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Civil Litigation in a Globalising World

X. E. Kramer
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Preface and Acknowledgments

In 2009, the editors of this volume developed the idea to organise a conference on the harmonisation and globalisation of civil procedure in view of the recent legislative developments in Europe and on the global level. We chose to approach this theme from different legal disciplines, including legal history, Law and Economics and legal policy as well as to articulate its interaction with private international law and private law. The harmonisation and globalisation of civil procedure also has a strong impact on national civil procedure and judicial policy. We therefore decided to dedicate a substantial part of the conference to contributions from selected jurisdictions to learn how countries deal with the challenges of globalisation and harmonisation in the area of civil procedure. The conference 'Civil Litigation in a Globalising World' took place in Rotterdam on 17 and 18 July 2010 as a joint project of the Erasmus School of Law of the Erasmus University Rotterdam and the Faculty of Law of the University of Maastricht. The present book contains the results of the conference.

We are grateful to the persons and institutions that have made this conference and the publication of the present book, possible.

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Last but not least we would like to thank all the speakers at the conference and the contributors to this book, as well as TMC Asser Press for publication.

Rotterdam/Maastricht, Autumn 2011

Xandra Kramer
C. H. (Remco) van Rhee

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Chapter 1
Civil Litigation in a Globalising World: An Introduction

Xandra E. Kramer and C. H. van Rhee

Abstract Globalisation of legal matters and the inherent necessity of having to litigate in foreign courts or to enforce judgments in other countries considerably complicate civil proceedings due to great differences in civil procedure. This may jeopardise access to justice. As a result, the debate on the need for the harmonisation of civil procedure becomes ever more prominent. In recent years, this debate has gained in importance because of new legislative and practical developments both at the European and the global level. These developments require further study, amongst other things the bringing about of the ALI/UNIDROIT Principles of Transnational Civil Procedure and some recent European Regulations introducing harmonised procedures, as well as problems encountered in the modernisation of national civil procedure and in attempts for further harmonisation. This book discusses the globalisation and harmonisation of civil procedure from various angles, including fundamental (international) principles of civil justice, legal history, Law and Economics and (European) policy. Attention is also paid to the interaction with private international law and private law (Part I: Different perspectives on globalisation and harmonisation). European and global

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projects that aim at the harmonisation of civil procedure or provide guidelines for the fair and efficient adjudication of justice are discussed in a subsequent part of the book (Part II: Harmonisation in a European and global context). The volume further includes contributions that focus on globalisation and harmonisation of civil procedure from the viewpoint of various national jurisdictions (Part III: National approaches to globalisation and harmonisation).

Contents

1.1 Civil Litigation in a Global Context

The present volume discusses civil litigation in a global context. During the last three decades, it has become clear that this area of legal activity has acquired more international dimensions than was ever the case in the previous period. This is in part due to the fact that attempts to harmonise substantive law, for example within the context of international bodies such as the European Union, are considerably jeopardised by the existence of extensive differences in the court procedures through which this law has to be realised and enforced.[1] In addition, according to the drafters of the ALI/UNIDROIT Principles and Rules of Transnational Civil Procedure,[2] differences in court procedures also hamper international trade.

Harmonisation of civil procedure on a worldwide level is currently mainly achieved through soft law, an example being the ALI/UNIDROIT Principles and Rules. Additionally, there are activities in the field of private international law, notably the various Hague Conventions in the field of international civil procedure. One of the latest relevant conventions is the Convention of 30 June 2005 on

[1] This was already noted by Cambridge Law Professor H.C. Gutteridge in 1946: 'It would, however, seem to be obvious that no scheme of unification can be regarded as satisfactory if proceedings in one of the participating countries are more dilatory and expensive than in others, or if the remedies afforded by the unified law are not the same' and 'If unification is to possess any real value it is essential that the unified rules should be applied in practice without any impediments created by procedural difficulties' (Gutteridge 1946, 35).

[2] ALI/UNIDROIT Principles of Transnational Civil Procedure, as adopted by the American Law Institute and UNIDROIT in 2004. These Principles were published, accompanied by Rules and short commentaries in ALI/UNIDROIT 2006 Principles of Transnational Civil Procedure, 2006.

Choice of Court Agreements, which came into being after the failure of the broader Hague Convention on Jurisdiction and Judgments.[3] At a European level, various legislative instruments such as directives and regulations have been promulgated, either under Article 81 of the Treaty on the Functioning of the European Union (TFEU), or on the basis of this Treaty's Article 114 (and their predecessors under the Community Treaty). The various instruments promulgated under Article 81 only concern cross-border cases, whereas the procedural rules promulgated under Article 114—these may currently only be found in Directive 2004/48/EC on the Enforcement of Intellectual Property Rights—[4] are also applicable in purely national cases. At a national level, some convergence may be noticed as a result of the adoption of international and foreign procedural rules and regulations in national law reform projects, for example in the area of international jurisdiction where the Brussels regime has had an impact on national jurisdiction rules.

The various chapters of this volume will address the need for harmonisation of civil procedural law as a result of globalisation, and the extent and various ways in which civil procedural law is currently converging on a European, global and national level. The limits of harmonisation and its pros and cons will be addressed. Additionally, national responses to the challenges of globalisation and harmonisation will be discussed.

1.2 Different Perspectives on Globalisation and Harmonisation of Civil Procedure

Part I of this volume, presenting different perspectives on globalisation and harmonisation, starts with the contribution of Neil Andrews (Chap. 2). According to this author, principles of civil justice should be of major importance in the harmonisation debate. The author states that the leading principles should be singled out and these principles should then be categorised. The following categories can in his opinion be distinguished: (1) Access to legal advice and dispute resolution systems; (2) Equality and fairness between the parties; (3) A focussed and speedy process; and (4) Adjudicators of integrity. In his opinion, by looking at civil justice from the perspective of these sets of principles, the bewildering diversity of complex, detailed and technical national rules may become manageable and proposals may be made for a further alignment of the systems of civil justice on a European or global scale. This alignment should not be confused with unification of the civil justice systems, as a model of civil justice acceptable to all jurisdictions and cultures on a global scale or even on a European level is impossible to achieve (as is emphasised by a large number of contributors to the present volume).

[3] Schulz 2006, 243–286.

[4] Directive 2004/48/EC on the Enforcement of Intellectual Property Rights, OJ 2004, L 143/15, with corrigendum L 195/16.

It should, however, facilitate a growing together of civil justice systems by facilitating the introduction of a variety of national rules and procedural models that meet the requirements of the sets of principles that have been identified.

Consequently, these principles would function to some extent as European directives, which state the goals that need to be achieved but leave the Member States freedom as regards the means by which they want to achieve them. An example of a well-functioning set of principles at the level of the Council of Europe may be found in Article 6(1) of the European Convention on Human Rights (ECHR), principles that are reinforced by the existence of the European Court of Human Rights. These principles may give rise to best practices which may result in a further alignment of civil justice systems. To a certain extent, the various EU directives and regulations in the field of civil procedure may also serve as best practices. Although the present directives and regulations promulgated under Article 81 TFEU and its predecessors are aimed at cases in which litigants from different Members States are involved, a number of such directives and regulations, for example the Mediation Directive[5] and the Small Claims Regulation,[6] may also serve as best practices for national lawmakers who aim at reforming their national procedural law (see also the contribution by Burkhard Hess, Chap. 8). This would certainly result in a further alignment at the EU level. On a worldwide scale the ALI/UNIDROIT Principles may serve the same goal.

Whereas the contribution of Neil Andrews focuses on future harmonisation, the contribution by C. H. (Remco) van Rhee (Chap. 3) deals with past experiences in this field. The author identifies three types of harmonisation: incidental harmonisation as a result of national law reform, harmonisation as a result of competition between civil justice systems and planned harmonisation as a result of international harmonisation projects.

The author states that incidental harmonisation as a result of national law reform has a long history, and is mainly the result of the national legislature making use of foreign experience with procedural mechanisms and rules in order to evaluate their suitability in national law reform projects. Examples can be traced back to the fifteenth- and sixteenth-century Low Countries, where the rule-making authorities often followed French legislation, and such examples continue to be present up to the present day, though as Tanja Domej (Chap. 12) illustrates Switzerland may be an exception in its hesitation to follow foreign examples in the drafting of the new Swiss Code of Civil Procedure. Especially the civil justice systems of areas that are in one way or another related to the jurisdiction in need of reform (eg economically, politically, culturally) are taken into consideration in law reform projects, and this may be good news for the further alignment of the civil justice systems of the Member States of entities such as the European Union,

[5] Directive 2008/52/EC on certain aspects of mediation in civil and commercial matters, OJ 2008, L 136.

[6] Regulation (EC) No. 861/2007 establishing a European Small Claims Procedure, OJ 2007, L 199.

States who in various ways are closely linked to each other exactly because of their involvement in these bodies.

Harmonisation as a result of competition between civil justice systems also has a long history. In his contribution, Van Rhee discusses the example of the success of the Romano-canonical procedure, originally introduced in the spiritual courts, due to its adoption as the standard procedure of various secular courts from the later medieval period onwards. The author argues that this was to a large extent the result of competition for business between spiritual and secular courts. Such competition may currently again be witnessed. An example is provided by England and Germany, where, as Stefan Huber shows (Chap. 15), brochures have been published in order to promote England and Germany respectively as jurisdictions that are, amongst other things, well suited for international business litigation. In order to overcome the language advantage of the English civil justice system, the German parliament is currently contemplating the introduction of divisions at some German courts where international business litigation can be conducted in the English language. Similar experiments are contemplated in other countries, such as France and the Netherlands (Rotterdam Court of First Instance; not discussed in the present volume).

Louis Visscher (Chap. 4) charts the pros and cons of harmonisation of civil procedural law from the perspective of Law and Economics, ie primarily from the perspective of the production of legal norms aimed at avoiding various forms of market failure; market failure occurs in situations where perfect competition is absent. The author notes that there is only a limited amount of Law and Economics literature on the harmonisation of civil procedure. He states that there is no empirical research which shows that international trade is hindered by the existence of different civil justice systems or that the number of international legal transactions would increase if the existing differences were reduced (which is the underlying assumption of the drafters of the Principles and Rules of Transnational Civil Procedure). This author comes to the conclusion that the Law and Economics arguments against harmonisation of civil procedural law are stronger than the arguments in favour of such harmonisation.

Strong arguments against harmonisation are that the availability of alternative models of civil justice (1) enables satisfying a large number of preferences and (2) facilitates learning effects. In case harmonisation or unification of civil procedure would be pursued by a central legislator, another argument against harmonisation would be (3) that such a legislator would suffer from limited information and could easily be influenced by interest groups. Also problematic is, according to the author, that civil justice systems are closely linked to the existing systems of underlying substantive law; in other words, a strong path dependency can be noted. As stated, from a Law and Economics perspective these arguments cannot be set aside by arguments in favour of harmonisation. One such argument is the need to internalise interstate externalities, but such externalities do not exist since civil procedure only takes place between the parties involved. Another argument in favour of harmonisation, the desire to avoid a race to the bottom, is again unconvincing since the chances that this will occur are limited, for example

because the civil justice systems of individual jurisdictions must meet certain quality requirements, if only in order to have judgments of those systems recognised and enforced abroad. Finally, the argument that harmonisation would decrease transaction costs and allow profits of economies of scale is not convincing either. Although transaction costs are mentioned as a possible hurdle that would be taken away by harmonisation of civil procedural law, it is, according to the author, not certain that the cost savings caused by harmonisation would outweigh its costs. Therefore, the author is of the opinion that there is only limited space for the harmonisation of procedural law, and then only by way of the introduction of an additional, optional model (within a European context, a so-called 28th model). For the rest, Visscher subscribes to the view of Anthony Ogus[7] that spontaneous harmonisation is to be preferred. According to the latter author, from a Law and Economics perspective spontaneous convergence or harmonisation—eg incidental harmonisation as a result of national law reform or harmonisation as a result of competition, discussed in the contribution by Van Rhee—is to be preferred since it will only occur when the costs of convergence are exceeded by its benefits.

Gerhard Wagner (Chap. 5) discusses harmonisation of procedural law from a European policy perspective. First he mentions Article 81 TFEU, which gives rise to what is qualified as horizontal harmonisation, ie harmonisation by introducing a general set of procedural rules which apply whatever the substantive legal issue at stake may be as long as the requirements of Article 81 are met (cross-border cases, etc.). The author notes that the impact of the various directives and regulations that have been passed under Article 81 and its predecessors is very limited—an observation that is repeated by various contributors to the present volume—since for political reasons these legislative instruments are only applicable in cross-border cases, meaning cases in which litigants from different Member States are involved. Additionally, the author states that this approach results in two parallel sets of rules, one for domestic cases and another one for cross-border cases, something which may be perceived as an unnecessary burden for the judges who have to work with these rules. The author predicts that this type of law-making will not have a long future. More generally, he states that 'procedural law lacks the compromise solution of an optional system'. In his view, this would result in courts that are overburdened and in a waste of judicial resources. His view differs from that of Louis Visscher who, from a Law and Economics perspective, suggests that an additional set of rules in the sense of an optional, 28th system would be a feasible option.

Wagner continues with discussing harmonisation based on Article 114 TFEU and its predecessors. Article 114 TFEU includes a power for the EU to harmonise national procedural laws if they do not sufficiently implement substantive EU law. In other words, it sanctions a system of law enforcement and protection of subjective rights derived from EU law for specific areas of substantive EU law

[7] Ogus 1999, 415–416.

governing both international and domestic cases. This system of law enforcement and protection may encompass harmonised rules of civil procedure, as is witnessed by Directive 2004/48/EC on the enforcement of intellectual property rights and possible future EU legislation on Consumer Collective Redress. This type of harmonisation can be qualified as vertical harmonisation since the harmonised rules do not concern civil disputes in general but only specific subject matter. The author holds that this approach may be fruitful since it offers a valuable tool for experimenting with harmonisation, although it is hard to justify this sectoral approach apart from referring to the competences of the EU which are not linked with an overall plan in the area of civil procedure.

Xandra Kramer (Chap. 6) focuses on the relationship between private international law and civil procedure within the context of globalisation and harmonisation. The author states that modern private international law and issues of civil procedure are closely linked. She holds that the harmonisation of civil procedural law may be facilitated by the harmonisation of private international law as an initial stage. Though private international law rules serve their own purpose, and are not merely transitional, sometimes (harmonised) private international law rules function as a preliminary phase in the harmonisation of civil procedure. This is especially the case in the EU, where in different areas there is a gradual shift from the harmonisation of private international law to a more far-reaching harmonisation of civil procedure, primarily by introducing minimum standards of civil procedure. As is demonstrated, private international law rules can also result in a gradual and spontaneous approximation of civil procedure. By coordinating different national systems of law in international cases, private international law may smoothen the way for harmonisation, for example where concepts are concerned such as *lis pendens*, or the role of *ius curia novit* in the application of foreign substantive law. Private international law and harmonisation of civil procedure are closely interwoven and both (should) aim at meeting the challenges of globalisation and realising an EU, or even a global, area of justice.

The final chapter in Part I by Matthias Storme (Chap. 7) addresses the interaction of procedural law with substantive private law, particularly in an international context. The author notes that substantive law is often drafted without paying attention to the procedural environment in which it has to function, or without paying attention to the fact that in certain cases the procedural context may be different from the national one. Procedural law should take into account that the applicable private law is often drafted or developed having regard to different rules of procedure, or without taking into consideration the existing rules of procedure. The contribution contains a series of examples illustrating the problems that may arise as a result of this. These examples are grouped under three headings: (1) The availability of the necessary procedures, powers and rules at the national forum where the enforcement of the substantive rights granted by harmonised or foreign law is sought; (2) The protection of defendants, eg against vexatious litigation; and (3) Inflexibility of national procedural rules as regards a change of parties or their rights under substantive law.

1.3 Harmonisation in a European and Global Context

Part II of this volume on harmonisation in a European and global context starts with the contribution of Burkhard Hess (Chap. 8). The author holds that during the last decade or so, EU legislation in the area of international civil procedural law has been subject to change. The EU has moved from an approach focused on the coordination of national procedures and improving traditional instruments of private international law, to an attempt to connect the procedural systems of the Member States and to realise a situation where judgments can move freely within the Union. The author states that therefore it is time for academics to develop ideas about the future architecture of civil procedural law in a European context, a discussion that might even result in the development of a European Code of Civil Procedure or another umbrella instrument.

However, first the various bases of harmonisation of procedural law (and private international law) should be deliberated on, particularly Articles 81 and 114 TFEU (referred to as horizontal and vertical harmonisation, respectively, by Gerhard Wagner in this volume). Additionally, the standards developed by the European Court of Justice for reviewing national procedural law should be taken into consideration, as well as Articles 6 ECHR and 47 of the EU Charter of Fundamental Rights. The author notes that the European Court of Justice currently emphasises the role of the Charter in the interpretation of procedural instruments of the EU and of national procedural law when European Union law is implemented by national civil courts. This results in the harmonisation of national procedures via judicial interpretation and the application of constitutional standards. This trend may become even more dominant in the future since the Stockholm programme has determined that the European Commission shall elaborate an instrument on procedural minimum standards by 2012. These standards will not only be based on the case law of the Luxemburg and Strasbourg Courts, but also on the practice of the national courts.

Chapter 9 by Alan Uzelac takes a radically different approach to harmonisation of civil procedural law in Europe than the authors of the preceding chapters. Basically, the author holds that a discussion on the harmonisation of rules of civil procedure is meaningless if one does not take into consideration that these harmonised rules depend to a large extent on the procedural structures by which they need to be implemented. Based on his experience in the work of the European Commission for the Efficiency of Justice (CEPEJ)—the first international, intergovernmental organisation systematically engaged in the collection of statistical information on the functioning of the national civil justice systems—the author highlights huge structural differences between the 47 Member States of the Council of Europe. In his contribution to the present volume, he concentrates on three core organisational structures, ie (1) courts, (2) judges and (3) lawyers.

After having shown the huge structural differences (no common European definition of 'courts', differences in the understanding of the social functions of judges, divergences in their typical tasks, something which equally applies to

lawyers), the author concludes that due to the difficulty and at times even the impossibility of harmonising structures—although the CEPEJ reports seem to have triggered some structural reform and convergence—it is better to look at procedural harmonisation from a new perspective: concentrating on the issues that are of importance for the users of the judicial system instead of on the harmonisation of rules and structures. These issues may be summarised under the headings of the effectiveness and quality of the legal protection offered. Thus convergence should be aimed at the results of the national justice systems. These are, amongst other things, foreseeable time frames, clear procedural calendars, transparent time and case management, easily accessible information about the available options in the pursuit of individual and collective rights, user-friendly procedures, clearly defined fee and costs arrangements and fair legal aid systems for those who cannot afford the full costs of legal protection. Just as Visscher in the present volume, Uzelac underlines that all this does not mean that there is a need for complete harmonisation. He states: 'But, where different procedural structures turn out to be equally effective, fair, transparent and user-friendly, the pluralism of procedural forms may even be considered as desirable, just as harmony may be better achieved by polyphonic voices than by voices chanting in unison'.

Michele Taruffo (Chap. 10) addresses the issue of the harmonisation of civil procedure where transnational litigation is concerned. The author is one of the initiators of the ALI/UNIDROIT Principles and Rules of Transnational Civil Procedure, and it is these Principles and Rules which are the focus of his contribution. Just like Andrews (Chap. 2), the author is of the opinion that the Principles and Rules could be used as a model in law reform providing standards for harmonisation of national procedures, even though they primarily focus on transnational commercial litigation. The Principles are especially useful, since they are not too general to make them completely meaningless, but also not too specific such as to make harmonisation impossible. They focus on an intermediate level and consequently represent a point of reference in the drafting of more specific, national rules and regulations. One of the problems that this author mentions is that the Principles provide a standard model and do not deal with the 'plurality and fragmentation' of special procedures that often exist at the national level. Additionally, when using the Principles as a model, they need to be adapted to the procedural environment provided by the various national codes, and this may, according to the author, result in cherry picking and a rejection at the national level of parts of the Principles that are not familiar to the national legal system under consideration. This will of course hamper harmonisation.

1.4 National Approaches to Globalisation and Harmonisation

Part III of the volume presents a selection of national jurisdictions and addresses the question of how these jurisdictions deal with the issues of globalisation and harmonisation. The jurisdictions under consideration are the United States, Switzerland, Scotland, the Netherlands, Germany, Belgium, France and Romania.