCEDURE. COORDINATION OR HARMONISATION?* 91–110 (Fernando Gascón Inchausti & Burkhard Hess eds., 2020). See also, on the process of formation of an EU procedural law, NICOLÒ TROCKER, *LA FORMAZIONE DEL DIRITTO PROCESSUALE EUROPEO* (2011).

⁶³ See briefly, *inter alia multa*, BART WAUTERS & MARCO DE BENITO, *THE HISTORY OF LAW IN EUROPE*, 57–61 (2017).

⁶⁴ Burkhard Hess, *Procedural Harmonization in European Context*, in *CIVIL LITIGATION IN A GLOBALISING WORLD* 159–73, at 171 (Xandra E. Kramer & C.H. van Rhee eds., 2012).

⁶⁵ See van Rhee, *supra* note 1, at 63–75.

⁶⁶ Marcel Storme, *Closing Comments: Harmonisation or Globalisation of Civil Procedure?*, in *CIVIL LITIGATION IN A GLOBALISING WORLD* 379–87, at 386 (Xandra E. Kramer & C.H. van Rhee eds., 2012).

B Towards an Integrated International Dispute Resolution System

This overview is sufficient to give an idea of the convergence of the legal framework for dispute resolution with a cross-border component. After half a century of undisputed dominance of arbitration as the preferred method of dispute resolution for international disputes, the process of updating the legal framework for other mechanisms will hopefully soon provide individuals and companies with a structured set of options that are similarly effective from this international legal perspective. They will then be free to choose the dispute resolution mechanism that best suits their preferences and circumstances, without having to worry about the existence of an adequate international legal framework.⁶⁷ Just as a neutral tax regime should not unduly alter private economic decisions, but rather respect people's personal choices, a structured, integrated international legal framework should also neutrally accommodate and protect different adjudicative alternatives. Therefore, it would be short-sighted to see the strengthening of courts and judicial decisions as a militant reaction against private justice. On the contrary, whether intended or not, an international legal system that offers equally effective alternatives will inevitably encourage healthy competition between legal systems and adjudicative bodies, thoughtful private jurisdictional planning, and ultimately 'forum shopping'.⁶⁸

In fact, the introduction of non-adjudicative forms of dispute resolution, particularly mediation, as an equally powerful alternative, internationally recognized and enforced, available at all times and within each dispute, suggests not only a structured, coordinated, neutral system of international civil justice, but a holistic, even principled⁶⁹ approach that integrates the

⁶⁷ Giacomo Pailli, *Commercio internazionale e giurisdizione consensuale: le 'proposte' della Convenzione dell'Aja del 30 giugno 2005 sulle clausole di scelta del foro*, 1 *CONTRATTO E IMPRESA/EUROPA* 192–222, at 195–6 (2011).

⁶⁸ In the words of Marta Requejo, *International Commercial Courts in the Litigation Market*, 9(1) *INTERNATIONAL JOURNAL OF PROCEDURAL LAW* 4–49, at 34 (2019), 'the existence of a global market of competing legal services is no longer in dispute. Open reference is also made to a "litigation market," an area which is becoming global in parallel with the globalisation of commerce itself, and where competition is seen as a positive element, i.e., as an external factor boosting improvement and innovation.' See also MICHELE ANGELO LUPOI, *CONFLITTI TRANSNAZIONALI DI GIURISDIZIONI*, Vol. 1, *POLICIES, METODI, CRITERI DI COLLEGAMENTO* 25–48 (2002); Pamela Bookman, *The Unsung Virtues of Global Forum Shopping*, 92(2) *NOTRE DAME LAW REVIEW* 579–636 (2016). For a multidisciplinary approach to the difficulties that jurisdictional planning poses in practice, see J. Maurits Barendrecht & Berend R. de Vries, *Fitting the Forum to the Fuss with Sticky Defaults: Failure on the Market for Dispute Resolution Services?*, 7(1) *CARDOZO JOURNAL OF CONFLICT RESOLUTION* 83–118 (2006). All of this is without prejudice to the need to always consider the specific purposes of civil procedural law, which are far from being adequately captured by economic approaches to law. See in this regard, inter alia, Frédérique Ferrand, *Faut-il s'adapter? De l'avenir du procès civil: reddition ou résistance ?*, 2 *INTERNATIONAL JOURNAL OF PROCEDURAL LAW* 253–80 (2020), in English *On the Future of Civil Procedure – Should One Adapt or Resist?*, in *TECHNOLOGY, THE GLOBAL ECONOMY AND OTHER NEW CHALLENGES FOR CIVIL JUSTICE* 17–44 (Koichi Miki ed., 2021).

⁶⁹ Felix Steffek, *Principled Regulation of Dispute Resolution: Taxonomy, Policy, Topics*, in *REGULATING DISPUTE RESOLUTION. ADR AND ACCESS TO JUSTICE AT THE CROSSROADS* 33–61 (Felix Steffek & Hannes Unberath eds., 2013).

different forms of dispute settlement in a coherent whole to further promote access to justice.⁷⁰ Consensual forms of dispute resolution were, until recently, understood to stand separate from the civil justice system as having opposing aims: civil justice sought the pure vindication of rights⁷¹ and the embodiment of the will and values of the law – ‘to bring a recalcitrant reality closer to our chosen ideals’⁷² – while the other forms prioritized the preservation of social and commercial relationships through an efficient and constructive end of the conflict. Of course, this binary approach has never been that of the parties, whose primary goal is always to achieve the most favorable outcome possible, preferably through ‘capitulation’.⁷³ Likewise, from a values perspective, respect for party autonomy is a fundamental tenet of any healthy legal system. In sum, then, settlement and litigation today are necessarily conceived of as ‘symbiotic processes’.⁷⁴

By working towards the articulation of a – still nascent – integration principle, whether at the national or the international level, legislators seem to be acknowledging this reality, reinforcing the old party disposition dogma in a more pragmatic and effective manner, and perhaps unwittingly celebrating ‘the beauty in each process’s internal narrative’ of justice, truth, efficiency, predictability, and even morality.⁷⁵

II PROCEDURAL CONVERGENCE: TOWARDS A PRUDENTIAL CASE MANAGEMENT MODEL

Let us now turn to the approximation and harmonization of procedural principles, rules, and practices.

⁷⁰ Mauro Cappelletti, *Alternative Dispute Resolution Processes within the Framework of the World-Wide Access-to-Justice Movement*, 56 THE MODERN LAW REVIEW 282 *et seq.* (1993).

⁷¹ See generally RUDOLF VON JHERING, *DER KAMPF UMS RECHT* (1872); in English as *THE STRUGGLE FOR LAW* (1879).

⁷² Owen M. Fiss, *Against Settlement*, 93 YALE LAW JOURNAL 1073–90, at 1089 (1984); because a court’s ‘job is not to maximize the ends of private parties, nor simply to secure the peace, but to explicate and give force to the values embodied in authoritative texts such as the Constitution and statutes’ and ‘to bring reality into accord with them’ (at 1085).

⁷³ Richard Fentiman, *Theory and Practice in International Commercial Litigation*, 2(2) INTERNATIONAL JOURNAL OF PROCEDURAL LAW 235–60, at 238 (2012). After all, ‘any commercial dispute is an aspect of the transaction from which it arises’; ‘to paraphrase Clausewitz, international commercial litigation is the continuation of international commerce by other means’ (at 235 and 251).

⁷⁴ Michael L. Moffitt, *Three Things to Be Against* (‘Settlement’ Not Included), 78 FORDHAM LAW REVIEW 1203–45, at 1245 (2009).

⁷⁵ Moffitt, *supra* note 74, at 1245.

A The Long March towards Procedural Harmonization

1 Harmonization of arbitral procedure

The International Court of Arbitration (ICC) laid the foundation for a standard arbitration procedure by drafting the first version of the ICC Arbitration Rules in 1922.⁷⁶ The ICC Rules contain provisions governing each stage of the arbitral process, from the request for arbitration to the final award, including the constitution of the arbitral tribunal and – in a deliberately open manner – the conduct of the proceedings.

By providing a basic set of procedural rules, the ICC Rules reflected and codified a particular procedural scheme that served as a point of reference not only for the NYC but for many arbitral institutions.⁷⁷ The ICSID Rules, which have been part of the ICSID Convention since its adoption in 1966, provide a similar procedural scheme. UNCITRAL used the ICC Rules as a starting point when it led the first major attempt at procedural harmonization in arbitration, the adoption of the UNCITRAL Arbitration Rules in 1976.⁷⁸

The next major step towards harmonization was the adoption of the UNCITRAL Model Law on International Commercial Arbitration 1985.⁷⁹ Designed to assist states in reforming and modernizing their arbitration laws, the Model Law provides a harmonized regime for the normative pillars of arbitration, from the arbitration agreement, the composition and jurisdiction of the arbitral tribunal, the basic procedural principles, and the scope of judicial intervention to the recognition and enforcement of the award. Legislation based on or inspired by the Model Law has been adopted in 87 countries.⁸⁰

In addition to the essential instruments mentioned above, initiatives to harmonize the arbitral process are constantly being launched in the form of an ever-increasing number of soft law

⁷⁶ The Rules were first promulgated in 1922. They were recast in 1927, with amendments in 1931, 1933, 1935, 1939, and 1947. New versions of the Rules then appeared in 1955, 1975, 1988, 1998, 2012, 2017, and 2021. On the history of international arbitration, see generally Henry S. Fraser, *Sketch of the History of International Arbitration*, 11(2) *CORNELL LAW REVIEW* 179–208 (1926); MIKAËL SCHINAZI, *THE THREE AGES OF INTERNATIONAL COMMERCIAL ARBITRATION* (2021); for valuable primary and secondary sources, see HENRI LA FONTAINE, *PASICRISIE INTERNATIONALE 1794–1900. HISTOIRE DOCUMENTAIRE DES ARBITRAGES INTERNATIONAUX* (1902); Derek Roebuck, *Sources for the History of Arbitration. A Bibliographical Introduction*, 14(3) *ARBITRATION INTERNATIONAL* 237–343 (1998).

⁷⁷ E.g., the ICC, the Singapore International Arbitration Centre (SIAC), the Hong Kong International Arbitration Centre (HKIAC), the London Court of International Arbitration (LCIA), and the China International Economic and Trade Arbitration Commission (CIETAC), to name just the most preferred five worldwide according to the 2021 Survey by the School of International Arbitration at Queen Mary University of London, <https://arbitration.qmul.ac.uk/research/> (accessed November 2024).

⁷⁸ Revised in 2010, 2013, and 2021.

⁷⁹ Amended in 2006.

⁸⁰ See ILIAS BANTEKAS, PIETRO ORTOLANI, SHAHLA F. ALI, MANUEL A. GÓMEZ & MICHAEL POLKINGHORNE, *UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION. A COMMENTARY* (2020); GILLES CUNIBERTI, *THE UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION. A COMMENTARY* (2022).

instruments, which provide non-binding rules on all kinds of issues.⁸¹ UNCITRAL, the ICC, the IBA,⁸² or ICCA,⁸³ are particularly active and authoritative in this respect. For example, guides or practice notes⁸⁴ provide valuable and detailed guidance on case management. Other instruments address specific procedural aspects: selection and appointment of arbitrators,⁸⁵ conduct of counsel and the tribunal,⁸⁶ funding,⁸⁷ access to evidence,⁸⁸ technology and privacy,⁸⁹ costs,⁹⁰ awards,⁹¹ etc.

Ultimately, however, it is up to the arbitral tribunal, the lawyers, and the parties to shape the procedure with a great deal of discretion to incorporate, seek guidance from, ignore, or exclude any of these soft law instruments. Indeed, most national laws, whether based on the UNCITRAL Model Law or not, lack a specific mandatory procedure. The limits to the procedural autonomy of the parties do not derive from specific procedural forms or restrictions, but from compliance with the general principles of due process, namely equality of arms and bilateral hearing. The UNCITRAL Model Law exemplifies this:

⁸¹ See William W. Park, *The Procedural Soft Law of International Arbitration*, in PERSVASIVE PROBLEMS IN INTERNATIONAL ARBITRATION 141–54 (Loukas A. Mistelis & Julian D.M. Lew eds., 2006); Gabrielle Kaufmann-Kohler, *Soft Law in International Arbitration: Codification and Normativity*, 1(2) JOURNAL OF INTERNATIONAL DISPUTE SETTLEMENT 1–17 (2010); LAWRENCE W. NEWMAN & MICHAEL J. RADINE (EDS.), *SOFT LAW IN INTERNATIONAL ARBITRATION* (2014); DANIELE FAVALLI (ED.), *THE SENSE AND NON-SENSE OF GUIDELINES, RULES AND OTHER PARA-REGULATORY TEXTS IN INTERNATIONAL ARBITRATION* (2015); Diego P. Fernández Arroyo, *Soft Law and Arbitral Procedure: A Conditioned but Inescapable Couple*, 7(2) EUROPEAN INTERNATIONAL ARBITRATION REVIEW 71–86 (2018).

⁸² International Bar Association.

⁸³ International Council for Commercial Arbitration.

⁸⁴ E.g., the UNCITRAL Notes on Organizing Arbitral Proceedings; the ICC Effective Management of Arbitration Guide; the ICC Note to Parties and Tribunals on the Conduct of Arbitration; or the ICCA Guidelines on Standards of Practice in International Arbitration.

⁸⁵ E.g., IBA Guidelines on Conflict of Interests; CEA Code of Best Practices; CIArb Guidelines for Interviews for Prospective Arbitrators.

⁸⁶ E.g., P. de Ly, M.W. Friedman & L.G. Radicati di Brozolo (rapporteurs), *ILA Report and Recommendations on Inherent and Implied Powers of Arbitral Tribunals*, 2014; IBA Guidelines on Party Representation in International Arbitration; CCBE Code of Conduct for European Lawyers.

⁸⁷ E.g., Report of the ICCA-Queen Mary Task Force on Third Party Funding in International Arbitration; Association of Litigation Funders' Code of Conduct for Litigation Funders.

⁸⁸ E.g., IBA Rules on the Taking of Evidence; Prague Rules on Conduct of the Taking of Evidence in International Arbitration; ICC Arbitration Commission Report on Managing E-Document Production; ICDR Guidelines for Arbitrators Concerning Exchanges of Information.

⁸⁹ E.g., ICC Arbitration and ADR Commission Report on Leveraging Technology for Fair, Effective and Efficient International Arbitration Proceedings; CIArb Framework Guideline on the Use of Technology in International Arbitration; ICCA-IBA Joint Task Force on Data Protection in International Arbitration Proceedings.

⁹⁰ E.g., ICC Decisions on Costs in International Arbitration Report.

⁹¹ E.g., ICC Award Checklist; ICC Checklist on Correction and Interpretation of Awards Checklist; CIArb Guidelines for Drafting Arbitral Awards.

CHAPTER V. CONDUCT OF ARBITRAL PROCEEDINGS

Article 18. *Equal treatment of parties*

The parties shall be treated with equality and each party shall be given a full opportunity of presenting his case.

Article 19. *Determination of rules of procedure*

- (1) Subject to the provisions of this Law, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings.
- (2) Failing such agreement, the arbitral tribunal may, subject to the provisions of this Law, conduct the arbitration in such manner as it considers appropriate. ...

This large regulatory gap is usually filled by the parties' choice of an arbitral institution and its rules – which are often light on procedural details – and then usually in the first procedural order issued by the tribunal. The normative edifice of arbitration is thus necessarily constructed in layers, or rather, since they are not always arranged hierarchically, in pieces or blocks, the configuration of which is unique to each proceeding.

Interestingly, global competition among arbitral institutions (and arbitrators, governments, etc.), and the daily exercise of procedural party autonomy and authority, has led to convergence rather than divergence or chaos.⁹² Today, the arbitral process is highly standardized, regardless of the procedural traditions from which the parties may come.⁹³

2 Harmonization of civil procedure

In contrast to this already long-standing and variegated picture, harmonization of procedural law was late in making progress. True, the Universal Declaration of Human Rights enshrined fundamental procedural guarantees by proclaiming that 'everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law' and that 'everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations'; and later human right conventions included similar declarations and added other rights, such as the right to a hearing 'within a reasonable time' by a tribunal 'previously established by law' or the right to be 'advised, defended and represented' and to obtain 'legal aid'.⁹⁴

⁹² See, from a sociological perspective, YVES DEZALAY & BRYANT G. GARTH, *DEALING IN VIRTUE. INTERNATIONAL COMMERCIAL ARBITRATION AND THE CONSTRUCTION OF A TRANSNATIONAL LEGAL ORDER* (1996); from a cultural perspective, WON L. KIDANE, *THE CULTURE OF INTERNATIONAL ARBITRATION* (2017); from an economic theory perspective, inter alia, Marco de Benito & Sonsoles Huerta de Soto, *El arbitraje internacional como orden jurídico espontáneo*, 22 *SPAIN ARBITRATION REVIEW* 113–28 (2015); Sonsoles Huerta de Soto & Fabio Núñez del Prado, *International Arbitration As A Spontaneous Legal Order*, 17(2) *PROCESOS DE MERCADO* 117–53 (2020).

⁹³ See, inter alia, GEORGIOS PETROCHILOS, *PROCEDURAL LAW IN INTERNATIONAL ARBITRATION* 176 (2004); Claudia T. Salomon, *The Conduct of an International Arbitration: Do the Rules Make a Difference?*, 21(2) *JOURNAL OF INTERNATIONAL ARBITRATION* 103–41 (2004); MAURO RUBINO-SAMMARTANO, *INTERNATIONAL ARBITRATION LAW AND PRACTICE Chapter 17: Applicable Procedural Law* (2014); CLAUDIO CONSOLO, *PROBLEMI E SOLUZIONI IN TEMA DI ARBITRATO. RIGUARDATO DA UN GIURISTA ITALIANO TEORICO-PRATICO* 602 *et seq.* (2020).

⁹⁴ Art. 47 of the Charter of Fundamental Rights of the EU. See also Art. 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights), November 4, 1950; Art. 14 of the International Covenant on Civil and Political Rights,

These guarantees ‘constitute common international standards’ and provide ‘a universally recognized basis of procedural harmonization’.⁹⁵ Although the constitutional perspective has penetrated and strengthened the foundations of the entire edifice of procedural law, deeper harmonization has remained burdened by a certain ‘assumption that national procedural systems are too different from each other and too deeply embedded in local political history and cultural tradition to permit reduction or reconciliation of differences among legal systems’.⁹⁶

The long-running project for a Model Code of Civil Procedure for Ibero-America, launched in 1957 and completed in 1988, was an ambitious and successful first attempt.⁹⁷ The work of the Storme commission, published in 1994,⁹⁸ further demonstrated that harmonization among the even more diverse national legal systems of the European continent was possible. The Storme project inspired further initiatives, namely the Principles of Transnational Civil Procedure, adopted by UNIDROIT and the American Law Institute (ALI) in 2004,⁹⁹ and then the Model Rules of European Civil Procedure, adopted by UNIDROIT and the European Law Institute (ELI) in 2020.¹⁰⁰

The ALI-UNIDROIT Principles of Transnational Civil Procedure aim at reducing ‘the impact of differences between legal systems in lawsuits involving transnational commercial transactions’, proposing a model of universal procedure in 31 carefully drafted articles. The ALI-UNIDROIT Principles were accompanied by a set of ‘Rules of Transnational Civil Procedure’, which were not formally adopted by either UNIDROIT or the ALI but offer a possible model implementation of the Principles.

UNIDROIT decided to continue the harmonization efforts with a more detailed text for Europe. The ELI joined the initiative and work began in 2013 under the title ‘From Transnational Principles to European Rules of Civil Procedure’. The Model European Rules of Civil Procedure were adopted by both institutions in 2020. Although it was decided from the outset to draft model rules and to abandon the idea of a complete code, the 245 articles that make up the final text – divided into twelve chapters: general provisions; parties; case management; proceedings preparatory to a final hearing; preliminary proceedings; service and due notice of proceedings; access to information and evidence; judgment, *res judicata*, and *lis pendens*; means of review; provisional and precautionary measures; collective proceedings;

December 16, 1966; Art. 8 of the American Convention on Human Rights, November 22, 1969; Art. 7 of the African Charter on Human and People’s Rights, June 27, 1981.

⁹⁵ Hazard et al., *supra* note 2, at 2. See also Cappelletti & Garth, *supra* note 24, at 55; Düsterhaus, *supra* note 24, at 69–88.

⁹⁶ Hazard et al., *supra* note 2, at 2.

⁹⁷ INSTITUTO IBEROAMERICANO DE DERECHO PROCESAL, EL CÓDIGO PROCESAL CIVIL MODELO PARA IBEROAMÉRICA. HISTORIA – ANTECEDENTES – EXPOSICIÓN DE MOTIVOS. TEXTO DEL ANTEPROYECTO (1988). See, on the current state of discussion regarding the project, Roberto O. Berizonce, *Bases para actualizar el Código Modelo Procesal Civil para Iberoamérica*, 58 THEMIS 185–97 (2010).

⁹⁸ MARCEL STORME, STUDY ON THE APPROXIMATION OF THE LAWS AND RULES OF THE MEMBER STATES CONCERNING CERTAIN ASPECTS OF THE PROCEDURE FOR CIVIL LITIGATION (final report) (1994).

⁹⁹ ALI/UNIDROIT, PRINCIPLES OF TRANSNATIONAL CIVIL PROCEDURE (2006).

¹⁰⁰ ELI/UNIDROIT, ELI-UNIDROIT MODEL EUROPEAN RULES OF CIVIL PROCEDURE. FROM TRANSNATIONAL PRINCIPLES TO EUROPEAN RULES OF CIVIL PROCEDURE (2021).

costs – bear witness to the breadth of the project, especially when compared to the sparse 31 articles of ALI-UNIDROIT.

The preamble acknowledges some of the difficulties inherent in an undertaking of this magnitude. Among other things, the conceptual and terminological diversity inherent in the various European legal systems, together with the limitations of legal English in these matters, have led to a formulation that is intended to be neutral, descriptive, and functional, and which necessarily refers to the official commentary that accompanies each article for a full understanding. Moreover, no attempt was made to restate or identify a *tronc commun* of European civil procedure; the irreducible diversity of European legal systems would have made this impracticable. Nor was there any intention to apply the majority criterion or to systematically seek compromises. Rather, as the preamble expressly states, the aim was to formulate a set of ‘best practices’ for the future development of European civil procedure,¹⁰¹ with all the delicate value judgments that this objective entails.

The formulation of each thematic block was entrusted to different working groups. A working group on structure was then set up to integrate and consolidate the various proposals. At this stage, a French translation of the draft was also undertaken. A smaller team made the final technical and stylistic adjustments. Throughout the process, public and private institutions were present as observers – including the European Parliament, which even proposed a Directive on common minimum standards of civil procedure.¹⁰² The competence limits of the EU legal architecture, which naturally touch on deep and sensitive political and constitutional issues, make this an unlikely enterprise *rebus sic stantibus*.¹⁰³

The ELI-UNIDROIT Model Rules of European Civil Procedure is the most comprehensive effort to date to harmonize civil procedure at the international level. It has served and will continue to serve as a reference point for legislative reform.¹⁰⁴ It will no longer be possible to fully address most issues of civil procedure without reference to the harmonized rules and categories.¹⁰⁵

3 Harmonization of the mediation process

With respect to mediation, there is the UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation (2018),¹⁰⁶ which is designed to assist states in reforming and modernizing their laws relating to the medi-

¹⁰¹ As advocated, among others, by Marcel Storme, *A Single Civil Procedure for Europe: A Cathedral Builders’ Dream*, RITSUMEIKAN LAW REVIEW 87–100, at 99 (2005).

¹⁰² European Parliament resolution of July 4, 2017 with recommendations to the Commission on common minimum standards of civil procedure in the European Union.

¹⁰³ Storme, *supra* note 66, at 384.

¹⁰⁴ E.g., for the EU institutions in the 2020 revision of the Service of Documents and the Taking of Evidence Regulations.

¹⁰⁵ See generally ASTRID STADLER, VINCENT SMITH & FERNANDO GASCÓN INCHAUSTI (EDS.), EUROPEAN RULES OF CIVIL PROCEDURE. A COMMENTARY ON THE ELI/UNIDROIT MODEL RULES (2023); MARCO DE BENITO (ED.), COLLOQUIES ON EUROPEAN CIVIL PROCEDURE (2025).

¹⁰⁶ Amending and replacing the 2002 UNCITRAL Model Law on International Commercial Conciliation.

ation process. It provides uniform rules for the mediation process and addresses key issues such as the right to invoke a settlement agreement in proceedings.¹⁰⁷

B Converging Procedural Trends

These visible harmonization efforts, each in its own sphere, reflect deep, if less visible, common trends, sometimes even across families or traditions,¹⁰⁸ or across spheres such as litigation and arbitration. Let us focus on these.

1 Prudential and cooperative case management

Arbitration has always been a bespoke process. The tribunal, in close consultation with the parties, shapes and adapts the procedure to the circumstances of the case.¹⁰⁹ The parties, under the supervision of the tribunal, refine their factual and legal arguments and supplement their evidence during what we would call the interim or intermediate phase.¹¹⁰

The ELI-UNIDROIT Model European Rules articulate a case management model that focuses on the duty of loyal cooperation between the court and the parties and counsel.¹¹¹ This requires and encourages a flexible approach to case management that is closer to traditional practice in international arbitration than to the idea of predetermined stages that has characterized civil procedural systems for centuries.¹¹² This fixed scheme of stages and deadlines prescribed by the legislator, with a rigid correlation between a *what* and a *when*, is giving way to a looser way of managing cases.¹¹³ Case management powers are now listed outside of any stage or timeframe, without linking a *what* to a *when*, available to the court in a floating or delocalized manner: ‘where necessary for the proper management of proceedings’.¹¹⁴

¹⁰⁷ See generally PETER BINDER, *INTERNATIONAL COMMERCIAL ARBITRATION AND MEDIATION IN UNCITRAL MODEL LAW JURISDICTIONS* (2022).

¹⁰⁸ According to Mirjan R. Damaška, *The Common Law/Civil Law Divide: Residual Truth of a Misleading Distinction*, in COMMON LAW, CIVIL LAW AND THE FUTURE OF CATEGORIES 3–21, at 11–15 (Janet Walker & Oscar G. Chase eds., 2010) ‘rapprochement is quite substantial’.

¹⁰⁹ See de Ly, Friedman & Radicati di Brozolo, *supra* note 86; FRANCO FERRARI & FRIEDRICH ROSENFELD (EDS.), *INHERENT POWERS OF ARBITRATORS* (2019), esp. chapter 9.

¹¹⁰ The purposes of the interim or intermediate phase are nicely summarized in Art. 9 of the ALI-UNIDROIT Principles of Transnational Civil Procedure.

¹¹¹ On case management, see generally C.H. VAN RHEE (ED.), *JUDICIAL CASE MANAGEMENT AND EFFICIENCY IN CIVIL LITIGATION* (2007); Antonio Cabral, *New Trends and Perspectives on Case Management*, 8(1) *INTERNATIONAL JOURNAL OF PROCEDURAL LAW* 10–36 (2018); RAMÓN GARCÍA ODGERS, *EL CASE MANAGEMENT EN PERSPECTIVA COMPARADA TEORÍA, EVOLUCIÓN HISTÓRICA, MODELOS COMPARADOS Y UN CASO EN DESARROLLO* (2019); Marco de Benito, Anna Nylund, John Sorabji & Rolf Stürner, *Case Management*, in *COLLOQUIES ON EUROPEAN CIVIL PROCEDURE* (Marco de Benito ed., 2025).

¹¹² Cappelletti & Garth, *supra* note 24, at 5–13.

¹¹³ See Cabral, *supra* note 111, at 17–21.

¹¹⁴ See, inter alia, Rules 61 and 64. See also, on the trial-based structure (trial being used here to refer to the main evidentiary hearing), Xandra E. Kramer, *The Structure of Civil Proceedings and Why It Matters: Exploratory Observations on Future ELI-UNIDROIT European Rules of Civil Procedure*, 19(2) *UNIFORM LAW REVIEW* 218–38 (2014); Anna Nylund, *The Structure of Civil*

Rule 49. *Means of case management*

Where necessary for the proper management of proceedings, the court shall, in particular:

- (1) encourage parties to take active steps to settle their dispute or parts of their dispute and, where appropriate, to use alternative dispute resolution methods;
- (2) schedule case management conferences;
- (3) determine the type and the form of the procedure;
- (4) set a timetable or procedural calendar with deadlines for procedural steps to be taken by parties and/or their lawyers;
- (5) limit the number and length of future submissions;
- (6) determine the order in which issues should be tried and whether proceedings should be consolidated or separated;
- (7) determine the separation of questions concerning jurisdiction, provisional measures and statutes of limitation for early decision upon special hearings;
- (8) consider necessary amendments regarding the parties' proper representation, the consequences of changes related to the parties to litigation and the participation of third parties, intervenors, or other persons;
- (9) consider amendments to the pleadings or offers of evidence in the light of the parties' contentions;
- (10) require a party's appearance in person or require a party's representative, who should be fully informed of all matters relevant to the proceedings, to be present at a court hearing;
- (11) address the availability, admissibility, form, disclosure and exchange of evidence and, if adequate to the state of proceedings,
 - (a) determine the admissibility of evidence;
 - (b) order the taking of evidence.

This key provision of the Model European Rules is reminiscent not only of the broad case management powers traditionally accorded to arbitral tribunals, but also of the 'general management powers' available to English courts, following the Woolf reforms, to ensure the 'overriding objective' of fair and proportionate justice.¹¹⁵

But it would be misleading to imagine a judge or arbitrator with such powers as a *magnus iudex* or *magnus arbiter*, lofty and distant. While the Rules make the court ultimately responsible for the overall management of the case, the basic working principle is that the parties 'must cooperate' with each other and with the court to 'contribute to the proper conduct of the

Proceedings. Convergence through the Main Hearing Model?, 9(2) CIVIL PROCEDURE REVIEW 13–39 (2018).

¹¹⁵ Rule 3(1) of the Civil Procedure Rules. See generally NEIL ANDREWS, *ENGLISH CIVIL PROCEDURE. FUNDAMENTALS OF THE NEW CIVIL JUSTICE SYSTEM* (2003); Robert Turner, '*Actively*': *the Word that Changed the Civil Courts*, in *THE CIVIL PROCEDURE RULES TEN YEARS ON* 76–88 (Dáirdre Dwyer ed., 2010). C.H. van Rhee, *Introduction*, in *EUROPEAN TRADITIONS IN CIVIL PROCEDURE* 3–23 (C.H. van Rhee ed., 2005), identifies the English system as the forerunner of the 'common core' of the contemporary development of European civil procedure, which revolves around case management and cooperation. The same trend was emerging in the French Civil Procedure Code of 1975: see Loïc Cadiet, *Introduction to French Civil Justice System and Civil Procedural Law*, 28 *RITSUMEIKAN LAW REVIEW* 331–93, at 366–7 (2011). The trend was also visible in the US: see Jonathan T. Molot, *An Old Judicial Role for a New Litigation Era*, 113 *YALE LAW JOURNAL* 27–118 (2003). Regarding Latin America, see Eduardo Oteiza, *Civil Procedure Reforms in Latin America: The Role of the Judge and the Parties in Seeking a Fair Solution*, in *COMMON LAW, CIVIL LAW AND THE FUTURE OF CATEGORIES* 225–46 (Janet Walker & Oscar G. Chase eds., 2010).

proceedings'.¹¹⁶ Thus, the case management powers granted to the court do not increase at the expense of the parties, as in a zero-sum game.¹¹⁷ What increases is the overall flexibility of the system, bringing it closer to a coordinate rather than a hierarchical-bureaucratic paradigm,¹¹⁸ as has always been the case in arbitration.

As a result, case management in both harmonized civil procedure and international arbitration tends not to be more liberal or authoritarian, but simply looser, less focused on rules, mandates, and deadlines, and more reliant on prudential and cooperative stewardship: a sense of initiative and prudence in the exercise of discretion that rests primarily, but not exclusively, with judges and arbitrators,¹¹⁹ and a sense of loyalty and responsibility that rests primarily, but again not exclusively, with the parties.¹²⁰ 'Prudence' and 'prudential' may seem an odd choice of words in this context, but I can think of no more expressive term. φρόνησις, *prudentia*, 'prudence':¹²¹ the classical Aristotelian virtue that Aquinas elegantly defined as *recta ratio agibilium*, 'right reason in action'.¹²²

2 A hybrid model of witness testimony

Over the last few centuries, in the major civil law jurisdictions, testimony in civil proceedings has evolved from a written formality to a live interrogation that guarantees immediacy: a fresh, direct contact between the judge and the sources of evidence, especially the witnesses. The standard civil procedure that existed in virtually all the courts of continental Europe in the 19th and even in the 20th century maintained the Romano-canonical tradition that deliberately isolated the judge from the witnesses. Only an impersonal echo of the witness's voice, filtered

¹¹⁶ Rules 2–4. See C.H. van Rhee, *Towards Harmonised European Rules of Civil Procedure: Obligations of the Judge, the Parties and their Lawyers*, 6(1) ACCESS TO JUSTICE IN EASTERN EUROPE 6–33 (2020); Marco de Benito, Marco Gradi, C.H. van Rhee & Alan Uzelac, *Obligations of Parties, Lawyers, and Judges*, in COLLOQUIES ON EUROPEAN CIVIL PROCEDURE (Marco de Benito ed., 2025).

¹¹⁷ See De Benito et al., *supra* note 111.

¹¹⁸ MIRJAN R. DAMAŠKA, *THE FACES OF JUSTICE AND STATE AUTHORITY. A COMPARATIVE APPROACH TO THE LEGAL PROCESS* (1986).

¹¹⁹ See generally MARCEL STORME & BURKHARD HESS (EDS.), *DISCRETIONARY POWER OF THE JUDGE. LIMITS AND CONTROL/DISCRETIONAIRE BEVOEGDHEID VAN DE RECHTER: GRENZEN EN CONTROLE* (2003). On the ability of judges to exercise discretion well, see Tom Bingham, *The Discretion of the Judge*, in *THE BUSINESS OF JUDGING: SELECTED ESSAYS AND SPEECHES* 35–52 (Tom Bingham ed., 2000); Robert G. Bone, *Who Decides? A Critical Look at Procedural Discretion*, 28 *CARDOZO LAW REVIEW* 1061–2007 (2007). For a critical historical and constitutional analysis in the US context, see Molot, *supra* note 115, at 27–118.

¹²⁰ On the changing roles of the actors of civil justice, see Trevor C.W. & Garry D. Watson, *Courts and Procedures: The Changing Roles of the Participants*, in *COMMON LAW, CIVIL LAW AND THE FUTURE OF CATEGORIES* 155–60 (Janet Walker & Oscar G. Chase eds., 2010).

¹²¹ At least in this context, I prefer to translate φρόνησις as 'prudence' rather than 'mindfulness', as suggested by THOMAS McEVILLEY, *THE SHAPE OF ANCIENT THOUGHT: COMPARATIVE STUDIES IN GREEK AND INDIAN PHILOSOPHIES* 609 (2002).

¹²² ARISTOTLE, *NICOMACHEAN ETHICS*, VI:7–8, <https://oll.libertyfund.org/title/peters-the-nicomachean-ethics> (accessed November 2024). See, in this legal context, De Benito et al., *supra* note 111.

through intermediaries in the process of producing written records, reached the judge.¹²³ As a result, all subjective or psychological elements such as hesitation, contradictory or evasive answers, even non-verbal language – the ‘human stumbling and groping’¹²⁴ inherent in oral testimony – were absent from the evaluation. The orality movement, initiated by the French *philosophes* of the Enlightenment and successfully championed by Austrian and German reformers in the late 19th century, sought to remedy the many drawbacks of this system and to bring the witness into direct contact with the judge. The Benthamite reform of the rules of evidence had similar aims in 19th century England.¹²⁵ As a result of these movements, judges can now benefit from relatively open, spontaneous questioning that allows for a more effective assessment of the witness.

International arbitration seems to have taken the opposite path. Originally conceived as an informal, flexible process,¹²⁶ in recent decades it has developed procedural features that rely increasingly on the written element. This is particularly evident with respect to witness testimony, which now often involves a series of formalities and caveats that make the taking of testimony a cumbersome exercise, where interchangeable written statements – of identical format, length, and tone – sometimes completely replace live testimony. Clients’ interests, big law counsel’s anxieties, and arbitrators’ fears are likely all contributing to this trend, which threatens to turn witness testimony into a vehicle for advocacy rather than evidence.¹²⁷

This practice is rapidly and forcefully penetrating court litigation: First in England, where witness testimony is now used in much the same way as in international arbitration, then in the new commercial courts, and the trend seems to be deepening.¹²⁸ The regulation of witness

¹²³ See generally Raoul C. van Caenegem, *History of European Civil Procedure, 1973*, in CIVIL PROCEDURE (Maur o Cappelletti ed., Vol. XVI); in INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW (1973). More briefly, Cappelletti & Garth, *supra* note 24, at 5–13. More recently, C.H. VAN RHEE (ED.), EUROPEAN TRADITIONS IN CIVIL PROCEDURE (2005). More generally, JOHN H. MERRYMAN & ROGELIO PÉREZ, THE CIVIL LAW TRADITION. AN INTRODUCTION TO THE LEGAL SYSTEMS OF EUROPE AND LATIN AMERICA (2018).

¹²⁴ Doug Jones, *Developing Best Practice in International Arbitration: Witness Statements*, 15 VINDOBONA JOURNAL OF INTERNATIONAL COMMERCIAL LAW AND ARBITRATION 303–18, at 312 (2011).

¹²⁵ Cappelletti & Garth, *supra* note 24, at 5–13.

¹²⁶ RENÉ DAVID, ARBITRATION IN INTERNATIONAL TRADE 296 (1985), points out that ‘the witnesses will ordinarily be asked questions there both by the parties’ advocates and by the arbitrator in as friendly an atmosphere as possible’, and thus ‘examination-in-chief and cross-examination will not be separated into two phases as distinct as they are in common law procedures’. See also Alan Rau & Edward F. Sherman, *Tradition and Innovation in International Arbitration Procedure*, 30(1) TEXAS INTERNATIONAL LAW JOURNAL 89–120 (1995).

¹²⁷ See Rau & Sherman, *supra* note 126, at 89–120.

¹²⁸ See, *inter alia*, LAURENT LÉVY & V.V. VEEDER (EDS.), ARBITRATION AND ORAL EVIDENCE (2005); FEDERICO CARPI & MANUEL ORTELLS (EDS.), ORALIDAD Y ESCRITURA EN UN PROCESO CIVIL EFICIENTE. COLOQUIO DE LA ASOCIACIÓN INTERNACIONAL DE DERECHO PROCESAL, 2008 (2008); PIETER SPUIJBROEK, WITNESS EVIDENCE IN INTERNATIONAL COMMERCIAL ARBITRATION. THE USE OF WRITTEN WITNESS TESTIMONY IN LIEU OF ORAL EXAMINATION IN INTERNATIONAL COMMERCIAL ARBITRATION, diss. University of Amsterdam (2013), https://issuu.com/pieterspuijbroek/docs/pieter_spuijbroek_-_witness_evidenc (accessed November 2024).

testimony in the ALI-UNIDROIT Principles¹²⁹ and the ELI-UNIDROIT Rules¹³⁰ reflects the reality of convergence towards a hybrid model of witness testimony.¹³¹

With proper awareness of this culturally sensitive issue, judges and arbitrators can use their broad powers of case management to reflect the importance of oral testimony in each case.¹³² For example, they can make it clear that a written statement that is not accompanied by live testimony at the hearing (especially now that the cost problem can be solved by video-conferencing)¹³³ will carry little or no weight in the evaluation of the evidence. They can allow the party that submitted the statement to call the witness at the hearing even if the other party has not requested cross-examination (which often leads to the abuse of preventing an otherwise informative oral exchange for purely tactical reasons). They can also allow a party to substitute a list of issues to be addressed at the hearing (thereby neutralizing the other party's due process arguments) for written statements if the witness is legitimately unwilling to engage with counsel in the process of writing a statement.

3 A hybrid model of access to evidence

It was the IBA Rules on the Taking of Evidence in International Arbitration, adopted in 1999 and revised in 2010 and 2020,¹³⁴ that first and most successfully bridged the gap between US discovery and the limited access to evidence in the traditional continental procedure. Then came the ALI-UNIDROIT Principles,¹³⁵ and then the ELI-UNIDROIT Rules,¹³⁶ with a section in the chapter on access to information and evidence that provides a more coherent and comprehensive regime than any other harmonization project to date. As they represent the current state of the convergence process in this area, the ELI-UNIDROIT Rules can be adopted as a useful guide in both the civil and arbitral spheres.

¹²⁹ Art. 19.

¹³⁰ Arts. 18(3), 62(2), 99, 115, 117, 118.

¹³¹ Alessandro Fabbi, *Prova testimoniale in senso lato (di parti e terzi « non esperti ») e arbitrato commerciale internazionale*, 3 RIVISTA DELL'ARBITRATO 401–38 (2001).

¹³² See Marcel Storme, *More Voice, Less Print. Why Court Proceedings Should Become More Oral*, in ORALIDAD Y ESCRITURA EN UN PROCESO CIVIL EFICIENTE. COLOQUIO DE LA ASOCIACIÓN INTERNACIONAL DE DERECHO PROCESAL Vol. 1, 41–6 (Federico Carpi & Manuel Ortells eds., 2008).

¹³³ See Erlis Themeli, *The Frontiers of Digital Justice in Europe*, in FRONTIERS IN CIVIL JUSTICE. PRIVATISATION, MONETISATION AND DIGITISATION 102–20 (Xandra E. Kramer, Jos Hoevenaars, Betül Kas & Erlis Themeli eds., 2022); BART KRANS & ANNA NYLUND, CIVIL COURTS COPING WITH COVID-19 (2021); Rolf Stürner, *The ELI/UNIDROIT Model European Rules of Civil Procedure. An Introduction to Their Basic Conceptions*, 86 RABELSZ 421–72, at 469–71 (2022).

¹³⁴ IBA Rules on the Taking of Evidence in International Arbitration, adopted by a resolution of 17 December 2020 of the Council of the International Bar Association.

¹³⁵ Art. 16.

¹³⁶ Arts. 100–10. See generally Michael Stürner, *The ELI-UNIDROIT European Rules of Civil Procedure. Access to Information and Evidence*, in THE FUTURE OF THE EUROPEAN LAW OF CIVIL PROCEDURE. COORDINATION OR HARMONISATION? 205–22 (Fernando Gascón Inchausti & Burkhard Hess, 2020); Marco de Benito, Fernando Gascón Inchausti, Michele Angelo Lupoi & Michael Stürner, *Access to Information and Evidence*, in COLLOQUIES ON EUROPEAN CIVIL PROCEDURE (Marco de Benito ed., 2025).

III CONCLUDING REMARKS

These examples are sufficient to reveal a profound process of convergence that goes beyond treaties, laws, and soft law instruments to the actual practice of international adjudication in civil and commercial matters. The process is so discreet that it may even seem untimely to point it out openly. Indeed, the arbitral and procedural communities may be reluctant to fully acknowledge the process underway.¹³⁷ Most arbitration practitioners will avoid resorting to procedural categories. Rosenberg, Storme, or Taruffo are unlikely to be cited in arbitral pleadings, hearings, or awards, even though the procedural conceptual framework would easily resolve many practical issues at once. Proceduralists, in turn, may sometimes be tempted to fall into the same attitude toward arbitration. No matter how agile or innovative a given arbitral solution may be – arbitration is a privileged watchtower and testing ground for procedural developments – it may be frowned upon as insubstantial unless it is somehow properly incorporated and blessed by procedural science.¹³⁸

But if the process described in this chapter is not entirely inaccurate, the regulatory and procedural convergence of cross-border litigation and international arbitration, whether by harmonization or approximation, with the recent inclusion of mediation in the spirit of an emerging integration principle, is already a *phenomenon*. And *φαινόμενα* must be the starting point of any scientific endeavor. Let us all work together in our common quest for justice.

¹³⁷ See RICARDO DE CARVALHO APRIGLIANO, *FUNDAMENTOS PROCESSUAIS DA ARBITRAGEM* (2023).

¹³⁸ Of course, all of this is a hyperbole and should be taken *con mica salis*.

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