

5-2019

## Cornerstones of Civil Justice

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### Recommended Citation

Neil Andrews, *Cornerstones of Civil Justice*, 70 HASTINGS L.J. 1045 (2019).

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## *Tributes*

### Cornerstones of Civil Justice

NEIL ANDREWS<sup>†</sup>

#### INTRODUCTION

Geoff Hazard was a jurist of great vision and huge intellectual ability. He was also versatile. Many were lucky to have witnessed his mastery of the law in class, or American Law Institute (ALI) meetings, or in the wider forum of soft law preparation, especially the sessions in Rome from 2000 to 2004, which led to the ALI/UNIDROIT's *Principles of Transnational Civil Procedure*.<sup>1</sup> During the Rome discussions, it was clear that he had a remarkable capacity to summarize complex argument, to identify opportunities for progress, and to accept that on other points legal systems approach things quite differently. In this respect, he was also a great comparative lawyer.

Here, the Author will consider briefly the underpinning principles of civil procedure. A stimulating collection of major procedural principles is the ALI/UNIDROIT's *Principles of Transnational Civil Procedure*.<sup>2</sup> In Europe, signatory states, including the United Kingdom, must comply with the jurisprudence of the Strasbourg court concerning the guarantees contained in Article 6(1) of the European Convention on Human Rights. Besides these external influences, there is the internal task of arranging a set of fundamental procedural norms. Such a canon of principles seems indispensable if lawyers are to view procedural justice in a coherent and systematic way, liberated from the fine detail of individual rules. The Author suggests that principles of civil justice can be usefully arranged under these four headings:

- I. Access to Justice
- II. Fairness of the Process
- III. Speed and Efficiency
- IV. Just Conclusions

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1. AM. LAW INST., UNIDROIT, *Principles of Transnational Civil Procedure*, <https://www.unidroit.org/instruments/transnational-civil-procedure> (last updated Sept. 27, 2016) [hereinafter ALI/UNIDROIT]; *see also infra* Part I.

2. *See id.*

In greater detail, this is how the various leading and fundamental principles of civil justice can be arranged:

#### I. ACCESS TO JUSTICE

1. Access to court and to justice (including, where appropriate, promoting settlement and facilitating resort to alternative forms of dispute-resolution, notably mediation and arbitration)
2. Rights of Legal Representation (Right to Choose a Lawyer; Confidential Legal Consultation; Representation in Legal Proceedings)
3. Protection against bad or spurious claims and defenses

#### II. FAIRNESS OF THE PROCESS

4. Judicial independence
5. Judicial impartiality
6. Publicity or open justice
7. Procedural Equality (equal respect for the parties)
8. Fair play between the parties
9. Judicial duty to avoid surprise: The Principle of Due Notice
10. Equal access to information, including disclosure of information between parties

#### III. SPEED AND EFFICIENCY

11. Judicial control of the civil process to ensure focus and proportionality (tempered, where appropriate, by Procedural Equity; the process is not to be administered in an oppressive manner)
12. Avoidance of Undue Delay

#### IV. JUST CONCLUSIONS

13. Judicial duty to give reasons

## 14. Accuracy of decision-making

15. Effectiveness (provision of protective relief and enforcement of judgments)

16. Finality

## I. ALI/UNIDROIT PROJECT (2000–2006)

The working group of the ALI/UNIDROIT project<sup>3</sup>—now known as *Principles of Transnational Civil Procedure*<sup>4</sup>—first met in Rome in 2000. On day one, a detailed document containing Rules of Transnational Civil Procedure, drafted by Geoff Hazard and Michele Taruffo, was on the meeting table. By the second day of this first meeting, the working group had drawn up a list of principles. These were elaborated during the working group's meetings from 2000 to 2003. Rolf Stürner, appointed to be the General Reporter of the UNIDROIT side of this collaborative project, has chronicled the working group's elaboration of these principles.<sup>5</sup> The original Rules were not rejected but they became the subsidiary element of the project. They were later refined, once the principles had been established—and fixing the principles took three years of debate. The Rules are more detailed than the Principles. As Geoffrey Hazard explained, the Rules are merely one, among many, possible ways of implementing the Principles.<sup>6</sup> In fact, the Rules were relegated to an unofficial appendix to the main project.

The ALI/UNIDROIT *Principles of Transnational Civil Procedure* offer a balanced distillation of best practice, especially in the sphere of transnational commercial litigation. They are not restricted to the largely uncontroversial 'high terrain' of constitutional guarantees of due process. The Principles and Rules were drafted by a team, appointed by the ALI and UNIDROIT. The drafting team met for a total of twenty days in Rome during the years 2000–2003 (the Author was privileged to be a member). The "Common Law" was clearly out-numbered seven to two by the "Civil Law" representatives. It is also fair to say that the civil-law members of the group were strong in resisting certain common-law ideas. Everywhere the restraining hand of the Civil Law is visible, and robust common-law tendencies (American and English) are curbed.

It was apparent throughout the drafting group's discussion that there were radical differences between the U.S. and English systems, and between the

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3. Neil Andrews, *The Modern Procedural Synthesis: The American Law Institute and UNIDROIT's "Principles and Rules of Transnational Civil Procedure,"* 164 REVISTA DE PROCESSO 109, 109–20 (2008) (Braz.).

4. ALI/UNIDROIT (2016), *supra* note 2.

5. See generally Rolf Stürner, *The Principles of Transnational Civil Procedure: An Introduction to Their Basic Conceptions*, 69 RABELS ZEITSCHRIFT 201 (2005) (Ger.).

6. See Geoffrey C. Hazard, Jr. & Michele Taruffo, *Transnational Rules of Civil Procedure Rules and Commentary*, 30 CORNELL INT'L L.J. 493, 495–508 (1997) (listing rules).

various civil law jurisdictions represented around the table. These differences make a nonsense of both the glib phrase “Anglo-American procedure” and the crude expression “civilian procedure.”

Sometimes, the Principles acknowledge that there is scope for radical differences of approach on aspects of practice.<sup>7</sup> Such agnosticism pervades discussion of the following topics: sanctions for procedural default, receipt of expert evidence, examination of witnesses, and the system of appeal.

As the Author has suggested elsewhere, the Principles operate at three levels of importance: “*fundamental procedural guarantees*,” other “*leading principles*,” and “*framework or incidental principles*.”<sup>8</sup> The ALI/UNIDROIT principles range from (1) quasi-constitutional declarations of fundamental procedural guarantees to (2) major guidelines concerning the style and course of procedure to (3) points of important detail.<sup>9</sup>

#### I. FUNDAMENTAL PROCEDURAL GUARANTEES

1. Judicial Competence; Judicial Independence; Judicial Impartiality; Procedural Equality;
2. Due Notice or the Right to Be Heard; Publicity; Reasoned Decisions;
3. Prompt and Accelerated Justice;
4. Professional Independence of Counsel; Right to Assistance of Counsel; Attorney-Client Privilege (“Legal Professional Privilege”);
5. The Privilege Against Self-Incrimination.<sup>10</sup>

#### II. LEADING PRINCIPLES CONCERNING THE STYLE AND COURSE OF PROCEDURE

1. Jurisdiction over Parties; Venue Rules; Party Initiation of Proceedings;
2. Party’s definition of scope of proceedings; Joinder Rules; Allocation of burden and nature of standard of proof; Pleadings; Parties’ duty to avoid false pleading and abuse of process;

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7. ALI/UNIDROIT (2016), *supra* note 2, at 12.5, P-12B (“There are differences in the rules of various countries governing jurisdictions over third parties. In some civil-law systems, a valid third-party claim is itself a basis of jurisdiction whereas in some common-law systems the third party must be independently subject to jurisdiction.”).

8. Neil Andrews, *Embracing the Noble Quest for Transnational Procedural Principles*, in *THE FUTURE OF TRANSNATIONAL CIVIL LITIGATION: ENGLISH RESPONSES TO THE ALI/UNIDROIT DRAFT PRINCIPLES AND RULES OF TRANSNATIONAL CIVIL PROCEDURE* 21, 22 (Mads Andenas, Neil Andrews et al. eds., 2004) (emphasis added).

9. *Id.* at 23–25.

10. *Id.* at 23; *see also* European Convention on Human Rights art. 6(1), Nov. 4, 1950 (amended 1998).

3. Rights of Access to Information; Judicial Initiative in Evidential Matters; Experts
4. Judicial Management of Proceedings; Sanctions Against Default and Non-compliance; Need for Proportionality in Use of Sanctions;
5. Parties' duty to act fairly and to promote efficient and speedy proceedings; Parties' duty to co-operate;
6. Parties' right to discontinue or settle proceedings; Judicial Encouragement of Settlement,
7. Right to an Oral Stage of Procedure; Final Hearing Before Ultimate Adjudicators; Judicial Responsibility for Correct Application of the Law;
8. Basic Costs Shifting Rule; Finality of Decisions; Appeal Mechanisms;
9. Effective Enforcement; Recognition by Foreign Courts; International Judicial Co-operation.<sup>11</sup>

### III. POINTS OF IMPORTANT DETAIL

1. Protection of Parties Lacking Capacity;
2. Security for Costs;
3. Expedited Forms of Communication;
4. Non-party Submissions;
5. Making of Judicial "Suggestions."<sup>12</sup>

The ALI/UNIDROIT project was not the first attempt at bridging the division between civilian and common-law procedures. Marcel Storme (and his team, including Tony Jolowicz) led the way.<sup>13</sup> Although the ALI/UNIDROIT project is relatively young (completed in 2004, published in 2006), it seems likely that it will assist greatly in the intellectual mapping of civil justice and that it will influence policy-makers. At a 2002 London meeting, the

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11. Andrews, *supra* note 8, at 23–24.

12. *Id.* at 24.

13. APPROXIMATION OF JUDICIARY LAW IN THE EUROPEAN UNION (Marcel Storme ed., 1994).

ALI/UNIDROIT text was widely admired by English commentators, who found this work to be suggestive, original, and admirably flexible.<sup>14</sup>

Since 2013, the European Law Institute and UNIDROIT have been engaged in a topic-by-topic project, which is intended to transpose the ALI/UNIDROIT *Principles* and elaborate more concrete soft-law rules within the European jurisdictions (not confined to the European Union).

## II. EUROPEAN CONVENTION ON HUMAN RIGHTS

The Human Rights Act 1998 (United Kingdom)—which took effect in October 2000—rendered the European Convention on Human Rights directly applicable in English courts. The case law of the European Court of Human Rights must be “taken into account” and becomes binding in the United Kingdom only in restricted circumstances, according to the United Kingdom Supreme Court.<sup>15</sup> Lord Neuberger explained the position as follows:

This Court is not bound to follow every decision of the [European court]. . . . Where, however, there is a clear and constant line of decisions whose effect is not inconsistent with some fundamental substantive or procedural aspect of our law, and whose reasoning does not appear to overlook or misunderstand some argument or point of principle, we consider that it would be wrong for this Court not to follow that line.<sup>16</sup>

Article 6(1) of the European Convention on Human Rights states: “Right to a Fair Trial: In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.”<sup>17</sup>

The preceding encapsulation of fundamental principles comprises the following elements:

1. The right to “a fair hearing”: this is a wide concept embracing:
  - a. The right to be present at an adversarial hearing;
  - b. The right to equality of arms;
  - c. The right to fair presentation of the evidence;
  - d. The right to cross examine opponents’ witnesses;
2. The right to a reasoned judgment;<sup>18</sup>
3. “A public hearing”: including the right to a public pronouncement of judgment;

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14. Adrian Zuckerman, Note, *Conference on “The ALI-UNIDROIT Principles and Rules of Transnational Civil Procedure,”* 21 CIV. JUST. Q. 322 (2002).

15. *Times Newspapers Ltd. v. Flood* [2017] UKSC 33, [29]–[41] (appeal taken from Eng.); *Poshteh v. Royal Borough of Kensington* [2017] UKSC 36, [29]–[37] (appeal taken from Eng.); *Manchester CC v. Pinnock* [2010] UKSC 45, [48] (appeal taken from Eng.).

16. *Manchester CC*, [2010] UKSC at [48].

17. European Convention on Human Rights, *supra* note 10, art. 6(1); Human Rights Act 1998, 1998 c42, § 1(3), Schedule 1 (incorporating the European Convention on Human Rights into U.K. law).

18. See *English v. Emery Reimbold & Strick Ltd.* [2002] EWCA (Civ) 605 (noting that Article 6(1) of the European Convention on Human Rights requires a court to provide a reasoned judgment within a reasonable time).

4. “A hearing within a reasonable time”; and
5. “A hearing before an independent and impartial tribunal established by law.”<sup>19</sup>

A. ABOLITION OF THE JUDICIAL COMMITTEE OF THE HOUSE OF LORDS:  
CREATION OF THE SUPREME COURT OF THE UNITED KINGDOM

Undoubtedly, the most significant impact of the European Convention on Human Rights was the decision to abolish the traditional judicial role of the Lord Chancellor and reconstitute the Appellate Committee of the House of Lords as the Supreme Court of the United Kingdom, which first sat on October 1, 2009.

These events unfolded as follows. The European Court of Human Rights in *McGonnell v. United Kingdom*,<sup>20</sup> a case concerning legal arrangements on the island of Guernsey—a “mini-legal system” within the British Isles—had signaled the need for there to be complete separation of judicial, executive, and legislative functions. The court (sitting in Strasbourg) held that the United Kingdom infringed this requirement because the Bailiff of Guernsey (a judge and a member of the Guernsey legislature) had sat in a civil case concerning planning legislation, which was enacted when he was presiding over the legislative chamber on the island.<sup>21</sup> The Strasbourg Court in *McGonnell* held that such a confusion of legislative and judicial roles is “[in]compatible with the requirements of Article 6 as to independence and impartiality” demanded by Article 6(1) of the European Convention on Human Rights.<sup>22</sup> The court said that once a person presided over a legislative chamber, he should be precluded from adjudicating in any civil or criminal case that requires interpretation of the relevant enactment.<sup>23</sup> Building on the *McGonnell* case, constitutional purists<sup>24</sup> contended that it would be desirable, even—as they further argued—necessary, to detach the judicial House of Lords from the legislative House of Lords so that (1) the Law Lords would be physically separate from the legislature and (2) they would no longer be allowed to participate in legislative debates.<sup>25</sup>

In 2005, the Constitutional Reform Act<sup>26</sup> was enacted, leading to the House’s abolition in 2009. The Constitutional Reform Act 2005 stripped out the judicial role from the ancient office of the Lord Chancellor. He has ceased to be a judge. Instead, he is merely a representative of the Executive, a Minister of the

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19. European Convention on Human Rights, *supra* note 10, art. 6(1).

20. 30 Eur. H.R. Rep. 289 (2000).

21. *Id.* at [15]–[16].

22. *Id.* at [52].

23. *Id.* at [57].

24. *See, e.g.*, Lord Steyn, *The Case for a Supreme Court*, 118 L.Q.R. 382, 383 (2002) (Eng.) (criticizing the multi-faceted role of the Lord Chancellor).

25. *Id.* at 388.

26. “Reform! Reform! Don’t talk to me about reform. Aren’t things bad enough already?” Lord Neuberger, Pres. of the Supreme Court of the U.K., Address: “The Supreme Court: Is the House of Lords ‘Losing Part of Itself’” (Dec. 2, 2009 at [13]) (transcript available in the National Archives of the United Kingdom).

Crown, and a Cabinet member. Furthermore, since the 2005 Act, the Lord Chancellor need not be legally qualified. Once the Lord Chancellor was downgraded to a non-judicial Minister, the ground was cleared for creating a Supreme Court. On October 1, 2009, the Supreme Court of the United Kingdom sat for the first time.

The constitutional purists prevailed. Whether or not there was any constitutional necessity to disturb the settled traditions of the House of Lords, the new court is now manifestly insulated from any “legislative or executive contamination”: none of its judges is involved in the legislative process or in the practice of Government. But it is still a matter for political debate whether it was necessary to create the Supreme Court and annihilate the judicial House of Lords.

#### B. “ACCESS TO COURT” PRINCIPLE

The European Court of Human Rights in *Golder v. United Kingdom*<sup>27</sup> divined an implicit fundamental right of ‘access to court’. Lord Bingham in *Brown v. Stott* explained:

Article 6 contains no express right of access to a court, but in *Golder v. United Kingdom* the European Court held . . . that it was “inconceivable” that article 6 should describe the procedural guarantees afforded to parties in a pending law suit and should not first protect that which alone makes it possible to benefit from such guarantees, namely access to a court.<sup>28</sup>

Thus, the court in the *Golder* case conceded that this implied right was not absolute and so was subject to limitations.<sup>29</sup>

The right of access to court is not engaged unless there is a procedural restriction or impediment. It follows that a substantive rule, which renders the defendant’s conduct lawful, even though it might be unlawful in the absence of that substantive rule, is not open to challenge by reference to the present human right.<sup>30</sup>

The Supreme Court in *R (on the application of UNISON) v. Lord Chancellor*<sup>31</sup> considered the legality of the Government’s scheme imposing significant commencement fees, payable by persons seeking redress within an Employment Tribunal (for example, claims for unfair dismissal or discrimination). The Supreme Court held that it was a breach of European Union law and contrary to the U.K.’s constitutional principle of access to justice.<sup>32</sup> Lord

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27. App. No. 4451/70 Eur. Co. H.R. para. 35, HUDOC (Feb. 21, 1975), <http://hudoc.echr.coe.int/eng?i=001-57496>.

28. [2003] 1 AC 681, 694.

29. *Golder*, App. No. 4451/70 Eur. Co. H.R. para. 29.

30. *Mohammed v. Ministry of Defence* [2017] UKSC 1, [42]–[45] (appeal taken from U.K.).

31. [2017] UKSC 51 (appeal taken from U.K.).

32. *Id.*

Reed's judgment<sup>33</sup> is a powerful vindication of this principle. The court drew upon detailed studies of the impact of these fees.<sup>34</sup>

The Court of Appeal in *Re K, H (Children)* critically commented on the absence of public civil aid funding to enable cross-examination to be conducted by a lawyer, rather than being left to the court itself. The same court noted that it was inappropriate for the relevant party, a father, to conduct the cross-examination personally because that would involve oppressive confrontation between him and his daughter (the complainant) whom he had allegedly sexually assaulted.<sup>35</sup>

### III. THE EUROPEAN UNION BANS ON ANTI-SUIT INJUNCTIONS

This judicial prohibition (for the European Court of Justice's decisions in the three seminal cases) has hit hard within England and Wales. Many common-law lawyers regret the ban.

#### A. JURISDICTION CLAUSES WITHIN THE EUROPEAN UNION OR FOR LUGANO CONVENTION JURISDICTIONS

The European Court of Justice's decision in *Turner v. Grovit*<sup>36</sup> prevents the English courts from issuing anti-suit injunctions to enforce exclusive English jurisdiction clauses where the offending court proceedings have been commenced within the European jurisdictional zone. Anti-suit relief remains available if the foreign proceedings are outside the European Union.

#### B. ARBITRATION CLAUSES WITHIN THE EUROPEAN UNION OR FOR LUGANO CONVENTION JURISDICTIONS

The European Court of Justice's decision in *Allianz SpA v. West Tankers*<sup>37</sup> prevents the Common Law anti-suit injunction from being issued to counter breach of arbitration clauses by the commencement of inconsistent *court* litigation within the *same* European jurisdictional zone. But Recital 12 of the Jurisdiction Regulation (2012) (effective from 10 January 2015) makes clear that a judgment by a Member State court on the substance of a civil or commercial

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33. *Id.* at [66]–[117].

34. *Id.* at [38] (citing MINISTRY OF JUSTICE, REVIEW OF THE INTRODUCTION OF FEES IN THE EMPLOYMENT TRIBUNALS (2017), [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/587649/Review-of-introduction-of-fees-in-employment-tribunals.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/587649/Review-of-introduction-of-fees-in-employment-tribunals.pdf)).

35. [2015] EWCA (Civ) 543 (appeal taken from U.K.).

36. 2005 E.C.R. I-03565; *see also* Neil Andrews, *Abuse of Process and Obstructive Tactics Under the Brussels Jurisdictional System: Unresolved Problems for the European Authorities in Erich Gasser GmbH v MISAT Srl Cased C-116/02 (9 December 2003) and Turner v Grovit Case C-159/02 (27 April 2004)*, EUR. COMMUNITY PRIV. L. REV. 8, 8–15 (2005); *Commerzbank AG v. Liquimar Tankers Management Inc* [2017] EWHC (Comm) 161, [62]–[81] (Cranston, J.) (discussing “asymmetrical” jurisdiction clauses, one party being subject to exclusivity, the other having a choice of jurisdictions).

37. 1 Lloyd's Rep 413 (2009).

case is binding, even though that decision involved an incidental decision that the dispute was not subject to a valid arbitration clause.

In the *Gazprom OAO v. Lietuvos Respublika* case,<sup>38</sup> the European Court of Justice, confirming the *West Tankers* case, noted that it is incompatible with the Jurisdiction Regulation for the court of a Member State to issue a decision prohibiting the respondent from continuing, or initiating, civil or commercial proceedings covered by the Jurisdiction Regulation<sup>39</sup> in another Member State. This is because the latter court must be permitted to determine for itself whether it has jurisdiction<sup>40</sup> and this includes determining whether there is a valid arbitration clause in respect of the relevant civil or commercial matter.<sup>41</sup>

However, the European Court of Justice in the *Gazprom OAO* case distinguished<sup>42</sup> the grant by an arbitral tribunal of an anti-suit order from the issue by a Member State court of an anti-suit injunction (as in the *West Tankers* case). A Member State court does not act inconsistently with the Jurisdiction Regulation if it decides to recognize or enforce such an arbitral award. The result of such recognition might be that the relevant Member State court decides not to receive or continue to hear a civil or commercial matter (wholly or partially). Such a decision is compatible with the Jurisdiction Regulation for these reasons: (1) issues of arbitration fall outside the scope of the Jurisdiction Regulation,<sup>43</sup> so that any decision on such a matter made by one Member State court cannot be binding under the same Regulation on the courts of other Member States; (2) an “anti-suit” arbitral award (that is, one which prohibits a party from pursuing or continuing court proceedings) is unobjectionable under the Jurisdiction Regulation because the arbitral tribunal is not a Member State court; and so the arbitral award involves no attempt by a Member State court to preclude or constrain (whether directly or indirectly) another Member State court’s determination concerning its jurisdiction; there is no conflict between courts in the matter of jurisdiction;<sup>44</sup> and (3) the arbitral tribunal, unlike the Member State court in the *West Tankers* context, has no direct power to issue penalties against the party who fails to comply with the anti-suit prohibition.<sup>45</sup> The result is that a party who is subject to an arbitral tribunal’s prohibition has an opportunity to

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38. Case C-536/13, ECJ (May 13, 2015) <http://curia.europa.eu/juris/document/document.jsf?text=&docid=164260&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=7798460>.

39. The *Gazprom* case was decided under the pre-2012 Jurisdiction Regulation, Council Regulation (EC) No 44/2001 of 22 December 2000, but it is clear from the Opinion of Advocate General Wathelet (delivered Dec. 4, 2014) that Recital 12 in the preamble to the Brussels 1 Regulation (recast) (2012) is a “retroactive interpretative law,” which “explains how [the arbitration] exclusion must be and always should have been interpreted.” See *Gazprom OAO v. Lietuvos Respublika*, at [91] (2014) (opinion of Advocate General Wathelet).

40. *Gazprom OAO* (2015), at [32]–[33].

41. *Id.* at [34].

42. *Id.* at [35].

43. *Id.* at [28], [36].

44. *Id.* at [37].

45. *Id.* at [40].

contest<sup>46</sup> whether the prohibitive arbitral award (the “anti-suit” arbitral award) should be recognized and enforced (in the case of a foreign arbitral award) by applying the New York Convention 1958’s criteria.<sup>47</sup>

The European Court of Justice in the *Gazprom* case<sup>48</sup> did not endorse Advocate General Wathelet’s Opinion<sup>49</sup> that *West Tankers* has been impliedly reversed by Recital 12 of the Brussels 1 Regulation (recast).<sup>50</sup> And so, the *Gazprom* case confirms that courts in Member States still lack capacity to issue anti-suit injunctions to give effect to arbitration clauses.

#### CONCLUSION

The main contention has been that the wide array of fundamental and important principles of civil justice can be usefully arranged under these four headings:

- I. Access to Justice
- II. Fairness of the Process
- III. Speed and Efficiency
- IV. Just Conclusions

The greatest impact of European law on English and indeed British law has been Human Rights reasoning. But, this ‘impact’ was conveniently crafted by jurists whose main aim was to recast the highest judicial chamber as a court quite independent of Parliament. In short, the creation, under the Constitutional Reform Act 2005, of the Supreme Court of the United Kingdom was ostensibly compelled by European human rights jurisprudence. According to this analysis, the court was necessary to achieve a hermetic separation of functions between the legislature and judicial system and, in particular, to ensure that the Lord Chancellor (that is, the Minister of Justice) can no longer sit as a judge. This dismantling of long-standing arrangements was a dramatic, surprising, and controversial “spin-off” from the separation of powers notion, more exactly, the concept of “judicial independence,” contained within the European Convention on Human Rights.

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46. *Id.* at [38].

47. *Id.* at [38], [41]–[43].

48. *Id.*

49. *Gazprom OAO v. Lietuvos Respublika*, at [130]–[152] (2014) (opinion of Advocate General Wathelet).

50. Council Regulation 1215/2012, 2012 O.J. (L 351/1) 1, 32 (EU) (discussing jurisdiction and the recognition and enforcement of judgments in civil and commercial matters).

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