Improving the Prospects of the Transnational Rules of Civil Procedure Project: Some Thoughts on Purpose and Means of Implementation

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I. Introduction

Japanese proceduralists are masters of comparative analysis and cross-systemic adaptation. It is therefore a great pleasure to discuss for an audience with this expertise a project that "seek[s] to combine the best elements of adversary procedure, particularly that in the common-law tradition, with the best elements of judge-centered procedure, particularly that in the civil-law tradition."[3)] The reference is, of course, to the Transnational Rules of Civil Procedure, a project initiated by the two respected proceduralists Geoffrey Hazard of the University of Pennsylvania and Michele Taruffo of the University of Pavia, Italy.

Professors Hazard and Taruffo began the project by sending a first draft of the Transnational Rules with Commentary to a number of proceduralists in Europe for comment in January of 1996.[4)] Since then, the Transnational Rules have been discussed at innumerable fora in Europe, North America and, most recently, Asia. In response to the contributions offered there, some of which have been published,[5)] Professors Hazard and

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3) **Transnational Rules of Civil Procedure**, Introduction at 7-8 (Preliminary Draft No. 2, 2000) [hereinafter Preliminary Draft 2].

4) **See** Gerhard Walter & Samuel Baumgartner, **Utility and Feasibility of Transnational Rules of Civil Procedure: Some German and Swiss Reactions to the Hazard and Taruffo Project,** 33 Tex. Int'l L. J. 463, 464 (1998) [hereinafter Walter & Baumgartner, **Transnational Rules**].

5) **See id;** Gary B. Born, **Critical Observations on the Draft Transnational Rules of Civil Procedure,** 33 Tex. Int'l L. J. 387 (1998); Jacob Dolinger & Carmen Tiburcio, **The Forum-Law Rule in International Litigation-Which Procedural Law Governs Proceedings to Be Performed in Foreign Jurisdictions,** ↗

Taruffo have produced a number of subsequent drafts in 1996,[6] 1997,[7] 1998,[8] 1999,[9] and 2000,[10] improving the content of the Transnational Rules substantially along the way. In the meantime, the project has been adopted by the American Law Institute,[11] as whose distinguished Director Professor Hazard served until his retirement in 1999, and, more recently, by UNIDROIT, the Institute for the Unification of Private Law in Rome.[12]

The result of this ongoing collaboration with proceduralists from all over the world has been an ambitious and respectable amalgam of procedural rules and principles borrowed from various national laws. However, since its inception, the project has faced strong criticism as well as praise.[13] Taking this criticism seriously is crucial for the success of the enterprise. In response, the drafters have concentrated on changing, adding, and deleting specific rules, for, as Professor Hazard has pointed out, the devil is often in the detail.[14] However, concentrating too much on detail too early in the process may cause fundamental insights to go unnoticed, and the discussion of particular rules may lose focus in a transnational enterprise such as this. Our suggestion in this essay is that the drafters step back for a moment and contemplate two fundamental questions that have not been answered clearly so far: What are the Transnational Rules for and in what fashion should the stated goal or goals be implemented? Answering these two questions would allow

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↘33 Tex. Int'l L. J. 425 (1998); Catherine Kessedjian, **First Impressions of the Transnational Rules of Civil Procedure From Paris and The Hague,** 33 Tex. Int'l L. J. 477 (1998); Giuseppe Tarzia, **Une Procédure Civile Sans Frontières: Harmonisation et Unification du Droit Procédural in** Procedural Law on the Threshold of a New Millennium, 11. World Congress on Procedural Law 25 (1999); Russel J. Weintraub, **Critique of the Hazard-Taruffo Transnational Rules of Civil Procedure,** 33 Tex. Int'l L. J. 413 (1998). **See also** Rolf Stürner, **Modellregeln für den internationalen Zivilprozeß?,** 112 Zeitschrift für Zivilprozess 185 (1999). For a list of names of some of those who provided written comments see Preliminary Draft 2, **supra** note 3, Introduction at 9.

6) Geoffrey C. Hazard, Jr. & Michele Taruffo, **Transnational Rules of Civil Procedure Rules and Commentary,** 30 Cornell Int'l L. J. 493 (1997) [hereinafter 1996 Draft].

7) **Transnational Rules of Civil Procedure** (December 1997 Draft) [hereinafter 1997 Draft].

8) **Transnational Rules of Civil Procedure** (Preliminary Draft No. 1, 1998) [hereinafter Preliminary Draft 1].

9) **Transnational Rules of Civil Procedure** (Discussion Draft No. 1, 1999) [hereinafter Discussion Draft].

10) Preliminary Draft 2, supra note 3. This essay was originally prepared on the basis of the 1999 Discussion Draft 1, supra note 9, and subsequently adapted, as far a possible, to Preliminary Draft 2, supra note 3. In the latter, the drafters have somewhat alleviated, if by no means, however, eliminated, some of the bases for criticism advanced in this essay. **See infra** text accompanying notes 20 (statement of purpose), 39-42 (litigation package), 116-120 (composition of court) and note 89 (scope of the Rules).

11) **See id.** and Preliminary Draft 1, **supra** note 8.

12) **See** Geoffrey C. Hazard, **Civil Litigation Without Frontiers: Harmonisation and Unification of Procedural Law in Procedural Law on the Threshold of a New Millennium, supra** note 5, at 3 (1999).

13) **See** the contributions listed **supra** notes 4-5.

14) Geoffrey C. Hazard, Jr., Oral introduction to the Transnational Rules of Civil Procedure at a symposium in Paris, France, on July 13, 1996.

both drafters and commentators more clearly to focus their debate on what the Transnational Rules can and should usefully cover, and it would help increase the chances of the endeavor to succeed in achieving its stated goal.

II. Purpose of the Rules

Anyone who is confronted with the Transnational Rules for the first time will sooner or later wonder what it is that the project wants to accomplish. While the usefulness of some law reform proposals may immediately be obvious to most of those involved in discussing it, that is not usually the case unless the perception of dysfunction that ordinarily drives reform[15] is widely shared.[16] It is certainly not the case with a project which seeks to combine rules and philosophies from national approaches the world over in a field that is considered to be so closely intertwined with a particular society or history as to render any borrowing a rather tricky undertaking.[17] Thus, a clearly stated rationale that has the potential of being persuasive with a great number of proceduralists, both academics and practitioners, is essential for the success of the Transnational Rules. It would also help focus the discussion on implementation[18] and on the content of the Rules.

Given this importance of a clearly stated purpose, it is rather surprising that none prominently appears in the text of, or the materials accompanying, the Rules. There is much talk about globalization and a concomitant need to harmonize procedural law,[19] but suggestions as to why procedural harmonization around the world would be helpful are scarce. A new heading in the introduction to the latest draft entitled "Purpose of These Rules"[20] only contains a few short statements to the point, statements which in their brevity ultimately appear unconvincing. Most prominently, the drafters suggest to create "a system of fair procedure for litigants involved in legal disputes arising from transnational transactions."[21] However, increasing fairness and reducing cost and delay have been perennial favorites among procedural law reformers everywhere.[22] The search for fairness

15) Stephen B. Burbank & Linda J. Silberman, **Civil Procedure Reform in Comparative Context: The United States of America,** 45 Am. J. Comp. L. 675, 675 (1997).

16) It may well be, however, that a widely held perception of dysfunction underlying specific reform proposals turns out to be ungrounded in fact. **See, e.g.,** Marc Galanter, **An Oil Strike in Hell: Contemporary Legends of the Civil Justice System,** 40 Ariz. L. Rev. 717 (1998) (demonstrating that much of the civil justice-reform rhetoric in the United States is based on legends unproven by empirical evidence).

17) **See, e.g.,** Walter & Baumgartner, **supra** note 4, at 471-72.

18) **See infra** Chapter III.

19) **See** Discussion Draft 1, **supra** note 9, Introduction at i-ii.

20) Preliminary Draft 2, **supra** note 3, Introduction at 8. The relevant text was formerly tucked away in the Commentary. **See** Discussion Draft 1, **supra** note 9, Commentary at 0.2.

21) Preliminary Draft 2, **supra** note 3, Introduction at 8.

22) Adrian Zuckerman, **Towards Procedural Economy: Reduction of Duration and Costs of Civil Litigation, in Procedural Law on the Threshold of a New Millennium**, **supra** note 5, 39 (1999). **Effektiver** ↗

alone is therefore unlikely to convince national reformers to support the Transnational Rules rather than any of the many other reform proposals that, over the years, have been introduced to meet the same objective,[23] for those reformers tend to favor the procedural model they know over entirely different foreign models.[24]

Apart from the general search for fairness, there are essentially two themes that emerge from a close reading of the materials accompanying the Transnational Rules, including scholarly articles published by Professors Hazard and Taruffo.[25] Professor Hazard originally captured them thus: The current lex fori rule "systematically disadvantage[s] one party, who must sue or defend in a foreign procedural system. And there is inequality of treatment of transnational cases due to the differences in effectiveness, speed and structure of the various systems."[26] How convincing are these two reasons and what do they imply for the content of the Rules?

A. The Current System Systematically Disadvantages One Litigant

1. Litigating in an Alien Forum

As to the first theme, the "disadvantage" experienced by the foreign party in transnational litigation may arise from various sources. Most importantly, that party is often forced to litigate in a far-flung forum, where judges, lawyers, and litigants speak another language and are steeped in a different cultural tradition with its own distinct value system. There is not much, however, that procedural approximation can do to improve this situation. Similar rules of procedure could and would still be applied in a different fashion in the various countries involved, and the decisionmakers would remain nationals of a foreign state with their own predilections and, perhaps, biases, which represent the main source of the "uncertainty and anxiety" that the drafters of the Transnational Rules seek to reduce.[27] In this regard, Professors Hazard and Taruffo have argued that the Transnational Rules Project bears close resemblance with the endeavor, earlier in this century, to introduce unified federal rules of civil procedure for the whole of the United States.[28] However, one should not forget that those Federal Rules were promulgated in a

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↘**Rechtsschutz und verfassungsmässige Ordnung** (Walther J. Habscheid ed., 1983). **See also Fed.** R. Civ. Proc. 1 [U. S. A.]: "These rules . . . shall be construed and administered to secure the just, speedy, and inexpensive determination of every action."

23) On a number of these proposals, some of them substantial, see Hazard, **infra** note 25, at 495.

24) **See** Born, **supra** note 5, at 400-01. For this reason Mr. Born suggests that "the burden of persuasion would lie squarely with the Rules' proponents," a view likely to be shared by many domestic law reformers. **Id.** at 401.

25) Michele Taruffo, Drafting Rules for Transnational Litigation, 2 Zeitschrift für Zivilprozess International, 449, 449-51 (1997). Geoffrey C. Hazard, Jr., Preliminary Draft of the ALI Transnational Rules of Civil Procedure, 33 Tex. Int'l L. J. 489, 495-96 (1998).

26) Letter from Professor Geoffrey C. Hazard, Jr. to Professor Gerhard Walter 1 (Jan. 18, 1995) (on file with authors).

27) Preliminary Draft 12, **supra** note 3, Introduction at 8.

country whose states share a common heritage and a considerable measure of social and economic background. Moreover, the Federal Rules were fashioned for the federal courts, which are organized and controlled by a single federal government, and whose judges are appointed by the President, with the advice and consent of the Senate,[29] and are all sworn to uphold the laws and Constitution of the national government[30] as interpreted by the Supreme Court.[31] In spite of the recent trend toward reinforcing states' rights in the United States,[32] one should not discount the enormous unifying power of this arrangement and the sense of trust the constitutional architecture of judicial independence[33] instills in potential litigants when compared to facing a lawsuit in a foreign country. Thus, without bringing about such a unified judiciary, operating within a similar social and economic background, a change of procedural rules has little chance of reducing the "uncertainty and anxiety" described. It would also be impossible thus to overcome the difficulties foreign parties and their attorneys may experience in communicating effectively with their local counsel, another concern of Professors Hazard and Taruffo's.[34]

But even if one were to put these insurmountable difficulties arising from local social and economic background and constitutional structure aside and were to assume, arguendo, that, indeed, procedural harmonization could significantly decrease the "uncertainty and anxiety" of parties litigating in foreign fora, one major problem would remain, for, from this perspective, it becomes clear that the current draft of the Transnational Rules attempts to harmonize one of the structural issue areas largely responsible for the procedural differences from country to country but not another. It deals in depth with the question of who does what in the litigation process, opting for an adversarial approach with the parties in charge of collecting the evidence and then presenting it to the trier of fact, a panel composed of professional and lay judges, all under the supervision of a powerful judge. It does not, however, systematically address the other structural source for much of the differences between national procedural systems — the size of the litigation package. That size, as one may remember, reaches from the large package in U. S. procedure, which, based on equity procedure[35] and, more recently, on concerns of system efficiency,[36]

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28) **Id.,** Introduction at 2; Geoffrey C. Hazard, Jr., **From Whom No Secrets Are Hid,** 76 Tex. L. Rev. 1665, 1669 (1998).

29) U. S. Const. art. II, § 2, cl. 2

30) U. S. Const. art. VI, § 2.

31) U. S. Const. art. III.

32) **See, e.g.,** Kimel v. Florida Bd. of Regents, 120 S. Ct. 631 (2000); Alden v. Maine, 119 S. Ct. 2240 (1999); Printz v. United States, 521 U. S. 898 (1997); Seminole Tribe v. Florida, 517 U. S. 44 (1996); United States v. Lopez, 514 U. S. 549 (1995); Frank B. Cross, Realism About Federalism, 74 N. Y. U. L. Rev. 1304 (1999); Stephen Gardbaum, **Rethinking Constitutional Federalism,** 74 Tex. L. Rev. 795 (1996); Vicki C. Jackson, **Federalism and the Uses and Limits of Law: Printz and Principle,** 111 Harv. L. Rev. 2181 (1998).

33) **See** Stephen B. Burbank, **The Architecture of Independence,** 72 S. Cal. L. Rev. 315 (1999).

34) Hazard, **supra** note 25, at 491; Taruffo, **supra** note 25, at 450.

attempts to adjudicate an entire transaction or occurrence once and for all,[37] to the lean German-style procedure with its goal primarily limited to testing the grounds of the plaintiff's claim, while other related claims can always be litigated later.[38]

The 1999 draft of the Transnational Rules did include some provisions on intervention and necessary parties,[39] and the latest draft has added a provision on joinder of claims in Rule 4.4.[40] However, the selective nature of these provisions indicates that they are not part of a larger systemic choice of a particular litigation package. Accordingly, provisions introducing cross claims and compulsory counter claims in earlier versions of the Rules[41] were soon criticized as U. S. idiosyncrasies in an area otherwise left to national procedure and were therefore left to domestic procedure in, or dropped from, later drafts.[42] If the goal of the Transnational Rules is to eliminate essential differences between procedural systems, however, they will have to harmonize more exhaustively the joinder of claims, joinder of parties (including the question of whether or not class actions or some other form of group litigation are available), and something they currently do not address at all: preclusion rules. That these issues have not been mined as well by comparative scholarship as the differences arising from adversarial versus judge-centered procedure should be all the more reason to pay attention to them.

2. Discrimination Against Foreigners

Foreign parties can further be disadvantaged as a result of procedural rules that treat foreigners differently than domestic litigants. Here, the drafters of the Transnational Rules are on firmer ground. The European Court of Justice, for example, has recently had occasion to strike down two provisions of the German Code of Civil Procedure (ZPO) which, it held, discriminated against citizens of other member states of the European Union in violation of article 12 (formerly article 6) EC Treaty: § 110 ZPO, which requires that foreign plaintiffs post a bond for their potential liability to pay the defendant's cost of

35) **See, e.g.,** Stephen Subrin, **How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective,** 135 U. Pa. L. Rev. 909 (1987).

36) **See, e.g.,** Richard L. Marcus & Edward F. Sherman, Complex Litigation, Cases and Materials on Advanced Civil Procedure 28-35 (3d. ed. 1998). On various advantages and disadvantages of packaging litigation in the United States see Stephen B. Burbank, **The Costs of Complexity,** 85 Mich. L. Rev. 1463 (1987) (reviewing an earlier edition of the Marcus & Sherman case book).

37) **See, e.g.,** Geoffrey C. Hazard Jr., **Forms of Action under the Federal Rules of Civil Procedure** 63 Notre Dame L. Rev. 628 (1988).

38) **See, e.g.,** Samuel P. Baumgartner, **Related Actions,** 3 Zeitschrift für Zivilprozess International 203, 210, 218 (1998).

39) Discussion Draft 1, **supra** note 9, Rules 2(b), (c), and (d).

40) Preliminary Draft 2, **supra** note 3, Rule 4.4.

41) 1996 Draft, **supra** note 6, Rule 10 (d).

42) **See** now Preliminary Draft 2, **supra** note 3, Rule 10.3 and Commentary C-10.3. The new reference to joinder of parties in Rule 4.5 follows the same pattern by deferring to the domestic law of the jurisdiction in question.

litigating if the defendant so requests,[43] and § 917(2) ZPO, which allows for an attachment (**Arrest**) to be made when enforcement of a claim would otherwise have to occur on foreign territory.[44]

If the main concern behind the Transnational Rules project is to eradicate this type of provision outside of the EC Treaty's sphere of application, however, a full set of procedural rules as currently proposed would not be necessary. The goal could be achieved much faster and with less cost through a multilateral compact guaranteeing equal treatment to citizens of all member states. Clauses of this nature can already be found in a number of bilateral Friendship, Commerce, and Navigation treaties[45] and could easily be made part of a multilateral trade agreement.

3. Inconsistent Legal Obligations: The Case of Gathering Evidence Abroad

Another reason for a foreign litigant to be disadvantaged in transnational litigation arises from the danger of facing inconsistent legal obligations in the forum state and at home. In this regard, procedural harmonization could indeed help ameliorate the situation, particularly in the difficult area of gathering evidence abroad.[46]

Approximation of the rules on discovery and the presentation of evidence along the lines proposed by the Transnational Rules is likely to defuse those disagreements that are based on the fundamental difference among the approaches toward discovery and the gathering of evidence in the various procedural systems of the world, particularly those of the United States and other countries.[47] From this perspective, however, it is not helpful that Rule 24, as currently drafted,[48] largely refers to domestic law on the question of

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43) Case C-20/92, Hubbard v. Hamburger, 1993 E. C. R. I-3790. Case C-323/95, Hayes v. Kronenberger, 1997 E. C. R. I-1718.

44) Case C-398/92, Mund & Fester v. Hatrex, 1994 E. C. R. I-467. On these and a number of similar cases see Gerhard Walter & Fridolin M. R. Walther, **International Litigation: Past Experiences and Future Perspectives,** 25 **Swiss Papers on European Integration** 9-12 (2000); Gerhard Walter, **Neuere Entwicklungen im internationalen Zivilprozessrecht** in **Verfahrensrecht am Ausgang des** 20. **Jahrhunderts**, **Festschrift für Gerhard Lüke zum** 70. **Geburtstag** 921, 923-24 (Hanns Prütting & Helmut Rüssmann ed. 1997). A provision that is more openly directed at foreigners is article 271(1) No. 4 of the Swiss Bundesgesetz über Schuldbetreibung und Konkurs of 1889, which allows for an attachment against a defendant who does not live in Switzerland. In 1994, this provision was limited by adding a number of additional requirements, most significantly the need for a showing that the case be sufficiently connected to Switzerland. In spite of the ECJ's holding, however, both § 917 (2) of the German ZPO and its sister provision in Switzerland have an important role to play in transnational litigation. **See infra** text accompanying notes 72-74.

45) **See, e.g.,** **Gary** B. **Born**, **International Civil Litigation in United States Courts** 330, 962 (3d ed. 1996) (indicating that several U. S. courts have considered the use of national treatment provisions in FNC treaties in favor of foreign litigants in the contexts of forum non conveniens and recognition of foreign judgments).

46) On the gathering of evidence abroad see, e.g., **id.,** at 843-920; **Haimo Schack**, **Internationales Zivilverfahrensrecht** 279-92 (2d ed. 1996).

47) Preliminary Draft 1, **supra** note 8, Introduction at 10-12.

evidentiary privileges, for the different scope of such privileges is precisely one of the sources of inconsistent obligations in transnational discovery. This is particularly true of privileges, such as the protection of trade and business secrets in § 383 (No. 6) of the German ZPO and similar provisions in other countries.[49]

However, current problems existing in the area of gathering evidence abroad are not exclusively attributable to differing views on the scope of evidentiary obligations. There are also a number of criminal statutes that prohibit certain persons from providing evidence,[50] and there are quite a few nations that insist that taking evidence on their territory involves their sovereign right to control such activities.[51] Procedural harmonization is unable to address these causes of international disagreement. Moreover, even if the scope of discovery were the same the world over, some discord would still be possible due to different regulatory policies. For example, a considerable number of countries have enacted statutes protecting specific industries from discovery related to U. S. antitrust cases.[52] To be true, the force of such concerns is intertwined to some degree with the scope of U. S. discovery. Thus, this would admittedly represent less of a problem under the relatively circumscribed model of discovery envisioned by Transnational Rules as currently drafted.[53] But the issue is unlikely to disappear entirely, unless discovery were so limited as to stifle any regulatory case at its inception, hardly a commendable prescription for a set of enlightened rules of procedure.

Thus, what a project concerned with improving the plight of litigants caught between inconsistent legal obligations in transnational litigation could do here is devise an approach to mitigate that plight in view of the national interests involved. Section 442 of the Restatement (Third) of Foreign Relations Law of the United States (1987) could serve as a starting point, but only as a starting point, for it approaches the issue from a distinctly U. S. point of view and leaves on the side the mentioned problems with state sovereignty. There may also be questions as to the relationship of such an approach to the regime of

48) Preliminary Draft 2, **supra** note 3, Rule 24.2.

49) Drafting a list of privileges for all countries of the world is made particularly difficult because some of the privileges currently available in Europe are either guaranteed by the constitution or are considered to have constitutional underpinnings. **See, e.g.,** BVerfG in NJW 1984, 1742 (1984) [Germany] and BGE 123 IV 236, 247 (1997) [Switzerland] (both holding that the constitutionally guaranteed freedom of the press requires a privilege of journalists to protect their sources). **See also** Unterpertinger v. Austria, 110 Eur. Ct. H. R. (ser. A) at 20 (1986) (indicating that article 8 of the European Convention on Human Rights, protecting the right to respect for one's family life, may necessitate a privilege of family members). The way to deal with such difficulties would depend on the chosen means to implement the Transnational Rules. **See infra** Part III.

50) **See, e.g.,** § 203 of the German Penal Code; articles 273 and 321 of the Swiss Penal Code; article 47 of the Swiss Banking Act. **See also** Louise Ellen Teitz, **Transnational Litigation** 166-73 (1996).

51) **See, e.g.,** Born, **supra** note 45, at 848-50.

52) **See, e.g., id.** at 851-52.

53) Preliminary Draft 2, **supra** note 3, Rules 16-19.

the Hague Evidence Convention.[54] It is clear, however, from this perspective, that such an approach would require substantially more than the cryptic obligation to provide judicial assistance as laid down in Rule 36.[55]

4. Disadvantage As Compared to Home Forum

Finally, the "systematic[] disadvantage" of one party in transnational litigation that Professors Hazard and Taruffo lament[56] may arise not only in comparison with that party's opponent, who is able to operate on her home turf, but also in comparison with the procedural law that the foreign party would have at his disposal if he were able to litigate in his home forum. To choose one obvious example, European businesses are notoriously loath to defend themselves in a U. S. forum, where discovery is considerably more intrusive than it would be at home, where the American rule of costs, the uncertainties of a jury trial, particularly when combined with the possibility of an award of punitive damages, and the impending expense of discovery may lead them to accept payment of a substantial settlement sum rather than defending against a claim they consider unfounded as they would at home.[57] Conversely, those U. S. litigants who tend to have little access to relevant evidence, such as antitrust and product liability claimants, and those who plan to take on unpopular causes clearly prefer those same elements of U. S. procedure over what they view as European procedural systems engaged in a massive conspiracy of concealment.[58]

This type of disadvantage could indeed be massively reduced by procedural harmonization. However, accomplishing such a goal would be no small feat, for as much as either side would love to see the other closely approximate its approach to civil litigation, as much it would resist abandoning its own procedural system, which it views as clearly superior. Mr. Born's forceful argument against adopting an earlier version of the Transnational Rules in the United States because it would disadvantage small local parties in litigation against large, internationally operating business enterprises is a good example of the kinds of arguments that are to be expected here.[59] The simple reason is that, if the goal is merely to eradicate differences between procedural systems in order to allow parties in transnational litigation always to litigate under similar procedural rules, that goal alone does not set any criteria by which to choose one approach over the other. As noted

54) Convention on the Taking of Evidence Abroad in Civil or Commercial Matters of March 18, 1970, 847 U. N. T. S. 231. **See infra** text accompanying notes 113-15.

55) Preliminary Draft 2, **supra** note 3, Rule 36. **See also infra** text accompanying notes 70-73.

56) **See supra** text accompanying note 26.

57) **See, e.g.,** Ernst C. Stiefel & Rolf Stürner, **Die Vollstreckbarkeit US-amerikanischer Schadensersatzurteile exzessiver Höhe,** 1987 **Versicherungsrecht** 829.

58) **See, e.g.,** Andreas F. Lowenfeld, **Some Reflections on Transnational Discovery,** 8 J. Comp. **Bus.** & **Cap. Mar.** L. 419, 419-20 (1986).

59) Born, **supra** note 5.

earlier, the search for fairness alone is hardly specific enough for this purpose.[60] Hence, the choice would largely be a matter of politics and thus call for a treaty as the implementing device if the states involved would consider it worthy of the effort, for it is in negotiating a treaty that a political give and take can occur.[61] This is particularly true because there are a number of procedural rules and philosophies that are inextricably intertwined with the substantive public policy of a particular jurisdiction. The importance of American-style discovery for the success of U. S. antitrust actions[62] and the more general U. S. model of the "private attorney general"[63] are well-known examples.

The situation is, of course, different if the chosen purpose for the Transnational Rules is one which suggests more specific criteria by which to select the procedural system. We will return to such an argument in a moment.[64] Even then, however, the drafters may suffer from a lack of empirical evicence to support their preferences.[65]

B. Differences in Effectiveness, Speed and Structure of the Various Procedural Systems

The second theme that emerges from a close reading of the materials accompanying the Transnational Rules, including the scholarly writings of their creators,[66] is that there are substantial differences in effectiveness, speed, and structure among the various procedural regimes of the world, and that these differences must be substantially reduced so as to diminish the differences in the way transnational cases are conducted from country to country.[67]

1. Forum Shopping?

To a large degree, this is simply restating the claim that the procedural law applicable

60) **See supra** text accompanying notes 21-24.

61) **See infra** Part III. B.

62) **See, e.g.,** Hospital Building Co. v. Trustees of Rex Hospital, 425 U. S. 738 (1976) ("[I]n antitrust cases, where 'the proof is largely in the hands of the alleged conspirators,' dismissals prior to giving the plaintiff ample opportunity for discovery should be granted very sparingly.")

63) **See, e.g.,** Patrick Higginbotham, **Foreword,** 49 ALA. L. Rev. 1 4-5 (1997) ("Congress has elected to use the . . . private attorney-general as an enforcing mechanism for the antitrust laws, the securities laws, environmental laws, civil rights and more . . . Calibration of discovery is calibration of the level of enforcement of the social policy set by Congress."); John C. Coffee, Jr., **Rescuing the Private Attorney General: Why the Model of the Lawyer as Bounty Hunter Is Not Working,** 42 Md. L. Rev. 215 (1983).

64) **See infra** Part II. B. 2.

65) **See, e.g.,** Ronald J. Allen et al., **The German Advantage in Civil Procedure: A Plea for More Details and Fewer Generalities in Comparative Scholarship,** 82 Nw. U. L. Rev. 705 (1988) (arguing that it is impossible to claim that German civil procedure is superior to U. S. procedure without adequate empirical data to back up such a claim).

66) See **supra** note 25.

67) See **supra** text accompanying note 26.

to transnational cases should be harmonized. But why is it necessary to substantially reduce procedural differences in such cases? Is it to suppress forum shopping? If so, procedural harmonization would offer some help, but no cure, for forum shopping occurs as much out of the belief that a country's substantive and procedural laws will offer an advantage over those of another as it is based on instincts about biases and predilections of a particular judiciary that are rooted in its social, historical, and economic background. As we have seen, no measure of procedural approximation can change these factors.[68] Thus, the propensity of parties in transnational cases to jockey for position will remain.

What the Transnational Rules could do from this perspective, however, is to set up appropriate standards and rules of forum selection and otherwise to optimize the cooperation of the various national fora that may be available in a particular dispute. It is here that a worldwide set of rules could be particularly helpful in improving the current jungle of unilateral approaches that are topically interlaced with provisions of bilateral and multilateral treaties in such areas as personal jurisdiction, lis pendens, forum non conveniens, antisuit injunctions, gathering evidence and serving process abroad, and the recognition of foreign judgments. Not in all of these areas would it be advisable to take up matters addressed in multilateral conventions, although doing so could provide a useful forum for discussing future avenues of improvement for those conventions.[69]

From this perspective, the Transnational Rules are currently inadequate.[70] Aside from the cryptic Rule 36 on judicial assistance[71] and a brief reference to the "applicable international convention" in Rule 8.2, the draft Rules only address one such standard issue of transnational litigation in Rule 14.2 by introducing the so-called "Mareva Injunction." But even this latter Rule could be improved: While it may be helpful to introduce the world-wide Mareva injunction in jurisdictions that do not currently know that instrument,[72] it may often be useful for a creditor to be able to obtain an attachment or garnishment in the jurisdiction in which enforceable assets are located, even if the courts there do not have personal jurisdiction over the defendant, rather than having to run first to the defendant's home jurisdiction to request an injunction, which he may then try to enforce where the assets are located.[73] While this possibility currently exists in civil law countries, it would have to be introduced in common law nations.[74] Yet, Rule 14 contains no such

68) See **supra** Part II. A. 1.

69) **See infra** text accompanying notes 112-14.

70) For more detail on this point see Walter & Baumgartner, **supra** note 4, at 472-74.

71) **See also supra** text accompanying notes 54-55.

72) The federal courts in the United States have now joined this group of jurisdictions. **See** Groupo Mexicano de Desarrollo, S. A. v. Alliance Bond Fund, Inc., 119 S. Ct. 1961 (1999).

73) Similarly Kessedjian, **supra** note 5, at 483.

74) This issue is treated well in the work of the International Law Associaton's Committee on International Civil and Commercial Litigation. **See International Law Association**, **Report of the Sixty-Seventh Conference Held at Helsinki Finland** 185 (James Crawford & Michael Byers eds, 1996).

provision.

2. Facilitation of International Trade

Another reason why one could want to harmonize procedural law is only implicitly stated in the materials on the Transnational Rules: The desire to facilitate international trade. This is an argument that has increasingly captured the attention of proceduralists within the European Union, and it is perhaps the best argument in support of the Transnational Rules project. The Europeans have suggested that the vagaries of transnational procedure in the member states of the European Union may violate the right to the free movement of goods and services under the EC Treaty as much as substantive regulatory provisions.[75] Academic thought along these lines resulted in the adoption of article 220 of the EC Treaty and the subsequent promulgation of the Brussels Convention. More recently, this reasoning has been used to suggest an approximation of other differences in transnational litigation among the member states,[76] now specifically supported by article 65(c) of the EC Treaty.[77] The European Court of Justice explicitly adopted it as a ground to outlaw the use of § 110 of the German ZPO against partnerships from other member states of the European Union in **Haynes v. Kronenberger.**[78] Moreover, similar arguments have long been advanced outside the framework of the EC treaty. Professor von Mehren, for example, has suggested a link between a country's approach to personal jurisdiction doctrines and its friendliness to international trade,[79] and the U. S. Supreme Court's case law on forum selection and arbitration clauses has been based on the assumption that overly restrictive attitudes regarding such clauses may hamper U. S. business interests internationally.[80]

In spite of the ubiquity of this reasoning, the establishment of a theoretical and

75) Message of the Commission to the Council and Parliament of the European Union on Ways to Improve the Recognition and Enforcement of Judgments, Jan. 31, 1998, 1998 O. J. (C-33) 3, **passim.**

76) The groundbreaking article is Manfred Wolf, **Abbau prozessualer Schranken im europäischen Binnenmarkt in Wege zu einem Europäischen Zivilprozessrecht** (Wolfgang Grunsky et al., ed., 1992).

77) Article 65, as amended by the Amsterdam Treaty, provides in pertinent part:

> Measures in the field of judicial cooperation in civil matters having cross-border implications . . . shall include:
>
> . . . (c) eliminating obstacles to the good functioning of civil proceedings, if necessary by promoting the compatibility of the rules on civil procedure applicable in the Member States.

On the difficulties in implementing article 65 arising from the reservations declared by the United Kingdom, Ireland, and Denmark to the Amsterdam Treaty see Walter & Walther, **supra** note 38; Burkhard Heß, **Die "Europäisierung" des internationalen Zivilprozessrechts durch den Amsterdamer Vertrag** — Chancen und Gefahren, 53 Neue Juristische Wochenschrift 23, 28 (2000).

78) Case C-323/95, 1997 E. C. R. I-1718 at nr. 14. **See also supra** note 43 and accompanying text.

79) Arthur T. von Mehren, **Adjudicatory Jurisdiction: General Theories Compared and Evaluated,** 63 B. U. L. Rev. 279, 289 (1983).

80) **See** Vimar Seguros y Reaseguros, S. A. v. M/V Sky Reefer, 515 U. S. 528 (1995); Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U. S. 614 (1985); Scherk v. Alberto Culver Co., 417 U. S. 506 (1974); The Bremen v. Zapata Off-Shore Co., 407 U. S. 1 (1972).

empirical foundation for it, which can then be used as support for more specific proposals of procedural law reform, only stands at its beginnings. Professor Slaughter, for instance, has suggested that the question of how "domestic legal doctrines encourage or discourage transnational economic interaction" be studied within the framework of liberal international relations theory, a subfield of political science which would be able to identify and empirically test the causal pathways by which procedural rules and approaches influence international economic activity.[81] And the European Union has commissioned a number of studies on the impact of the procedural rules of its member states on the common market.[82]

The body of knowledge emanating from this enticing new area of research promises to be particularly valuable for the drafters of the Transnational Rules. It will supply a vast array of normative arguments in favor of specific reform proposals, a feature that is absent if the stated objective is merely to remove differences between the procedural systems of the world in order to permit parties in transnational litigation always to litigate under similar conditions.[83] The normative arguments thus derived are also likely to be based on a broader range of procedural values than the mere interest in the effective administration of justice that may have been the main reason behind some of the judicial pronouncements mentioned above,[84] for the goal of facilitating international trade requires a procedural system that is capable of satisfying the needs of all participants in such trade. For instance, one of the European studies has found that lack of consumers' ability to pursue their complaints effectively and inexpensively undermines economic activity in the Single Market.[85]

In spite of this prospect of deriving sophisticated normative choices from the general goal of advancing international trade, there will be countervailing process values at every corner,[86] waiting to be adequately balanced by the drafters. Moreover, some of these

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81) Anne-Marie Slaughter Burley, **International Law and International Relations Theory: A Dual Agenda,** 87 Am. J. Int'l L. 205, 231-32 (1993).

82) Unfortunately, these studies have remained unpublished. Some of them can be accessed via the World Wide Web. For one such study see von Freyhold et al., The Cost of Legal Obstacles to the Disadvantage of Consumers in the Single Market (visited Dec. 21, 1999) ‹http://www.europa.eu.int/comm/dg24/library/pub/pub03.pdf›.

83) **See supra** Part II. A. 4.

84) **See, e.g.,** Stephen B. Burbank, **The World In Our Courts,** 89 Mich. L. Rev. 1456, 1497 (1991) (book review) (suggesting that the Supreme Court's willingness in **Mitsubishi, supra** note 73, to interpret the New York Arbitration Convention in a way favorable to that treaty's lawmaking purpose, while showing an unwillingness to do the same in regard to the Hague Service and Evidence Conventions may simply be "a function of calculations about when it is in the judiciary's interest to share power").

85) Helmut Wagner, **Macro-Economic Analysis of the Cost of Judicial Barriers for Consumers in the Single Market in** von Freyhold et al., Cost of Judicial Barriers for Consumers in the Single Market (1995) (unpublished report on file with authors).

86) On process values see the valuable collection of essays in **Robert** M. **Cover** & **Owen** M. **Fiss**, **The structure of Procedure** 1-26 (1979).

values are tied to particular substantive policies of a state,[87] making it necessary to draft the scope of application of the Transnational Rules carefully. However, simply dropping the hot potatoes will not be the solution. Excluding too many areas of law may ultimately frustrate the goal of facilitating international trade.[88] In fact, from this perspective, limiting the scope of the Transnational Rules to contract disputes between business enterprises[89] may render the Rules largely an academic exercise, since those businesses that consider the procedural rules that are potentially applicable to their deal contrary to their interests can choose the procedural regime of their liking from among the many valuable arbitration rules and fora available.[90] Perhaps it may be necessary to provide for special rules applicable only to certain areas of law to accommodate specific substantive needs, as the example of consumer disputes shows.[91] After all, as Professor Hazard has pointed out, for this project, transsubstantivity is no talisman.[92]

Most importantly, however, as is implicit in the above, if the main goal is to facilitate international trade, one would expect the drafters of the Transnational Rules to pay close attention to the scholarship and empirical evidence that is going to emerge from this new area of research and to carefully consider the arguments arising from it. At this point, one may speculate, first, that, from the point of view of international trade, one of the most unbecoming features of the current system of transnational litigation is the potential for protracted litigation about issues of forum choice and judicial cooperation in various fora of the world. The Transnational Rules could set up principles and rules to clarify forum selection and improve judicial cooperation but do not currently do so.[93]

Second, the goal of facilitating trade does not necessarily support the implementation of a unified code of procedure, but rather the harmonization of certain areas of litigation and the promulgation of more general principles of transnational procedure.[94] In **E. D. Srl. v. Italo Fenocchio**[95] even the European Court of Justice recognized that not every rule of procedure can be dictated by the so-called "four freedoms" guaranteed by the EC

87) **See supra** text accompanying notes 62-63.

88) Which areas to include also depends on the chosen means of implementation. **See infra** Part III. C.

89) The wording of Rule 1 of the Discussion Draft 1, **supra** note 9, comes considerably close to this characterization. Rule 2 of Preliminary Draft 2, **supra** note 3, however, attempts a somewhat more inclusive definition of the scope of application for the Rules.

90) **See, e.g.,** Stürner, **supra** note 5, at 192-93. On the various institutional arbitration rules and fora see generally **Karl Heinz Schwab** & **Gerhard Walter**, **Schiedsgerichtsbarkeit** 422-28 (6th ed. 2000).

91) **See supra** text accompanying note 85.

92) **See** Hazard **supra** note 25, at 494. The same is not true with regard to federal procedure in the United States. **See** Burbank, **supra** note 84, at 1466. It is on that home front that Professor Hazard has a different view. **See** Geoffrey C. Hazard, **Discovery Vices and Transsubstantive Virtues in the Federal Rules of Civil Procedure,** 137 U. Pa. L. Rev. 2237 (1989).

93) **See supra** Part II. B. 1.

94) **See also infra** Part III. C.

95) Case C-412/97 (1999 E. C. R. I-3874). For a brief analysis of this decision see Walter & Walther, **supra** note 44, at 11-12.

Treaty. One would therefore expect a careful analysis as to what type of rule and what principles are supportable by this goal. It would be particularly interesting to know why, from this point of view, the current choice of the Rules in favor of a system based on the collection and presentation of the evidence by the attorneys is superior to the civil-law alternative of judge-centered procedure, which combines both of these sequences in one,[96] and why regulating this aspect of procedure is important while systematically addressing the question of the size of the litigation package is not.[97]

On the other hand, and third, one may wonder whether some of the Rules are comprehensive enough. One of the most important aspects of effective adjudication appears to be the availability of a speedy enforcement process.[98] In this regard, unfortunately, the differences between procedural laws are most pronounced, even within Europe.[99] Thus, although the recognition of a foreign judgment abroad may pose its own difficulties,[100] it is the actual enforcement proceeding there that may cause the most headaches. Hence, it would be interesting to know whether Rule 35, as currently drafted, goes far enough in its attempt at harmonization and if so, why. For example, the European Union is considering mandating its member states to introduce an accelerated recovery procedure for monetary debts modeled after the German **Mahnverfahren** and similar procedures in France and Italy,[101] a procedure not currently contemplated by Rule 35.

III. Avenues of Implementation

Once it is clear what objective the Transnational Rules are to serve, the question becomes by what means that objective should be implemented. The materials suggest that the drafters envision using the full panoply of options here. They contemplate the adoption of the Rules "by nation states" through "treaty, convention or other international agreement, or statute or rule of court."[102] A court could further refer to the Rules ad hoc

96) **See, e.g.,** John H. Langbein, **The German Advantage in Civil Procedure,** 52 U. Chi. L. Rev. 823, 829 ("The [German] process [of proof-taking] merges the investigatory function of our [U. S.] pretrial discovery and the evidence-presenting function of our trial."). On this choice and the difficulties it may present in civil-law jurisdictions see Walter & Baumgartner, **supra** note 4, at 466-67.

97) **See supra** text accompanying notes 39-42.

98) **See** Freyhold et al., **supra** note 82.

99) **See id. and** Seizure **and** Overindebtedness **in the** European Union, 1 Civil Procedure **in** Europe (Georges de Leval ed. 1997). **See also** Konstantinos D. Kerameus, **Enforcement in the International Context,** 264 Recueil des Cours 183 (1997).

100) **See, e.g.,** Gerhard Walter & Samuel P. Baumgartner, **Recognition and Enforcement of Judgments Outside the Scope of the Brussels and Lugano Conventions, General Report in** Recognition and Enforcement of Judgments Outside the Scope of the Brussels and Lugano Conventions, 3 Civil Procedure in Europe (2000).

101) On this mandate of the EU see Walter & Walther, **supra** note 44.

102) Discussion Draft 1, **supra** note 3, Commentary at 0.2.

"as generally recognized standards of civil justice."[103] Finally, the Rules "could also be adopted through contractual stipulation by parties to govern . . . litigation from a contractual relationship."[104] In addition, UNIDROIT recently decided to support the project, but as a collection of principles rather than rules.[105] Thus, there are now at least four different approaches suggested for the enterprise to be employed at the same time: Treaty, model rules, model principles, and private rules governing contract disputes.

At least in this regard, the drafters do state their intentions clearly. But their shotgun approach may seriously hamper the success of their endeavor, for each one of these avenues of implementation has its own advantages and disadvantages; is better fit to achieve some goals than others; and determines to some extent the content of the proposal. Thus, concentration on one of these avenues would help focus the discussion and avoid the wasting of resources that the current debate on all kinds of rules, some of which may not perhaps be necessary or sensible under one approach but may well be under the other, entails.

A. Rules to Be Adopted Through Contractual Stipulation of Parties

If the chosen avenue is to promulgate rules that could be adopted by the parties to govern their dispute in the forum that has jurisdiction, little would be gained. Most civil law jurisdictions do not allow the parties to choose their own procedure in their courts. What the parties can choose, however, is to submit their dispute to arbitration. As pointed out earlier,[106] from the perspective of the litigants, this would clearly be superior to choosing the Transnational Rules to be applied in national court. Among many other things, the parties could select an institutional arbitrator with great experience in applying his particular arbitration rules rather than a national court that is forced to apply rules it is unfamiliar with, and arbitration would have the advantage of appearing more independent than adjudication by a national court.[107]

B. Treaty

The real difficulty, however, lies in choosing between pursuing a treaty and drafting model rules or model principles. The treaty is the more political of the two options. It usually involves a significant amount of give and take, within which treaty partners can link issues that are dear to them.[108] For example, the United States may say to the Europeans:

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103) **Id.**
104) **Id.**
105) **See supra** note 11 and accompanying text.
106) **See supra** text accompanying notes 89-90.
107) **See, e.g.,** Gary B. Born, **International Commercial Arbitration in the United States** 5-6 (1994) (listing the perception of neutral decision making as one of the advantages of international arbitration over litigation in a national forum).
108) **See, e.g.,** Howard Raiffa, **The Art and Science of Negotiation** 13, 285-87 (1982) (discussing ↗

"We will limit discovery if you are ready to drop personal injury claims from the scope of the treaty." This seems to be the approach the Transnational Rules are now pursuing in regard to their scope.[109] The way to deal with such a proposal would be through negotiation, the outcome of which would depend on political interests, clout, and savvy. In this process, however, the response of the Europeans to the above suggestion may well be: "This would make the treaty worthless for us."[110] But other issue linkages may prove more promising.

Another feature of the treaty is its ability to create a forum for discussion of the way the accepted compromises are in fact applied in the member states. It lays the groundwork for an "iterative process of discourse among the parties, the treaty organization, and the wider public,"[111] within which (1) states can be persuaded to follow through with the compromises they agreed to and (2) solutions can be found for problems not envisioned at the time of negotiation.[112] This process is absent in the case of model rules, which are partly or wholly adopted by some states, who then apply the rules in the fashion they see fit.

The treaty is thus the avenue to choose if the selection of any procedural system and specific procedural rules is largely political as is the case if the goal is simply to get rid of the differences between the procedural regimes of the various countries of the world.[113] If this avenue is chosen, then the drafters will have to pay careful attention to delineate their enterprise from the numerous regional and world-wide treaties already in existence on specific aspects of transnational litigation and to avoid overlapping coverage. While the same may be true for the avenue of model rules or model principles in regard to such subjects that have been or are currently being negotiated in a manner that is largely satisfactory to those involved, such as personal jurisdiction and the recognition of foreign judgments,[114] model rules could take much greater liberty to be innovative where current treaty regimes may be unsatisfactory, such as in regard to the gathering of evidence abroad.[115]

↘the positive impact of issue linkage in negotiation).

109) Discussion Draft 1, **supra** note 3, Preface.

110) **See** 22 ALI Reporter No. 1, 14-15 (Fall 1999) ("Concern was expressed that Europeans will not accept these Rules because personal-injury cases are not included within their scope.").

111) **Abram Chayes & Antonia Handler Chayes, The new Sovereignty, Compliance with International Regulatory Agreements** 25 (1995).

112) **See id.** at 25-26.

113) **See supra** Part II. A. 4.

114) **See** Kessedjian, **supra** note 5, at 480.

115) **See, e.g.,** Taruffo, **supra** note 25, at 450 (mentioning the unsatisfactory operation of the Hague Evidence Convention because of its article 23 and the standoff between the United States and several civil law countries because of it).

C. Model Rules or Model Principles

While treaties are good tools to negotiate agreements among different policy interests, model rules and model principles are the better avenue by which to pursue proposals that are both based on widely shared normative choices and need relatively comprehensive treatment. States are free to adopt the model rules in full, partially, or merely some of their basic ideas. Thus, their success depends on the persuasiveness of their underlying values and the way those values are implemented. Moreover, since states may adopt only part of the model, it makes much less sense to provide for some type of compromise solution than in the treaty situation. Thus, for example, Rule 4 of the 1999 Draft on the composition of the court[116] makes little sense if the Transnational Rules are to be implemented in the form of model rules. That Rule, originally much longer,[117] was apparently designed as a compromise between the U. S. jury system and the judge-centered procedure of most other countries. As such it may make sense as a basis for treaty negotiations, although it would still remain doubtful if the United States could agree to such a solution in light of its constitutional guarantee of a jury trial.[118] But little is gained for model rules if it is already clear that the United States would not adopt this particular rule,[119] and since it is also clear that the proposed three-judge, two lay-person court would create significant difficulty in many other nations, where the trend has clearly been toward the single-judge court in first instance.[120]

Similarly, it would make little sense to draw the scope of the Rules too narrowly in an attempt to exclude all areas likely to be controversial in this or that important country, thus rendering the model rules worthless for most.[121] Countries are likely to exclude additional areas from the scope anyway, and their propensity to do so depends on the persuasiveness of the normative choices underlying the model rules.

There may be a significant difference between model rules and model principles. The drafters will have to select carefully between the two in case they dismiss the treaty option. It may also be — in fact it is very likely — that a combination of rules and principles would be the best way to achieve some goals.[122] What is not likely to be productive, however, is to follow a double track, as seems to be envisioned by UNIDROIT — namely that the current draft of the Transnational Rules would be supplemented by a draft of principles of transnational civil procedure, both of which would then be pursued

116) Discussion Draft 1, **supra** note 3, Rule 4.
117) **Transnational Rules of Civil Procedure** (December 1995 Draft), Rule 3.
118) U.S. **Const**. amend. VII.
119) **See** Discussion Draft 1, **supra** note 3, Commentary at 4.3.
120) **See, e.g.,** Kessedjian, **supra** note 5, at 484-85.
121) **See** Stürner, **supra** note 5, at 192-93 (suggesting that the Rules as currently drafted are too narrow in scope). **See also supra** text accompanying notes 88-90.
122) **See supra** text accompanying notes 94-101.

simultaneously.

IV. Conclusion

The Transnational Rules of Civil Procedure initiated by Professors Hazard and Taruffo represent an exceedingly ambitious project. Its chances of success can be much improved if the drafters clarify two questions: First, what are the Transnational Rules supposed to accomplish? Answering this question unequivocally and in some depth will be important for the project to be convincing. The drafters should not forget that one of the main reasons the draft directive attempting to harmonize civil procedure within the European Union, a project that appears to have partly inspired Professors Hazard and Taruffo's work,[123] has been greeted with such skepticism by those who have even bothered to react, is its failure to convince commentators that such a harmonization is needed or even useful.[124] Moreover, clarification of the objective of the enterprise would help sort out what it is the Rules could and should profitably cover.[125]

Second, the drafters need to focus on one avenue of implementation, be it a treaty, model rules, model principles, or a combination of model rules and principles, for these avenues have different strengths and weaknesses to achieve the various possible goals, and they too determine to some extent what the Transnational Rules should usefully cover.[126]

Moreover, the likelihood of success will be increased significantly if the content of the Transnational Rules is based on sound theoretical and empirical research[127] and on comparative analysis. Whether the comparative work is done as part of treaty negotiations or by way of a national advice and comment period in preparation of a code of model rules,[128] it must be serious and comprehensive. The drafters should not forget that the other major reason for the tepid reaction to the European draft directive was the lack of in-depth comparative work underlying it.[129] As Professor Kojima has observed, "[l]egal transplantation has the potential to be a nourishing factor for improving the administration

123) **See** Discussion Draft 1, **supra** note 3, Introduction at ii; Hazard, **supra** note 25, at 491.

124) **See, e.g.,** Herbert Roth, **Die Vorschläge der Kommission für ein europäisches Zivilprozeßgesetzbuch — das Erkenntnisverfahren,** 109 **Zeitschrift für Zivilprozess** [ZZP] 271, 311 (1996); Eberhard Schilken, **Die Vorschläge der Kommission für ein europäisches Zivilprozeßgesetzbuch — einstweiliger und summarischer Rechtsschutz und Vollstreckung,** 109 ZZP 315, 316 (1996); Elmar Lemken, **Diskussionsbericht zum europäischen** Zivilprozessrecht, 109 ZZP 337, 340–41 (1996); Michael Upton, **European Harmonisation of Court Procedure,** 40 J. L. **Soc'y Scot.** 197 (1995). **But see** Gerhard Walter, **Tu Felix Europa . . . Zum Entwurf einer Europäischen Zivilprozessordnung, 3** Aktuelle Juristische Praxis 425 (1994).

125) **See supra** Part II.

126) **See supra** Part III.

127) **See supra** text accompanying note 93.

128) **See** Walter & Baumgartner, **supra** note 4, at 476.

129) **See, e.g.,** Roth, **supra** note 124, at 312; Schilken, **supra** note 124, at 331, 336; Upton, **supra** note 124, at 197. **See also** Heß, **supra** note 77, at 31.

of justice, but it . . . may [also] reduce itself to a useless combination of ineffective procedures adopted through unwise choices or missing key provisions."[130] The choice is the drafters'.

130) Takeshi Kojima, **Japanese Civil Procedure in Comparative Perspective,** 46 K**an**. L. R**ev**. 687, 696 (1998).