2001

Globalization and Cross-Border Litigation,

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Global Jurist Topics

Vol. 1, *Issue* 1 2001 *Article* 2

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Abstract

Talk delivered by the Author at Guam/Palau Judicial Conference, August 2000

Global Jurist Topics is in the *Global Jurist* family of journals.

Globalization and Cross-Border Litigation
(Talk Delivered at Guam/Palau Judicial Conference, August 2000)

by

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I. The Need for Harmonization of Procedural Rules

It is incontrovertible that we are living today in a world with vanishing borders: international trade and investment is at an all-time high, and cross-border transactions are quickly becoming the norm, fueled by the capability of computers and technology to facilitate exchanges around the globe. And the prognosis is that these trends will continue to expand. I expect that I am not telling any of you anything you don't already know, living and working here at the crossroads of the Pacific Rim. But as commerce forges ahead at a lightening pace, the procedural rules and judicial dispute resolution mechanisms that are critical to providing remedies when some of these transnational endeavors produce disputes remain largely national in character. Indeed, the differences between countries as to how they may handle disputes creates the potential for friction and disruption of the free flow of capital.

To date, the primary efforts to harmonize the differing laws of national legal systems have addressed substantive law, particularly the law governing commercial and financial transactions and numerous treaties now exist on these matters. The efforts to harmonize the procedural law surrounding judicial

dispute resolution have not been as visible. But that is now changing as increased attention is being placed on the need to develop some common rules or approaches to accommodate the new world of transborder litigation that is likely to be the model for the 21st century.

These efforts fall into two separate, but complementary, approaches. The first is focused on reaching agreement regarding when courts can assert jurisdiction over persons or entities that are outside their own country's borders and simultaneously when they will enforce judgments entered against their own nationals by courts in other countries. Reaching agreement on these matters would allow persons in cross-border transactions the important comfort of knowing that, should their dealings break down and they need to resort to court to adjudicate them, they may be required to defend only in certain courts under certain circumstances and whatever judgment is reached will be fully enforceable, thereby creating increased stability in their dealings. These assurances that are not present today.

The second effort is focused on trying to develop a set of procedural rules that a country could adopt for the adjudication of disputes arising from international business transactions--essentially to create a common vision of appropriate processes for resolving these disputes. If successful, this would provide certainty to those engaged in international commerce that should

their relationship break down, the means by which a court would adjudicate who is at fault and what remedies are available would be the same no matter where the litigation was filed. In this way, providing certainty as to how international disputes will be treated fosters stability. It also reduces substantially the current concerns that dispute resolution outside one's own country may be unfair, simply because national procedural systems are so different (particularly between the civil law and common law systems).

What I plan to do today is to update you on some of the current efforts at procedural reform in these two areas. I do so with the caveat that none of the changes I will be discussing are imminent - indeed, some may never be accepted -- but all currently are under discussion and I think it most appropriate that you too take part in that discussion because the success of these movements depends upon sharing insights from those around the globe to determine common interests and perspectives, as well as differences. That means that I hope that my presentation today will not simply be one-directional and that I can hear from you your thoughts or reactions to some of what is being proposed.

I say that because one of the major insitutions in the United States that is undertaking some of these reform efforts is the American Law Institute and, I must acknowledge that I am a member of that group's governing body, the ALI Council, as well as a

special advisor to its transnational procedure projects. Thus, I have some self-interest here, and I hope to be able to take back with me some additional insights for the discussions that we will be having at our next scheduled meeting. Time, of course, will only allow me to highlight a few of the matters under discussion, but for those of you who are interested in learning more, I have brought with me several copies of the current full draft of the ALI's proposed transnational rules and will leave them with Judge Impingco to give to anyone who would like. And please feel free, if the spirit moves you, to write or send me any comments you might have later. That said, let's begin.

II. Efforts in United States at Reform

As indicated in my outline, there currently are three efforts in the United States to work on the procedural reforms I just described. Today, what I plan to do is to sketch out the current status of each and the principal issues confronting and being addressed by these efforts. I then will focus most of my talk on some of the precise transnational rule proposals that are under consideration to give you some idea of the kinds of changes that are under review.

A. Proposed Hague Convention on Jurisdiction & Foreign Judgments

The first effort, a Hague Convention on Jurisdiction & Foreign Judgments, is really an international one in which the United

States is a participant. Actually the effort began in 1993 under the urging and initiative of the United States and to date some 35 countries have been engaged in trying to come to agreement on a proposed Jurisdiction and Judgments Convention. Many European countries already are signatories to a 1968 jurisdiction and judgments convention, called the "Brussels Convention," and that also was done under the sponsorship of the Hague Conference, but to date the United States has not been a signatory on any convention or even any individual treaty involving this area. Throughout the 1970s we attempted to negotiate a judgment recognition treaty with England, but that ultimately foundered largely because of the refusal of the English to recognize certain types of U.S. judgments - primarily antitrust and punitive damage awards.

As I indicated at the outset, increased commerce has resulted in growing interest in returning to the negotiations. This is particularly so because the United States currently is at a disadvantage. Foreign judgments are recognized and enforced to a much greater extent in the United States as a matter of comity than judgments rendered in the United States are recognized and enforced abroad. Thus, the United States has a greater need for an increased commitment by other states to the enforcement and recognition of American judgments. But for other countries, whose judgments already are enforced here in the absence of any treaty, the primary interest in a convention is to restrict the range of judicial jurisdiction asserted by the American courts over their

domiciliaries.

The approach of the proposed convention essentially is to provide that a civil judgment rendered in one convention State against a person habitually resident in another convention State would be recognized in all other convention States, subject to a narrow list of defenses, and provided that the court that rendered the judgment had jurisdiction over the defendant according to an agreed standard. In essence, the convention creates an international full faith and credit obligation, but ties it to an elaborate provision for court jurisdiction. The jurisdictional provisions establish both specifically approved bases for jurisdiction and prohibited bases that are deemed "exhorbitant." Signatory states would agree to provide in their national laws for jurisdiction on all of the approved bases and would be prohibited from asserting jurisdiction on any of the exhorbitant bases over defendants habitually resident or incorporated in any other signatory state. Also included is the possibility of jurisdiction on bases that fall between the required and prohibited categories and thus were neither explicitly approved nor prohibited. If jurisdiction fell into this gray area, then the enforcement of the judgment in another Convention state would be discretionary; in contrast, the enforcement of judgments premised on explicitly approved jurisdictional bases would be required.

Although there are various aspects of the proposed convention

that are still be debated, let me just focus on one area to illustrate the difficulty in this endeavor. Using the structure of approved, prohibited and "gray" areas of jurisdiction, the negotiations obviously focus on which forms of jurisdiction will be placed in which category and here is where the United States is now finding a problem. The latest preliminary draft convention was circulated in October 1999, with formal diplomatic sessions to consider and adopt it originally scheduled for October of this year. However, the United States has raised serious objections and, as of May if this year, it now looks as though the U.S. may pull out, although the other countries intend to proceed.

What is the problem? In the last round of negotiations, changes were made to include as prohibited bases of jurisdiction two forms of jurisdiction currently practiced in the U.S. The first is tag or transient jurisdiction by which a defendant is subject to a particular court's jurisdiction premised solely on the fact that he was personally served in the form state.--the living ghost of Pennoyer v. Neff. Although it generally was believed that giving up that jurisdiction in most civil litigation would not cause much concern, in the area of human rights, transient jurisdiction has been critical in permitting a party to bring an action under national law based on conduct that constitutes a violation of international law. Thus, U.S. negotiators had attempted to provide that transient jurisdiction could be placed on the gray, not the prohibited, list for those types of cases.

Also included as prohibited was jurisdiction premised on the fact that the defendant was "doing business" in the forum state, in cases in which the claim being sued upon did not arise directly out of that business activity. Since this form of jurisdiction is often invoked in commercial litigation in the United States in which the foreign defendant has engaged in continuous and systematic business in the forum state, but the claim is unrelated to that activity. having it prohibited, as opposed to leaving it in the "gray" area is deemed unacceptable. The controversy centers around several multinational enterprises. Let me illustrate the problem by an example.

Posit a U.S. resident travelling in Europe who ingests a pharmaceutical manufacturerd by Novartis and suffers an adverse reaction. When she returns to the U.S. she wants to sue the manufacturer here. Currently, that would cause no problem because of the continuing activities of Novartis throughout the country. Further the enforcement of a resulting judgment would be relatively easy in the United States, without the need to attept enforcement abroad, because the company holds many assets in the U.S. However, in order to join the Convention, the United States would need to agree to abandon jurisdiction on this basis against persons incorporated or headquartered in other Contracting States, quite apart from any need for enforcement abroad. A quite unacceptable result. Thus, U.S. negotiators report that if they are not successful in transferring the doing-business jurisdiction from the

prohibited to the gray list, they will need to pull from the convention. Time will tell, but the forecasts are not promising. The entire experience, however, is instructive as it underscores some of the important differences that currently exist and may provide significant barriers to free-flowing international litigation.

B. Proposed Federal Statute Governing the Enforcement of Foreign Judgments in the U.S.

Offering a greater possibility of success because it is a national, rather than an international, effort is the American Law Institute's Project to draft a federal statute to govern the enforcement of Foreign Judgments in the U.S. At present there is no uniform national standard for the enforcement of foreign judgments in the United States. A little more than half of the states have adopted the Uniform Foreign Money Judgments Recognition Act and follow the standards set forth there, but in other courts and in the federal courts these important questions are determined as a matter of comity, with no specific standards being applied. Thus, it is believed that now is an opportune time to develop federal legislation on this question that would supersede the Uniform Act in those states that have adopted it and that would better implement the foreign relations law of the United States by speaking with a uniform voice, providing some national certainty as to how international judgments will be handled. This would avoid

the anomalous position that we currently are in in which a foreign country judgment may be recognized or enforced in one state of the United States, but not in another. It also would encourage reciprocal treatment of U.S. judgments by other countries, particularly those, like Germany, whose law requires a finding of reciprocity for the recognition of foreign country judgments--a finding that is difficult to establish given the lack of uniform treatment throughout the United States. If the Hague Convention were adopted, this legislation could be designed to implement that treaty, but even if there is no convention, it would fill an important gap that currently exists in U.S. law.

This project is still in the seminal stages, so I have no details to share with you. It does embrace some extremely important issues, however, such as whether U.S. enforcement of foreign country judgments should be premised on reciprocity in the judgment-rendering state, and how to allocate jurisdiction between the U.S. state and federal courts for enforcement. These and other issues remain to be worked out, so I encourage you to follow the progress of the project over the next couple of years. The first preliminary draft is due to be presented to the Institute in May 2001.

C. ALI Project to Develop Transnational Rules of Procedure

For the remainder of my time with you, I want to focus on the ALI's other project to develop transnational rules of civil

procedure. Without a doubt this project is the most ambitious yet, because it is attempting to develop a set of "universal" procedural rules that will be acceptable to countries with very different court systems. Thus, the Institute is not simply following its usual practice of relying on its own members' expertise in advising what should be considered. Rather, the project which has two reporters, Professor Geoffrey Hazard from the University of Pennsylvania and Professor Michele Taruffo of the University of Pavia in Italy, to date has at least four advisory committees - one with U.S. and Canadian lawyers, one from Japan, one for Europe and Israel, one for the Pacific Rim, including Singapore, Australia, the Philippines, Thailand and China, and a newly formed one for South and Central America and Mexico that will begin meeting next year. In addition, the project is being done in cooperation with UNIDROIT (The International Institute for the Unification of Private Laws) whose member states are participating in the process of approving and critiquing drafts as they emerge. The current draft, which I will be talking about today, was published in March of this year and is the second revision. It is expected that further revisions will emerge over the next two to three years. This is a slow moving--not a bullet--train, not only because of the wide range and difficulty of the issues being addressed, but also because of the need to have such a wide array of consultations, as well as to have all drafts translated in several languages to ensure the widest possible feedback. Further, in an effort to avoid or lessen concerns about American "imperialism" in udertaking this

project, the reporters have made a conscious decision to try to use terms and drafting and numbering techniques that are more familiar to other parts of the world, than they are in the U.S.. That may mean that you will find that familiar concepts are described in unfamiliar terminology in an effort to achieve a broad consensus. Despite these awkwardnesses, progress is being made and it thus is most timely to share with you some of the important areas of consensus that are emerging, as well as to get your reaction to what is being proposed.

As set out in my outline, I will touch upon only a few of the proposals that are under consideration and I have included those in the handouts for this session. I do not intend to analyze the specifics in each of the rules I have included, however, as time would not permit that, but offer the draft rules to you so that you can at your leisure see how the ideas I am discussing have been implemented in statutory form.

Before turning to the specifics, let me offer an observation. In looking at procedure systems around the world it quickly becomes apparent that the U.S. system is unique, even among other common-law systems, in having extremely broad discovery and in providing for a right to jury trial for most civil disputes. To adhere to those two American civil justice features in the transnational setting would present an impenetrable barrier to general acceptance thoughout the world. Thus, it was decided to develop a system of

adjudication without the availability of a jury but to limit the scope of this project to commercial litigation or business disputes, clearly excluding personal-injury and wrongful-death actions because barring jury trial in those cases would be unacceptable in the United States. Conversely, party-conducted discovery generally is anathema in civil-law countries where it is deemed unethical for lawyers to interview a witness, lest they taint or coach the witness inappropriately. Nonetheless, disclosure of the intended testimony of witnesses is fundamental to all common-law systems and is viewed as assuring a fair procedure as a practical matter, so that although the broad and extended discovery that has characterized American discovery is not being advocated for adoption, a more limited form of disclosure and witness interviews are included. It is these kinds of trade-offs that are at the center of reaching an agreement about a set of transnational procedural rules.

Thus, an important way to think about what is being proposed is to evaluate both the detailed proposals as well as how those details fit together as a whole and to ask yourself whether an appropriate balance has been struck in selecting between the approaches of different national systems and whether, when it all comes together, this "blended" system will be workable and fair. The goal is to try to combine the best elements of the common law's adversary procedure with those of the civil-law's judge-centered procedure and in that way to offer a system of fair procedure for

litigants involved in disputes arising from transnational transactions, thereby reducing the uncertainty and anxiety that often attends parties who are obliged to litigate in unfamiliar surroundings. So, with that said, let me now turn to some of the proposals themselves.

III. Some Special Features of Proposed Transnational Rules

A. Composition of Court. Rule 6. There are 3 elements to note about this rule.

(1) This is the rule that makes it clear, by omission, that adjudication is by the judge, no juries are provided for.

(2) The reference to allowing the court to be composed in accordance with the law of the forum, is in deference to many civil law systems where courts of first instance use three judges, not one. The number of judges is not so fundamental a matter as to need uniformity so deferring to, and not intruding upon, the judicial structure of the forum court was deemed apprpriate.

(3) Note the power of the court to appoint up to two neutral assessors to aid in its decisionmaking; though their role is advisory only. Under Rule 6.2, the parties are made privy to all conversations between the court and the assessors so that they may be able to comment or challenge the assessor's opinions before they are relied upon by the court. This is to ensure fairness. The use of

lay assessors is a system not common to the U.S., but prevalent in other countries, and I understand may be in use in Palau, so I would be most interested in learning of any experience with it.

B. Settlement Offers. Rule 13. The next procedure that I included is for settlement offers; as you can see this is a much more elaborate protocol than we currently use in the federal system under Rule 68. It is modelled after a similar rule in Ontario Canada. In many countries the tradition is that the parties do not generally have an obligation to negotiate with the opposing party, but it was determined that particularly in the types of commercial litigation within these rules that it was important to encourage compromises and settlements and, further, that the best way to facilitate settlement is to provide a specifically defined procedure to which conformity is strictly required. A feature of this procedure that I would draw to your attention because it differs from the current U.S. practice is that public disclosure of the offer or disclosure of it to the court before the entry of judgment is forbidden under Rule 13.4 so as to avoid any potential that an offer could be interpreted as an admission of liability or of a weakness in a party's case.

C. Pleading and Discovery. As I indicated earlier, the determination that some discovery is important, but that it should be limited, is one of the key special characteristics of this proposed transnational procedure. Thus, I have included several rules in your handout to illustrate the balance that is being

struck and the type of disclosure and discovery that is envisioned. Let me just highlight those special features now.

(1) Since decisions about the need for and scope of discovery necessarily are tied to the level of detail required in the pleadings, let me first note that the transnational rules do not rely upon the notice pleading system currently used in our federal courts. Rather, plaintiffs are required Under **Rule 9** (which you do not have) to "state the facts on which the claim is based, the legal grounds that support the claim, and the basis upon which the claim is brought under the transnational rules." And the parties are told to provide in their factual statements details as to "time, place, participants, and events," insofar as that is practicable. This requirement is particularly important because it is the pleaded facts which establish the standard of relevance for discovery. As set out in **Rule 17**, discovery is limited to matters, not privileged, and directly relevant to the case; parties are not entitled to discovery of material that "might lead" to further evidence as is currently true in the U.S. federal scheme.

(2) Using that as the applicable standard, discovery is designed to operate first through a series of mandatory disclosures, as set forth in **Rule 16**. Although federal practice today also includes a disclosure responsibility, you will note several differences in these rules which place that responsibility at a much earlier stage and which require more detail. Thus, the

parties are required to attach to their pleadings copies of documents and lists of all the witnesses that they intend to present in evidence at the trial. Further, within 30 days after the answer they must exchange summaries of the testimony that is expected from each witness. This approach places a much greater burden on the parties at the outset, but is consistent with the kind of full-case preparation that is required before filing an action in civil law systems. Unlike the civil law, however, as provided in Rule 16.5, the lawyers may interview potential witnesses in order to determine their testimony, and compliance with the Rule 16 disclosure requirement, allows parties then to demand additional discovery from their opponents under Rule 17, thereby broadening and departing from the scope and type of discovery typically available in the civil law.

(3) Two other special features of the discovery system for transnational cases that are worth noting are found in the rules related to experts and privileges, which appear in your handouts. **Rule 23**, dealing with experts adopts a blended approach borrowing from both the common law and civil law systems. Following the civil law, Rule 23.1 authorizes the court to appoint a neutral expert or panel of experts; under this approach an expert is somewhat different from a percipient witness and is appointed for purposes of the court seeking techinical or scientific expertise. Thus, the court will formulate the questions it wants the expert to answer, it will regulate or specify the techniques or research the expert

will undertake, and will determine whether the expert's report should be presented in writing or orally. Although the court may consult the parties about the directions to give the expert, it is solely the court's decision. The expert's report will be entered into evidence and is not subject to cross-examination. The court is not obliged to follow the expert's advice; however, insofar as it rejects that advice it is required to provide the reason why. Rule 23 also provides authorization for the parties to designate their own experts. The principal role of a party expert under this scheme, however, is to advise the party about the technical and scientific matters and to comment on the activity of the court's expert; party experts participate only under the supervision of the court. For example, when the court's expert submits a written report, the parties' experts are allowed to do so, and the parties' experts may raise problems, ask questions, and submit comments, data and information to the court's expert. Of course, party experts are by definition partisan and partial, and their testimony is subject to cross-examination. Thus, the use of expert witnesses under these rules is both broadened to include as a more common matter court-appointed experts and narrowed insofar as party experts can only be allowed in response to a court-appointed expert and under tight court supervision.

Rule 24, dealing with Evidentiary Privileges, also is notable primarily because of what is included and what is not. First, be aware that this rule deals only with privileges attaching to

communications. Insofar as the privilege being invoked is the privilege against self-incrimination, I refer you to Rule 17.3, which upholds the right to assert that protection. The only absolute privileges explicitly recognized in Rule 24 deal with the legal profession (atty/client) privilege and a privilege covering communications between counsel in settlement negotiations. After much discussion it was determined that although privileged communications in numerous countries embrace a wide array of situations, all systems would recognize the two listed there. Thus, except for those two categories (and maybe national defense), the approach taken in Rule 24.2 is to refer to local law--using a choice of law rule referring the court to the place with the most significant relationship to the parties to the communication. The reference to the place of communication recognizes that most privileges are designed to protect party relationships and confidences exchanged in them. Further, the rule authorizes matter under these privileges to be excluded conditionally, unless the court determines that the need for the information outweighs the desire to maintain confidentiality. The court also is authorized to make that determination in an in camera hearing.

D. Plenary Hearings. The last provision that I would like to touch upon today is **Rule 25**, dealing with the plenary hearing (known in the U.S. as "the trial"). Two particular aspects of that rule are worth noting.

First, although much of what you see there may seem familiar, it is worth noting that the approach presented differs dramatically from that utilized in many civil law systems. For example, the notion that the receipt of oral evidence should be concentrated in a single hearing or in hearings held on consecutive days is consistent with the common-law trial model, but several civil law systems use a scheme of separated hearings. So this is a big change for those systems.

Second, note Rule 25.3.2, which provides that the lawyers examine and cross-examine the witnesses as a means of presenting evidence, and Rule 25.3.3, which authorizes the court to direct any questions it has to the witnesses as well. In the civil law systems, the attorneys are not allowed to question witnesses, the court conducts the examination; in the common law generally the court relies on the parties. In this transnational system a blended approach is being suggested to take advantage of the neutral search for truth and the elicitation of facts that is fostered by the court-examination of witnesses, but to ensure that a thorough examination of all evidence is preserved through the adversary process of party-lawyers questioning. If these rules are adopted, lawyers and judges who suddenly have new roles to play will need to be cross-trained in effective techniques of interrogation in order for the system to work. Obviously, this is a culture shift that will take some time to accomplish.

IV. Conclusion

I will stop there. I hope that this brief sketch highlighting some of the work that is going on to address the needs of transnational litigation has been of some interest to you and repeat that I would be most interested in hearing your reactions, questions, or comments.