

2014

Some Preliminary Observations on the Proposed ELI/Unidroit Civil Procedure Project in the Light of the Experience of the ALI/Unidroit Project

Geoffrey C. Hazard Jr.

UC Hastings College of the Law, hazardg@uchastings.edu

Follow this and additional works at: http://repository.uchastings.edu/faculty_scholarship



Part of the [Civil Procedure Commons](#)

Recommended Citation

Geoffrey C. Hazard Jr., *Some Preliminary Observations on the Proposed ELI/Unidroit Civil Procedure Project in the Light of the Experience of the ALI/Unidroit Project*, 19 *Unif. L. Rev.* 176 (2014).

Available at: http://repository.uchastings.edu/faculty_scholarship/1318

This Article is brought to you for free and open access by UC Hastings Scholarship Repository. It has been accepted for inclusion in Faculty Scholarship by an authorized administrator of UC Hastings Scholarship Repository. For more information, please contact marcus@uchastings.edu.

Some preliminary observations on the proposed ELI/UNIDROIT civil procedure project in the light of the experience of the ALI/UNIDROIT project

Geoffrey C. Hazard, Jr.*

The following subject matters in the American Law Institute (ALI)/International Institute for the Unification of Private Law (UNIDROIT) project are particularly important or require special attention in the proposed European Law Institute (ELI)/UNIDROIT civil procedure project.

Discovery or disclosure of evidence from opposing parties, particularly on behalf of individuals against government and private bureaucracies

If the project addresses ‘commercial litigation,’ this will be a lesser concern because in most of these cases both sides usually have adequate evidence under their own control. However, in litigation between an organization and an individual, whether of a commercial, consumer, or personal type, there is usually an imbalance. Most organizations keep records of transactions with others—for example, banks, insurance companies, and hospitals. The European tradition is that access to such information is a matter of substantive law, and right-of-access is provided in various ways for the affected individuals. The scope and basis of such access should be given careful attention.

Permitting parallel or alternative claims, given Europe’s new ‘federal’ legal structure

In the classic civil law systems, as I understand them, the claimant should identify the applicable civil law provisions available under the law of the forum and frame the allegations of his or her claim in this legal framework. However, the burgeoning European law now creates rights that overlap, or are concurrent, with the national forum law. Thus, potentially valid claims can be asserted under more

* Geoffrey C. Hazard, Jr., Thomas E. Miller Distinguished Professor of Law Emeritus, Hastings College of the Law, University of California, San Francisco, CA; Trustee Professor of Law Emeritus, University of Pennsylvania Law School, Philadelphia, PA; Sterling Professor Emeritus of Law, Yale Law School, New Haven, CT. Hastings College of the Law, 200 McAllister St., San Francisco, CA 94102 USA. Tel: 415-6-4800. Email: hazardg@uchastings.edu.

than one substantive legal basis, as in the American federal system. The rules of pleading under a European system should similarly allow pleading in multiple and alternative substantive terms.

Evidentiary privileges: definition and scope

The civil law generally treats confidences between a client and an advocate as a matter of the professional's privilege or immunity. Under the common law, the attorney-client privilege is a matter of the client's right, but it is limited to communications between a client and his or her counsel (in England and Wales, it also encompasses communications with third parties entered into for the purposes of actual or contemplated litigation). Under the old common law, there was no provision of confidentiality for the information gathered by counsel outside of communications with the client. In the USA, this latter body of material is protected by the 'work-product immunity.' There can be parallel problems concerning medical information in the course of treatment. The terms of these evidentiary immunities and protections should be carefully analysed and addressed.

Trial procedure: judge-centred or advocate presentations

There is an emerging 'convergence' between civil and common law systems regarding the conduct of evidentiary development. Classically, the judge was the energetic agent in the civil law, while the advocate held this role in the common law system. Now, common law systems accord the judge a more active role, while some civil law systems allow the advocate a greater role. Apparently in some civil law systems, the advocates essentially provide the judge with scripts to be followed. As expressed in the ALI/UNIDROIT provisions, 'supplemental' questioning is allowed by the advocates even in a judge-centred system of hearing. In any event, the matter should be addressed, perhaps with alternative systems.

Hearings: consecutive trial or episodes and relationship to lawyer fees

The classic common law evidentiary presentation was held in a single consecutive hearing in which all evidence on both (or all) sides was presented. This process responded to the fact that classic common law trials went before juries, the juries being ad hoc assemblies. Practically all UK civil trials are tried by a judge, as are many American trials. The classic civil systems involved a series of hearings, which were short and addressed one or a few items of evidence. The modern civil law trend has been to hold a single consecutive hearing. The topic should be addressed.

In addition, the compensation of advocates in the civil law system has been linked to the hearings, so that a single hearing system would seriously distort

proper compensation as well as the rules on costs shifting, which were addressed by Neil Andrews. This subject also deserves attention.

Appellate review: scope (*de novo* or error review) and available interlocutory

The ALI/UNIDROIT project did not deal with appellate review. It simply deferred to the procedure under the national law of the forum. The topic of appellate review is very important. Classically, in the civil law, an appellate court has the authority and responsibility to reconsider the merits of the case. In the common law system, the appellate court has plenary authority over issues of law, but in factual matters and matters of mixed fact and law it reviews only for error—indeed, only for ‘prejudicial error.’ Perhaps the ELI should also simply defer to the governing national law. In any event, the matter should be explained and clearly defined.

***Lis pendens*: first filed being preemptive**

Deference to the ‘first court seized’ has been required in Europe. The result is that parties seeking to delay litigation, which is typical of the defendant, often desire to have the dispute lodged in a court suffering long delays. I understand this issue has been addressed, and some modification has possibly been made in the ‘first court seized’ rule. In any event, the issue should be revisited, perhaps in a sub-project.

Group litigation (‘class actions’)

The ALI/UNIDROIT project excluded these forms of procedure. At the time, it would have been premature to address them. Now there are several rather different varieties in the national systems, and new proposals seem to be forthcoming. I recommend exclusion of the topic from the main ELI/UNIDROIT project, but it should perhaps be made a separate sub-project.