INNOVATIONS AND WEAKNESSES OF PRINCIPLES OF TRANSNATIONAL CIVIL PROCEDURE

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Resumo: A avaliação dos pontos fortes e fracos dos "Princípios do Processo Civil Transnacional", trabalho conjunto do "Instituto de Direito Americano" e do "Instituto de Unificação do Direito Privado" é o objeto deste artigo. O texto trata destes princípios, vistos por dois iranianos. Inovações como, v.g., o princípio da cooperação, a distinção entre princípios e regras, a duração razoável do processo, sanções para comportamentos inadequados das partes, estímulo aos acordos são pontos extremamente positivos. Por outro lado, há pontos fracos: um certo monopólio do saber, conceitos muito repetitivos, excessiva insistência na disciplina da prova, uso exagerado de conceitos vagos em alguns princípios e falta de harmonia entre as versões dos princípios em inglês e em francês.

Abstract: Evaluation of the advantages and weaknesses of "Principles of Transnational Civil Procedure", the joint work of the Institute of American Law and the Institute of Unification of Private Law is the main subject of this article. Some times as two Iranian lawyers, we have criticized these principles or appreciated them. We believe that cooperation is the basic theory of these principles that have been expressed itself in many norms and way of communication between parties and judge. The innovations of these principles such as the cooperation theory, the distinction between the "Principles" and the "Rules", the reasonable speed in addressing the case, providing some reliable sanctions for the behavior of the parties, providing an obligation for the court to encourage the parties towards settlement and compromise, a fluent text regarding the principles in English and French, and some other linguistic achievement are very significant in authors point of view. On the other side, for introducing their probable weakness, the authors have emphasized to some monopolization in scope of study, the repetition of concepts and regulations, excessive insist to evidences, lack of generality in some principles, using almost vague terminology in some principles and lack of harmony between the English and French in versions of the principles.

Keywords: Cooperation Theory - Principles - Rules - Transnational cases - Reasonable time - Sanction - Settlement - Monopoly - Lack of harmony.

Sumário:
- 1.INTRODUCTION - 2.CONCLUSIONS


1. INTRODUCTION

The American Law Institute (ALI) at Washington D.C., U.S.A. and International Institute for the Unification of Private Law (Unidroit) at Rome, Italy, decided to establish some uniform regulations regarding one of the most important branches of law, so that the international commercial disputes will be judged on basis of a set of fair and acceptable rules and regulations. The founders of this idea are two individuals named Mr. G.C. Hazard Jr. from the Law School of Pennsylvania, U.S.A. and Mr. M. Taruffo from Pavia University of Italy. Later on, Mr. A. Gidi from Salvador, Brazil and professor of Law at School of Detroit Mercy, Michigan, also joined them. Pursuant to the fact that the American Law Institute supported this idea in 1997, the first draft of the "Rules of Transnational Civil Procedure"
was drafted. Thereafter, the said Rules were discussed from different aspects and one of the results of such discussions was the recognition of the necessity of their further generalization and expansion, so that the harmonization and approximation intended by the authors will be realized and the unification of the civil procedure rules would become possible.

At this stage, the International Institute for the Unification of Private Law at Rome accepted the proposal for cooperation in the said project.

In 1999 Mr. R. Stürner, the Law professor of Freiburg University, Germany, embarked upon a feasibility study on this project and submitted the result of his studies in the same year.¹

Up to the year 2000, studies were focused on the regulations being called “The Rules”. Such regulations had been written under the influence of the Common Law legal system and for this reason they were not consistent with the attitudes of the jurists in Roman-German legal system.²

In this manner, the International Institute for the Unification of Private Law at Rome which had already prepared some regulations regarding the “Principles of International Commercial Contracts”, suggested that some more general regulations be drafted beside these “Rules” which would be called “Principles”. On this basis, Stürner, Tarrufo, Gidi and Hazard, prepared and introduced the draft of the Principles and Rules of Transnational Civil Procedure.³

Study and research on these principles and rules continued and subsequently in 2001 to 2003 some other documents were suggested. Finally in 2004, the said two institutes reached an agreement in respect of the text of the Principles of Transnational Civil Procedure and adopted the said text in April and May of the same year.⁴

The text of the “Rules of Transnational Civil Procedure” was also published parallel with these principles, without having been adopted by those institutes.⁵

The purpose of the authors from making a distinction between those principles and rules was to consider the two general and particular parts of the regulations governing the transnational commercial disputes. “Principles”, consider the fair standards of proceeding by providing very general regulations, and “Rules” facilitate the application of required changes in each country and legal system by providing special and detailed regulations for purpose of completion and supplementation.

In fact, regarding the difference between the Principles and Rules of procedure, it should be mentioned here, that the Principles proposed by the authors, illustrate the general concepts of justice and equity in dealing with the civil and commercial lawsuits, which are recognized in the modern legal systems as “Fundamental Principles”.

These Principles may be exposed to some changes in the Rules and Regulations, having regard to various circumstances of each country. The Rules of Transnational Civil Procedure provided together with these Principles, are the same changes which may be applied for purpose of completion of the Principles.

These Rules, although are more particular, however, are essential for the entire achievement of the goals of the said Principles.⁶

Preparation of Transnational Principles has taken place in general by complying with the Roman-German legal system. In this path, endeavor has been made in order to establish the required rules and regulations in form of “General Principle of Law” (Le principe general du droit), the principle with the generality of which the Common Law system jurists are less familiar. Perhaps, due to the same reason, in the relatively simultaneous drafting of the Principles and Rules after the year 2000, the authors have endeavored to show more clearly the relation between the general and particular cases, thereby making those Principles as guidelines for the interpretation of the Rules which are in fact the more detailed body of the procedural law. On the other hand, these principles may be considered the interpretative principles of procedural rules or rules of proceeding of national legal systems. By way of analogy, the rules may be also regarded as example or supplementary to the Principles, which are hoped to be admitted by the national legal systems.

Anyway, the consequence of these Principles in the national and international system is subject of discussion and controversy. Are they “by themselves sufficient” (autosuffisant) or they have to be submitted to the Hague Conference so that an international convention be prepared on their basis? ⁷
Is it necessary to take them to the United Nations to introduce them as a “Model Law” and to let the states adopt them wholly or partially according to their own desire and initiative? Or rather these Principles will remain at the same level of the other Principles suggested by the International Institute of Unification of Private Law at Rome, which will be utilized under the agreements between the disputing parties and of course within the authorized framework of public order in each country?

In this paper, the authors have endeavored to evaluate impartially, the advantages and weaknesses of the joint work of the Institute of American Law and the Institute of Unification of Private Law. On this basis, effort has been made in order to firstly explain the basic theory of these texts (Part 1) and then to consider the innovations of these Principles (Part 2) and finally to introduce their probable weakness points from a critical point of view (Part 3).

1.1 Part 1: “cooperation” as a basic theory for the Principles of Transnational Civil Procedure

Drafting the Rules and Principles of procedure regardless of one or more theories serving as their governing spirit, seems pointless. Setting some regulations together with imperative or negative command and introducing a number of principles among them or in their side, while the purpose of legislators or the theory behind enactment of such regulations is unknown, will not regulate the task of legislation and administration of justice. Review of the legislation reforms makes it obvious that in the past, the purpose of legislators was the mere implementation of the exigencies of the principle of sovereignty of statutes over the society, however, the era of enacting Laws and Regulations regardless of fundamental theories, is over. Nowadays, the legal systems seek to step forward in this path using a guide lamp. Many newly enacted Laws and Regulations in the field of civil procedure have been drafted on basis of one or more fundamentals and theories.

For example, in the opinion of the French theorists, the New Civil Procedure Code (Neuveau code de procedure civile) of France ratified in 1975, has been written on basis of the “balance between the rights and duties of the judge and the disputing parties”. Also a group of English lawyers are of the opinion that the English Civil Procedure Rules, 1998, seeks to provide a kind of civil procedure, which contains some clear, simple and understandable rules besides being speedy and cheap and guaranties the cooperation of the parties with the justice administration. The Federal Civil Procedure Code of Switzerland, the referendum time limit of which was expired recently after 16 April 2009, has been drafted with the purpose of unification of civil procedure methods in 26 cantons of the said country, as believed by the lawyers of that country. Theoretical concepts such as complying with good-faith and distinction between the duties arising from competence over judgment and subject for the judge and the parties to litigation are seen in this code.

In Spain, also a new civil procedure code has been ratified which, as interpreted by the Spanish authors, has been the starting point of implementation of the characteristics of “Fair Trial” while complying with the balance between the rights and duties of the judge and that of the disputing parties as well as creating a type of reference authority for it compared to the other procedure laws in that country.

Scrutiny on the Principles shows that the writers were seeking to create a suitable ground for “cooperation” between the parties and the judge in the disputes resolution. For instance, Article 7 which has been drafted in respect of the speed of the proceeding (or Prompt Rendition of Justice), provides that achievement of this goal, is subject to cooperation between the disputing parties and the court. This Principle provides that:

“The court should resolve the dispute within a reasonable time. The parties have a duty to cooperate and a right of reasonable consultation concerning scheduling. Procedural rules and court orders may prescribe reasonable time schedules and deadlines and impose sanctions on the parties or their lawyers for noncompliance with such rules and orders that is not excused by good reason.”

Therefore, from the viewpoint of the writers of the Principles, even when the objective is to provide and guarantee the desirable speed in the adjudication, this task will not become possible without the cooperation of the parties to litigation with the court. That is why the writers of the Principles have, pursuant to the said Principle, talked about necessity of reasonable consultations regarding fixing the time of hearing and have endeavored to prepare the rules of proceeding and the court orders in a manner so that the court may be able to specify a foreseeable time schedule for the proceeding and to fix some deadlines for guarantee of enforcement thereof.
Whatever carried out in line with preparing a time schedule in the interim stage of the proceeding (Principle 9.3.2) whether for cooperation in management of the proceeding (Principle 14.2) or participation and contribution to the court for fair resolution of the dispute (Principle 11.2) and cooperation for realization of settlement (Principle 24.3), all must be arising from a process which is the result of cooperation and participation of the parties with the court. The court, of course, should facilitate the participation of the parties for purpose of taking part in the Alternative Methods of Dispute Resolution (Principle 24.3) and if the parties refuse to fulfill the duty of cooperation and participation, the court should punish them through appropriate sanctions (Principles 15.6 and 17). The duty of cooperation with the court and serious participation in directing the proceeding, is not only related to the main disputing parties, but also it pertains to the third parties who enter the proceeding pursuant to lodging some “Incident claims” (Les demandes incidentes) or at the court’s discretion. And by way of analogy, the sanction for complying with the same duty will be imposed on them (Principle 12.4). Therefore, the cooperation mentioned in the said Principles does not only refer to judicial cooperation and assistance among the foreign states as provided in Principle 31 of the said Principles. Cooperation in this text means a theory which attracts all other Principles to itself and guides them.

Selection of such theory by the writers of these principles among the current theories in the procedural law, indicates their interest in the solutions for enhancement of the possibility of achieving the reality and law enforcement (some of these theories in Procedural Justice such as Accuracy or Discovery of Truth and Resolution of Dispute, Economic and Moral Costs, Time of proceeding and Participation, have been discussed elsewhere, particularly regarding the latter theory in which four interpretations have been provided: Dignity, Satisfaction, Discourse and Game. If the proceeding is held on basis of mutual cooperation between the parties and the judge in discovery of the truth and resolution of dispute, the rules of proceeding being more related to the evidences and access to them and are, to a large extent, traditionally faced with non-disclosure by the disputing parties and the holders of evidences, in general, will be implemented more dynamically. The fact that the judge is bound to manage the proceeding with cooperation of the parties (Principle 14.2) shows, on one hand, that how important the participation role of the parties of dispute is in the process of entering judgments affecting their destinies and on the other part, it reflects the elimination of the traditional distinction between the duties of the judge and the parties in the fair management and resolution of disputes (Principle 11.2). Evidently, the culture of proceeding in the legal system has not yet been structured in form of the existence of willful and voluntary cooperation of the parties, thus the writers of Principles, despite providing the duty of behavior with good faith for the parties and their attorneys, also paid attention to their bad faith by refusal to cooperate and did not leave this matter without sanction (Principle 15.6).

Anyway, scrutiny and diligence on the Principles clearly show that the ideal judge, from the viewpoint of the writers of this text, should provide the maximum cooperation between the judge and the parties. This intention in itself deserves admiration and should be noted as a basis in the interpretation of all provisions of these Principles. The theory of cooperation between the parties and the judge is one of the most innovative and modern theories propounded in the philosophy of the procedural law, which undoubtedly causes the promotion of the element of satisfaction in the assessment of the results of adjudication and consequently the legitimacy of adjudication and judicial acts of the government and of any authority dealing with the disputes.

Consideration of the present theory should be also regarded as one of the innovations in the Principles of Transnational Civil Procedure, the subject which is discussed in the next part.

1.2 Part 2: innovations in the Principles of Transnational Civil Procedure

It should be admitted that besides considering the cooperation theory in these texts, the mere fact that the writers of the Principles of Transnational Civil Procedure have arrived at the conclusion that there is gap for a set of regulations for the resolution of the disputes arising from the international commercial disputes, is by itself a type of admirable innovation in the arena of civil procedure law. Effort for unification of the civil procedure rules, which may be in fact considered among the most inflexible parts of the Domestic Law of each country due to its dependence on the judicial body of national sovereignty, is itself another innovation which deserves attention.

The Principles of “Harmonization” and “Approximation” are known by the writers and initiators of these principles, as the solution for realization of this innovation.
In “Harmonization”, harmonizing the legal systems is considered by enacting Laws or drafting some international documents and in “Approximation”, amendment of legal rules in different legal systems will be the subject of attention to the extent that these rules are approximated. Despite the fact that most harmonization and approximation efforts were only carried out in the scope of the substantial Laws, the writers of Principles, considered them in their joint work and when defining the “Scope and Implementation” wished for the realization of both of them:

“These Principles are standards for adjudication of transnational commercial disputes. These Principles may be equally appropriate for the resolution of most other kinds of civil disputes and may be the basis for future initiatives in reforming civil procedure.”

On the other hand, each national system aiming at adapting itself to these Principles, may do so by ratifying some Laws appropriate to such Principles. Beside this solution “The Principles may be put forward for admission by the member states of the international community as an international treaty”.

Distinction between the “Principles” and the “Rules” is another considerable task which has been performed in line with further unification of the Rules of procedure; some general rules which serve as General Principles of Law in the field of legal procedure, are studied under the title of “Principles of Procedure” and another set of rules which deal in particular and in detail with formalities, technics and method of trial and proceeding, are called “Formalities or Rules of Proceeding”. The general regulations are the generally accepted and less doubtful ideas in the national legal systems and the particular regulations are the standards of elimination of monopolization and attraction of further flexibility. For example, if the impartiality of the judge and independence of the court are admitted as provided in Principle 1, which is acceptable in all legal systems, the methods of provision thereof will be realized more possibly and more easily in the part of the Rules.

On this basis, approximation and harmonization of the two Common Law and Roman-German legal systems in the arena of Procedural Law, should be considered another innovation of these Rules and Principles; the two legal systems which are sometimes extremely different in respect of the Rules of Procedure, stipulation of the minimums accepted by these systems such as compliance with the Principle of good-faith and honesty, providing for independence and impartiality of the court and the judge, assurance of complete equality between the parties in the proceeding, observing the rights of the disputing parties in enjoyment from the services of the attorneys at law for recovery of the rights and taking care of informing and serving notices at the beginning, during and at the end of the proceedings, are some examples of the unification tendency in these Principles.

Paying appropriate attention to the speed of adjudication in these two texts is another innovation the trace and impact of which are observed all throughout the texts.

Principle 7 emphasizes properly on reasonable speed in addressing the case and provides the mechanism for its achievement to the courts aiming at resolving the disputes under these principles; speed which is achieved by the cooperation between the parties and the judge, is not inconsistent with the aim of discovery of truth which is well apparent in the various parts of the Principles. The desirable speed for the writers of the principles, was not only intended during the process of dispute resolution as provided under Principle 14 (Sect. 1, Principle 14 regarding direction of the proceedings in a prompt and active manner), but it also includes the effective and prompt enforcement of the judgment entered by the court, which is the requisite of realization of the concept of Fair Trial, and the writers intelligently noted and considered this point.

This noble point may be inferred from Principle 29, because it is inferred from this Principle that execution of judgment is a part of the proceeding and consequently it is subject to the Principle of necessity of speed in proceeding. In other words, this type of speed will also provide the possibility of accepting the rapid tools of exchange of information. Internet, email, fax, telephone and other communication devices, although being so effective in the day-to-day life of the people, have not been accepted in respect of the Rules of Procedure. Writers of Principles have looked more carefully to the social realities therefore; they seem to have approached the modern tools of information exchange more freely (Principle 5.7). The tools, the effects of which, on the proceeding and concept of assessment of its quality, speed and accuracy, are undisputable, like that of the social life. The Principles have accepted an intermediate solution for using these tools by providing for necessity of agreement between the parties. The solution is innovative, compared to the domestic laws of the
countries.\footnote{16}

Furthermore, the other approach of the writers of the principles to the speed of proceeding has been manifested in the Immediate Enforceability of Judgments: “The final judgment of the first-instance court ordinarily should be immediately enforceable” (Principle 26.1). A Judgment acquired from the court by a tradesman against another tradesman in a transnational dispute, should not be subject to various kinds of complaint against judgments through ordinary or extraordinary methods in a manner that the purpose of the proceeding is obviated. That is why, by another innovative measure, the writers of Principles, believe that the possibility of appeal to a judgment, will be subject to the Laws of the venue of the court (Principle 27). Moreover, the writers of these texts endeavored to provide easy access for the disputing parties and the court to the evidences, subject to the confidentiality obligation (Principle 18), through extending the methods of discovery of truth (Principle 16); a measure which strengthens the possibility of adherence of the judgment to the reality and makes that reality a basis for necessity of immediate enforcement of the judgment of the first instance court (Principle 26).

Providing some sanctions for the behavior of the parties in the proceeding is another innovation which does not exist in most Procedural Laws such as the \textit{Civil Procedure Code of Iran} (Principles 17, 15 and 25). How is it possible nowadays, to direct the proceeding and its procedure without availability of any sanction? If the parties or their attorneys have no good-faith and honesty during the proceeding, they will be subject to sanctions and they may even be deprived from receiving the ordinary costs, despite winning the case (Principle 25.2).

If they refuse to participate in the efforts and negotiations for reaching settlement and compromise by Alternative Dispute Resolution, they may be faced with some sanctions as provided under the principles (Principle 24.3).

Also, drawing adverse inferences is another solution for preventing the obstruction of the civil procedure in the course of defining the sanctions, which the writers of Principles have managed to perform it properly (Principle 17.2 and Principle 18.2). Therefore, if the general theory of sanctions in civil procedure can be based on misconduct, faults and abuse of civil procedure rules as well as lack of good-faith, a new and harmonized work will take place, which the writers of the present texts have managed to perform it very well.

Providing an obligation for the court to encourage the parties towards settlement and compromise, in other words defining a new duty for the court in reliance of which, it may invite the parties to settlement and compromise, must be considered another innovation in these texts; a task which has been secured by providing access to the Alternative Methods of Dispute Resolution by the court to the parties and even by recognition of the authority of fixing some sanctions and punishments against their bad-faith (Principle 24). This task, as seen in this paper, although being recognized in the national Laws of many countries, however, explaining thereof as one of Fundamental Principles of proceeding, is by itself an innovative measure and is in the meantime admirable.

The advantages of writing a fluent text regarding the Principles of Transnational Civil Procedure in English and French may not be denied. Both versions of such principles are undoubtedly among acceptable examples in the civil procedure literature.

As an example, comparison between the English and French versions may be helpful:

“Court’s Responsibility for Direction of the Proceeding

14.1 Commencing as early as practicable, the court should actively manage the proceeding, exercising discretion to achieve disposition of the dispute fairly, efficiently, and with reasonable speed. Consideration should be given to the transnational character of the dispute.

14.2 To the extent reasonably practicable, the court should manage the proceeding in consultation with the parties.

14.3 The court should determine the order in which issues are to be resolved, and fix a timetable for all stages of the proceeding, including dates and deadlines. The court may revise such directions.”

“L’office du juge dans la conduite de l’instance...”
14.1 Le tribunal conduit activement l’instance le plus tôt possible dans la procédure. Il exerce un pouvoir d’appréciation afin de pouvoir mettre fin au litige loyalement, de façon efficace et dans un délai raisonnable. Le caractère transnational du litige doit être pris en compte.

14.2 Dans la limite du raisonnable, le tribunal conduit l’instance en collaboration avec les parties.

14.3 Le tribunal détermine l’ordre dans lequel les questions doivent être traitées et établit un calendrier comprenant dates et délais pour chaque étape de la procédure. Le tribunal peut modifier ces dispositions.”

Under this Principle which deals with the role of the court in directing the proceeding, the writers have been well able to select almost precise terminology for this task while conveying the meaning. The term “l’office” which has different meanings in French legal terminology is the best equivalent for “Responsibility”. “L’office” under this Principle, does not only mean action and initiative, but explains the role imposed on the judge on basis of the court’s responsibilities including rights and duties. Also, “Direction” may be a suitable equivalent for “la conduite” which means direction as well as management. The terms “Proceeding” and “L’instance” are also equal without any doubt. Proceeding in the sense of a process for gradual investigation and review of an issue, is the meaning correctly inferred from the said two terms. In fact, after litigation, a type of relationship is created between the parties in the center of justice in which there is a process for investigation and enquiry. The method of such enquiry is defined under the Rules of Procedure. But the direction and management is performed by the court or in a sense, by the judge, who directs the proceeding within the framework of the already provided rules of procedure. This task is clearly manifested in Principle 14.1:

“Commencing as early as practicable, the court should actively manage the proceeding, exercising discretion to achieve disposition of the dispute fairly, efficiently, and with reasonable speed. Consideration should be given to the transnational character of the dispute.”

Meaning of the English text is seen in the French text of Principles with the same transparency:

“Le tribunal conduit activement l’instance le plus tôt possible dans la procédure. Il exerce un pouvoir d’appréciation afin de pouvoir mettre fin au litige loyalement, de façon efficace et dans un délai raisonnable. Le caractère transnational du litige doit être pris en compte.”

Both versions speak of one subject, that is:

“The court actively and as early as practicable, will direct the proceeding within the framework of the procedure. In this line, the courts will efficiently and within a reasonable speed, exercise its discretionary authority for purpose of fair resolution of the dispute. Consideration should be given to the transnational character of the dispute. Effort by the writers to reflect one meaning in two language structures so briefly is definitely an extraordinary work. The fact that the phrase ‘with reasonable speed’, without being literally translated, has been made equivalent to ‘dans un délai raisonnable’, shows the depth of the knowledge of the group in charge of comparing the two texts. Undoubtedly, the translator of the latter phrase from English to French could have used the sentence avec/en raisonnable rapidité/vitesse, however, since the latter sentence cannot convey the intended meaning in the French legal language and even the new legal terminology such as ‘la célérité’, being presently the subject of new research regarding the speed of proceeding in the French legal system, does not seem sufficient for expressing the meaning, therefore, the writers of Principles have preferred to place the said phrase as equivalent of the English version, which seems correct.”

Regarding the word “discretion” which means expediency and free decision making, the point should be noted that although the term “discrétion” exists in French language, however, the writers have preferred to use the phrase “un pouvoir d’appréciation” to convey this meaning instead of using the phrase “pouvoir discrétionnaire” which could have been close to the English Terminology. This selection of terminology must be approved since having the authority of assessment as mentioned in the French sentence, is something more than free will and desire. In assessment, the court combines its legal knowledge with the case contents and then acts according to its own discretion. Recognition of this type of authority for the judge, which originates from the principle of independence of the court and the judge’s liberty in judicial interpretation, if being possible under the term of “discretion” in English, however, it will not fall under the equivalent of “discrétion” in French. Therefore, it seemed necessary for the writers to use another French phrase which would convey the whole meaning. The
more interesting point is that in Iranian civil procedure literature, neither assessment will solely convey the above meaning, nor personal discretion, on this basis, the writers have chosen the phrase “discretionary competence” as an equivalent, to convey the intention.

From viewpoint of the used language, the additional advantage should be also mentioned that the writers, by unification and harmonization approach, have only used the Latin terminology and expressions, when the Latin term had the same meaning in English and French legal terminology. For example, the phrase *Amicus curiae* which has been used in Principle 13, has an identical meaning in both languages.

Dean G. Cornu, the French lawyer and linguist, has defined the said Latin expression in his legal dictionary as follows:

“Expression latine signifiant littéralement ‘ami de la Cour’ empruntée au droit anglais pour désigner la qualité de consultant extraordinaire et d’informateur bénévole (…)”.17

In the same direction, the *Black Law Dictionary* authors have defined the same word as allows:

“Latin ‘friend of the court’. A person who is not a party to a lawsuit but who petitions the court or is requested by the court to file a brief in the action because that person has a strong interest in the subject matter.”18

This kind of equalization attitude may be also seen in respect of some terms such as *Lis pendens*, *quasi in rem*, *Ex parte*, *infra/ultra petita*, *Res judicata*, *status quo*, which is itself another kind of effort for unification of the Law.

Accordingly, it should be admitted that the writers of the Principles of Civil Procedure, did not intend to transfer the historical record behind the national legal terminology to the document which is supposed to help to the harmonization and approximation of the civil procedure law of various legal systems by selecting the common legal terminology in English or French. This careful attention which is in fact giving consideration to the impact of the legal history in searching for the meaning of legal terms and expressions deserves admiration in its part.

Anyway, it seems that for the same reason, in the English and French versions of Principle 5 and the English version of Rule 7 regarding due notice and right to be heard is no trace of the well-recognized and common expression: “Le principe du contradictoire” or “Le principe de la contradiction”.

In French Law, the latter Principle is manifested by the provisions of Article 14 of the *Civil Procedure Code* under the title of “La contradiction” as follows:19 “A party may not be judged without having been heard or called (…)”.20 The same point which has been provided in more detail under sect. 1, Principle 5 and sect.1, Rule 7. Sections 4 and 5 of Principle 5 almost repeat the rule of Article 15 of the French Code.21 Authors of these texts, despite using this expression in the Procedural Laws of some countries such as the *Civil Procedure Code of Spain 2000* (Art. 344),22 refrained from using it in the title of the Principle and instead, in the English text of the principles, used the expression “Due Notice and Right to be Heard” and in the French text the expression “Notification et droit d’être entendu” has been used. Despite the fact that disregard of the above expression may be considered among the weaknesses of these two institutes,23 because if we consider it intentional, then it is unknown why in section 4, Principle 1 opposite the expression “Proceeding without notice” the words “une procédure non contradictoire” has been used, but it seems that the writers of Principles have made an effort to present an independent and in the meantime, understandable text to the interested people and to submit some useful regulations to the arena of international disputes resolution, more than being willing to be overwhelmed by the conflict and diversity of the decisions in the national legal systems.

Nevertheless, this practice is not observed in respect of Principle 10 between the two English & French versions. “Le principe dispositif” which means domination of the parties of dispute over the factual issues of the dispute, has a Roman-German origin and particularly in Italian and French Law,24 it has been the subject of discussion since the time of Henri Motulsky,25 and has been exposed to special changes and reforms at present time, in a manner that a group of eminent judges of the said country believe that the domination Principle which speaks of the domination of the parties over the facts, with mutual expansion of authorities of the judge in factual matters and of the parties in the judgment affairs, has been converted into the modern principle of “Effective Cooperation of the Judge and the Parties”.26
and the Parties” (Le principe de la cooperation efficiente de juge et des parties). Nevertheless, the above term has been used in the French version of the Principles, but in the English version, the phrase “Party Initiative and Scope of the Proceeding” is seen. This part of innovation on basis of which, the referred expression has been excluded from the English version, may be approved, but the position of the other part which illustrates the utilization of same expression in the French version, seems ambiguous. Besides, as we will see, there are some serious criticisms to the terminology used in this Principle, which will be discussed later.

The present paper does not have the time for discussing all linguistic subtleties in this text and as seen in the next part, existence of some objections may not be denied in it, the objections, though not reducing the value of the whole work, but deserving care and attention.

1.3 Part 3: weaknesses of the Principles of Transnational Civil Procedure

The first weakness should be found in the monopolization by the writers of the principles of civil procedure, who have limited this great and important task to the exigencies of the two Common Law and Roman-German systems, as if in the world of Law, there are only two legal systems, one is Common Law with Anglo-American tendency and the other is Roman-German system with French Law background. However, the reality is different from what they have assumed.

The Law is moving forward and growing in the east and even in the west in different forms. In today’s Europe, when the Swiss lawyers embarked upon writing a new code for the civil procedure, they, not only gave consideration to the Laws of France, Germany or Italy, but they recognized their own Laws and wrote a new text considering their political and judicial culture. Even, the British, when enacting their Civil Procedure Rules of 1998, according to the research and studies done by Lord Woolf, did not remain committed to the English Common Law traditions and, to a great extent, gave attention to the solutions of other legal systems. It cannot be stated that in Latin America and South America, the legal authors are looking to the Laws of Spain, Italy and France to translate such laws and change them into their own codes. The model code document of Ibéro-America regarding the civil procedure is a clear example for proof of the assertion that the Latin American Law is moving and progressing so rapidly and strongly. The reforms in the Law of the eastern countries in the field of civil procedure, is undeniable.

The reform of dispute settlement out of court which has achieved evolution in Japan cannot be ignored. Also, the realities existing in the systems dependent on Islamic Law should not be disregarded, although most Islamic countries are influenced by the Roman-German Law in civil procedure. In Islamic law, there are some remarkable points and aspects which are unique by themselves. The open and non-monopolized approach of the Islamic ideology and the jurisprudence in the Moslem countries like Iran towards the constructive role of the judge’s knowledge in the proceeding deserves any attention in the universal approaches towards unification of the civil procedure.

In better words, the transnational commercial disputes do not appear in the international arena only among the citizens of special legal systems, so that the rules and regulations related to the resolution of such disputes derive from the same special systems. It is true that for the first time, the idea of writing such regulations came from the mind of a person with American origin and a person Italian origin, however, this will not cause the fact that for searching such general rules, a limited ground be considered. When it is said that the Principles have been written under the influence of the German-Roman system and the Rules are inspired from the Common Law, seems a justified reason for the fact that many national legal systems may not be interested in these texts but for fun, something which is inconsistent with the basis of harmonization, approximation and unification intended by the writers.

The next problem is related to the repetition of concepts and regulations in the text of the Principles. If the reader studies the text of the Principles of Transnational Civil Procedure several times, he will immediately find out that contents and concepts inserted in the Principles, have been repeated in the text of the Rules. This repetition, considering the fact that the philosophy of drafting the Rules, was writing some particular regulations in line with the Principles, has no problem. In fact, it may be useful to explain as an example, the concept of the first Principle regarding independence, impartiality and characteristics of the court and its members with more details in section C of the Rules, i.e. Articles 9 and 10. The national legislators specify the composition of the court members and its impartiality in Articles 9 and 10 with more care and precision. The problem is that we observe extreme repetition...
concepts and regulations in the Principles themselves. How is it possible to justify the repetition of sections 2 and 3 of Principle 10 in Principle 28? If those two sections of Principle 10 speak of the time of lodging the complaint with the court, compliance with statutes of limitation, *lis pendens*, and other requirements of timeliness, what is the necessity of repeating the same point in the sections of principle 28? In fact the same situation can be observed in several Principles:


It may be stated that interrelation of the general legal concepts to each other necessitates their repetition, if necessary. For example, repletion of the issue of service of process and compliance with defensive rights, is not only without problem, where there is any fear of violation, but it is also an advantage, such as repetition of the provisions of section 1, principle 5 in some sections of principle 15. This type of repetition seems without problem. Some of the above examples are of this type, such as repetition of the necessity of speed in proceeding and avoidance from prolongation, as expressed in principle 7, in other principles or repetition of the necessity of cooperation and participation, as expressed in the latter principle, in other principles. Also, it may be mentioned that one or more principles may be agreed by the parties under the arbitration agreements.

Therefore, the rule which may be agreed in the future has to be comprehensive. For example, agreement on the implementation of principle 11 in which a part of Sect. 3 is the repetition of Sect.4, principle 9, although has provided some rules in respect of the duties of the parties and their attorneys, cannot be irrespective of service of notice and information as per section 4 of the said principle. In better words, the principle writers wanted, by this repetition, to take care of all tastes.

Also, there is the probability that some countries only accept some of the principles for amending their legal systems, on this basis, their desired principle must be sufficiently comprehensive. For instance, if only principle 28 attracts the attention of a country, this principle should deal with the subject which is the ground of discretion and standard and should also specify the rule of the validity of the judged object or record of previous litigation. Therefore, if this extent of repetition is not accepted, many sections of the Principles will be changed into references to the sections of other Principles. For example, Sect. 1, principle 28 would be written as follows: “for determination of the subject of litigation, please refer to Sect. 3, principle 10”, the method which is not usual in the tradition of drafting statutes.

On the contrary, repetition must have an acceptable limit. It seems that more than 20 Principles (whether related to concept or wording) among 31 principles, is not reasonable and eliminates the generality and comprehensiveness of the principles, the generality which is combined with the principles and has in fact separated the Principles from the Rules, for the same reason.

This boring repetition even has resulted, in some cases, in writing two contradictory Principles on one subject. Sect. 3, principle 3 which is pertaining to one of the general Principles governing the proceeding i.e. *Procedural Equality of the Parties*, provides as follows: “A person should not be required to provide security for costs, or security for liability for pursuing provisional measures, solely because the person is not a national or resident of the forum state”. Rule of this section of principle 3 is in contradiction with the last part of Sect. 3 of principle 8. In the latter section, it has been provided: “An applicant for provisional relief should ordinarily be liable for compensation of a person against whom the relief is issued if the court thereafter determines that the relief should not have been granted. In appropriate circumstances, the court must require the applicant for provisional relief to post a bond or formally to assume a duty of compensation”.

In other words, if as expressly provided under Sect. 3, Principle 3, in case of a request for provisional measures, providing security should not be compulsory due to the possibility that the requesting party...
may be condemned as to the substance of the case, why the latter part of Sect. 3, Principle 8, permits the court to obtain security from the requesting party or to make the provisional measure conditional upon official undertaking by the requesting party to pay the damages incurred by the other party? Response to this question and reason for this contradiction in the interval of five principles, is not known, unless it is stated that Sect. 3, principle 3 only pertains to the prevention of obtaining security or guarantee from the foreign nationals or persons who are not domiciled in the venue of the court and in respect of other persons, the rule of Sect. 3, Principle 8 will be applied.

Regarding the other objection, it should be stated that there is almost no principle which is irrelevant to evidences of proof. Sect. 4, Principle 5, regarding the right of submission of evidences of proof for the parties, Sect. 1, Principle 6, regarding the language of documents, Sect. 2, Principle 9, regarding the stage of evidence submission and parts 4 & 6 of Sect. 3 and also Sect. 4 of the same Principle regarding submission, admissibility and information about the evidences and management thereof as well as presenting thereof in the final hearing, Sect. 3, Principle 11, description of the evidences supporting the claim in a sufficient manner, Principle 16 regarding access to evidences, Principle 18 regarding the obligation of confidentiality and security from disclosure of evidence, Sect. 3, Principle 19 governing the evidence based on verbal or written testimony, Sect. 1, Principle 20 regarding the public nature of the session for evidence submission, Principle 21 regarding the burden of proof and convicement of the judge, the several parts of Sect. 2, Principle 22 related to additional evidences, new evidences, method of collection, obtaining and assessment of evidence, expert and his comments, Sect. 2, Principle 23 regarding the supporting evidence of the judgment, Sect. 3, Principle 27 governing the new evidences in the appeal request and finally, Principle 31 regarding the international judicial cooperation in defining, maintaining and submission of evidence.

Among the issues discussed in respect of evidences, the issue of disclosure and discovery of evidence has attracted the mind of the authors tremendously, which has been provided in Principle 16 under the title of “Access to information and evidences”.

It seems that despite the serious attention, extensive effort for approximation of legal systems particularly concerning discovery of truth by disclosure and discovery of evidence, is not so effective on these principles and the system which has been faced with some serious criticisms even in the American legal system, will not be much accepted by the universal community.

Disclosure and discovery of evidence in the American Common Law system which is recognized under the caption of discovery, briefly means that the disputing parties, request the court to take action for collection of information for the proceeding. In civil cases, this task may be performed in the pre-trial stage. The Federal Rules of Civil Procedure has some detailed regulations regarding evidence discovery. Before ratification of these rules in 1938, the claimant had to prove his claim at the court personally, according to the rule.

The Federal Rules of Civil Procedure changed this difficult tradition, in a manner that nowadays the claim may be initiated even without evidence.

The American legislator, in part 5 of the said Rules, has enacted some detailed regulations in this regard. On basis of Sect. 1, part B of Article 26 of the Federal Rules of Civil Procedure, the parties are entitled to request the court to implement the evidence discovery procedure regarding any non-confidential evidence related to any part of the claim or defense. Also, the Law has envisaged many tools and methods for performing this task, such as interrogations, Dispositions and Requests for Admission. It is also possible that one party of dispute requires the other party to bring evidence or some document.

G. C. Hazard and M. Taruffo who are considered among the writers of these Principles, have written in a book on the American Civil Procedure: “Discovery has broad scope. According to Federal Rule 26, which is model in modern procedural codes inquiry may be made into ‘any matter, not privileged, that is relevant to the subject of the action’. Thus, discovery may be had of facts incidentally relevant to the issues in the pleadings even if the facts do not directly prove or disprove the facts in question”.

As a result, it should be generally stated that the solutions of this system for evidence discovery, are very lengthy and costly. Therefore, its inefficiency and incompatibility with today’s standards of fair proceeding including speed and low cost of proceeding are obviously seen. How it is possible to
implement the necessities of speed in proceeding as provided in Principle 7, through this wide system of discovery and disclosure of evidence? In the transnational commercial disputes which are naturally in need of speed in proceeding, why should we wait several years for obtaining a judgment from the transnational court, while the arbitral tribunals deal with the disputes between tradesmen more rapidly?

This approach has also led to another consequence such as immediate enforcement of the judgment of the first instance court and impossibility of appealing from such judgment (Principles 26 and 27).

On the other hand, it is not known why the writers of this kind of common document, which should normally approximate the two American Common Law and the Roman-German legal systems, unilaterally tended towards such a costly and lengthy system, a tendency which has not been considered to be compatible with the legal and judicial culture of the countries and has no brilliant record.33 Has anything been involved more than the personal interest of the writers?

Some regulations drafted in form of principle, lack the required generality. Defining the Principle or “le principe” is even difficult under the Roman-German Legal system. This word has a special historical and philosophical meaning comprehension burden. Any definition from any viewpoint and with any approach slips towards different concepts. Professor Cornu has written different meanings for it, in his paper, such as a general rule or norm with a non-legal characteristic, from which a legal norm may be inferred or a legal rule which has been expressed in a general manner under a legal text, which is applicable to various cases and is imposed by a high authority or an example. A general rule which is compulsory from legal point of view, although it has not been written in any text.34

At least, all admit the generality and rule nature of Principle in this system. Therefore, Principle is a rule with sufficient generality and applicability in numerous cases. Most Principles of Translational Civil Procedure have this generality, however, some of them like Principle 6 are not as general as they must be.

In this Principle which is related the language of proceeding, the problems have been dealt with, which are more at the level of procedural regulations; despite the fact that the proceeding must be conducted in the court language, it may be permitted that the whole or part of the proceeding be conducted in another language provided that it will not jeopardize the right of either of the parties and also the fact that translation of long and voluminous documents may be limited to the translation of some part selected by the court or by the parties. The writers could have foreseen these regulations being at procedural level, in the section of Rules.

Anyway, it cannot be denied that specifying the language of proceeding may be necessary in the international arena, but the objection is to the point that principle 6 lacks the same generality and comprehensive nature in directorship as possessed by principles such as Principle 1, 2, 4, etc. Nevertheless, the value of the first part of Sect. 3, principle 6 which speaks of providing possibility of translation for a party who does not understand the language of the proceeding, should not be considered less than the other Principles.

The link between the necessity of translation and compliance with the rights of defense, has led to the recognition of the value and importance of the same Principle for the latter case. Anyhow, what was written about the low generality of principle 6 is, from the viewpoint of the authors, more abstract and subjective rather than practical and real. Another reader may have a different understanding from principle 6.

Using almost vague terminology is another objection to these texts. In the Principles of Transnational Civil Procedure the word “reasonable” or “raisonnable” have been repeated.

This word, as explained in respect of Principle 3, at least has two meanings of “Rational and Reasonable”. Due to the ambiguity of this term in the French Law and American Law, the writers of Principles have endeavored to place them as equivalent of the terms: Proportional, Significant, Non-excessive, Fair and opposite of the term “Arbitrary”.35

The writers of the Principles have considered that reference to this word will prevent the courts from providing complicated interpretations and in fact, benefit from a kind of discretion authority, the interpretation which, as supposed by them, will prevent harsh, extreme and illogical imposition of the court’s authorities. If this intention is achieved by application of this word, it should be definitely
considered among the advantages of the Principles, not among their disadvantages, however, it
should be admitted that using some irregular concepts such as the above word will be of no result
except for adding to the ambiguities and consequently extreme authority of discretion and
assessment for the judge, something which will destroy the balance of the proceeding system. The
Procedural or formal Law, contrary to the Substantive Law, must be extremely clear and
unambiguous, so that the exigencies of fair proceeding such as understandability for all will be
observed. The word which may have meanings of Proportional, Significant, Non-excessive and Fair
and is placed opposite the term Arbitrary will show the ambiguity by itself. This ambiguity is to the
extent that the authors in Persian translation preferred to make it equivalent to “Rational and
Reasonable” and avoided from using one of them except in case of Sect. 1, principle 25, for which
there was no other choice. It has been mentioned in this principle: “The winning party ordinarily
should be awarded all or a substantial portion of its reasonable costs. ‘Costs’ include court filing fees,
fees paid to officials such as court stenographers, expenses such as expert-witness fees, and
lawyers’ fees”. Referring to 5 experts at the beginning of the proceeding may seem rational to the
beneficiary but the cost thereof cannot be considered reasonable costs.

The said objection may be also considered correct in respect of words such as “proportionnalité” in
Sect. 8, Principle 5, Sect. 1, Principle 8, “Substantial Connection”, in part 2, Sect. 2, Sect. 1, Principle
12, pertinent (relevant) object, in Sect. 1 and 2, Principle 16, Sect. 3, Principle 21, Sect. 1, Principle
22 and “question pertinente” (Relevant Issue) in Sect. 4, Principle 22, and part 2, Sect. 4, Principle 22
and “des questions non pertinentes (Unnecessary Issues)” in Sect. 2, Principle 25, although many
efforts have been made to explain the said terminology and to give them logical meanings.

The other objection relates to the lack of harmony between the English and French versions of the
Principles. Despite the remarkable advantages of the Principles of Transnational Civil Procedure and
although it may be said that the Principles and Rules are considered examples of understandable and
fluent legal texts, sometimes in comparison of the two texts, there are seen some contradictions
which disturb the meaning. For example, in the French text, Sect. 4, Principle 11, the phrase “after
warning the party” has not been included:

English: A party’s unjustified failure to make a timely response to an opposing party’s contention may
be taken by the court, after warning the party, as a sufficient basis for considering that contention to
be admitted or accepted.

Français: En l’absence de contestation en temps utile par une partie d’un moyen soulevé par la partie
adverse, le tribunal peut considérer que ledit moyen a été admis ou accepté.

In the English text, Sect. 4, Principle 17, the phrase “submitting perjured evidence” has been used
which includes “Faux témoignage (giving wrong testimony)”, which has been written in the French
text.

English: The law of the forum may also provide further sanctions including criminal liability for severe
or aggravated misconduct by parties and nonparties, such as submitting perjured evidence or violent
or threatening behavior.

Français: Le droit du for peut prévoir des sanctions supplémentaires, telles que la responsabilité
pénale d’une partie ou d’un tiers ayant commis une faute grave, par exemple en cas de faux
témoignage, de violence ou de tentative d’intimidation.

The sentence “oralement des moyens supplémentaires” in Sect. 1, Principle 19, has been provided in
the English text as “presenting oral arguments”.

Français: Les conclusions, mémoires et moyens de droit sont en principe présentés initialement par
écrit. Les parties peuvent toutefois présenter oralement des moyens supplémentaires sur des
questions importantes de fond ou de procédure.

English: Pleadings, formal requests (motions), and legal argument ordinarily should be presented
initially in writing, but the parties should have the right to present oral argument on important substantive and procedural issues.

Generally, the structure and literature of Sect. 2, Principle 25 is different in the French and English versions, the difference which seems remarkable.

This degree of difference between the two texts, although mostly resulting from the two lingual structures, however is not justifiable at least in one case. From the study of the English version, Sect. 3, Principle 12, the court’s “duty” is inferred in respect of permitting substitution or representation by another person instead of the parties to the proceeding, but from reading the French text, “authority or faculty” is inferred in this regard:

English: When appropriate, the court should grant permission for a person to be substituted for, or to be admitted in succession to, a party.

Français: Lorsque cela lui paraît justifié, le tribunal peut autoriser une personne a se substituer a une partie ou a continuer l'action en cours d’instance.

This difference which has caused serious change in the role of the court does not seem trivial and ignorable. It should be considered in the next edits of the Principles.

Also, the caption of Principle 10 in the French text is “le principe dispositif” while in the English text, there is the phrase: “Party initiative and scope of the proceeding”. This point was mentioned in the section related to the innovations in the Principles, however, the objection which cannot be disregarded, is that the Principle of “private initiative” although is very much related to the Principle of “le principe dispositif”, however, the first one speaks of the initiatives and authorities of the parties in “starting and ending the proceeding” and the second one speaks of the “facts of case and its scope”. In other words, the first one is related to the “course of proceeding” and the second one is about the “subject of the proceeding”. Further to the fact that contrary to the French version, Principle 10 of the English version speaks of the party initiative and scope of proceeding, this distinction has not been complied with, in Principle 10 itself. Sections 1, 2 and 5 of Principle 10 are pertaining to the initiative of the parties, in particular Sect. 2 thereof has no relation to the Principle called in French terminology as “le principe dispositif” and sections 3 and 4 are related to the mentioned principle and scope of the subject of proceeding. This combination may be explained considering the connection of the two Principles, but the lack of harmony of the two titles in the two texts may not be disregarded.


In fact, although the Principles of Transnational Civil Procedure speaks of “Protective and provisional measures” in Principle 8 and refers to both measures in Principle 31, however, in the said Principle, only the provisional measures (Measures provisoires) has been mentioned, while the expediency and conditions of issuing both measures are identical i.e. protection of the beneficiary’s interests which are at risk of being deteriorated, in protective and provisional form. Therefore, discrimination in mentioning both names is without logical and legal ground.

2. CONCLUSIONS

From the review of the Principles of Transnational Civil Procedure, it may be inferred that the writers, for purpose of creating a suitable ground for cooperation between the judge and the parties to the litigation, have referred to the theory of cooperation between them. This cooperation has been sometimes considered for assuring the reasonable speed in the proceeding and sometimes for directing the proceeding and fair disposition of the dispute, out-of-court compromise and settlement.

Remarkable innovations such as considering a set of general regulations beside particular and detailed regulations for proceeding, effort for approximation of the Common Law and Roman-German legal systems, appropriate attention to the principle of prompt rendition of justice, immediate enforcement of judgments, predicting appropriate sanctions for regulating the movement towards discovery of the truth in the proceeding, providing a duty for the court in creating compromise between the parties, benefiting from fluent and understandable texts, must be counted as the privileges and innovations of the Principles of Transnational Civil Procedure.

Objections such as monopolization by the principle writers in merely giving attention to the
Law and Roman-German legal systems, repeating the concepts and regulations of the Principles, which are sometimes disturbing, extreme attention to the selected system of evidence management and unjustified tendency to the evidence disclosure and discovery system of American Common Law, lack of appropriate generality in respect of some Principles and finally using some vague terminology and expressions in the text of the Principles and some lack of harmony between the French and English texts and a kind of irregularity in respect of some expressions, should be introduced as the weakness points of this text.

1 Unidroit 2001 - Study LXXVI - Doc. 3.


3 Unidroit 2001 - Study LXXVI - Doc. 4.

4 Unidroit 2004 - Study LXXVI - Doc. 11.


6 In this respect, see: MOHSENI, Hassan. Concept of principles of procedure and their interpretative role and method of distinguishing thereof from the procedural formalities. Central Bar Association Journal. n. 23 & 24, 2006, 205 et seq. (205-235). In Persian language.


8 Before 2008, this code was referred to as “New Civil Procedure Code” in order to distinguish it from Civil Procedure Code 1806 of Napoleon, some provisions of which were implemented. However, thereafter with abolishment of the provisions of Napoleon Civil Procedure Code, the term “new” was deleted from the official title of code 1975.


11 See: Code de procédure civile suisse (CPC (LGL\1973\5)): Titre 3: principes de procédure et conditions de recevabilité.

12 See: Ley 1/2000, de 07.01.2000 Enjiciamiento Civil. This code refers in its Article 4 to the
complementary and motherhood character of the civil procedure Code as to the other procedural laws such as penal, administrative, military etc: Articulo 4. Caracter supletorio de la ley de Enjuiciamiento Civil. En defecto de disposiciones en las leyes que regulan los procesos penales, contencioso-administrativos, laborales y militares, sera’n de aplicacion’n, a todos ellos, los preceptos de la presente ley.


16 MOHSENI, Hassan. *Supra* note 14, 80.


20 Article 14: *Nulle partie ne peut être jugée sans avoir été entendue ou appelée*.

21 Article 15: *Les parties doivent se faire connaître mutuellement en temps utile les moyens de fait sur lesquels elles fondent leurs prétentions, les éléments de preuve qu’elles produisent et les moyens de droit qu’elles invoquent, afin que chacune soit à même d’organiser sa défense*.

22 Artículo 344. *Contradicción y valoración de la tacha. Sanción en caso de tacha temeraria o desleal*.


Producing Documents, Electronically Stored Information, and Tangible Things, or Entering onto Land, for Inspection and Other Purposes; 35. Physical and Mental Examinations; 36. Requests for Admission; 37. Failure to Make Disclosures or to Cooperate in Discovery; Sanctions.

30 (b) Discovery Scope and Limits, (1) Scope in General: Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any non-privileged matter that is relevant to any party’s claim or defense - including the existence, description, nature, custody, condition, and location of any documents or other tangible things and the identity and location of persons who know of any discoverable matter. For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action. Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence. All discovery is subject to the limitations imposed by Rule 26(b)(2)(C).


33 Professor Cadiet wrote that this reluctance to the discovery system, has been once proved in respect of Article 23 of the Hague Convention regarding access to the evidences existing in a foreign country, dated March 18 1970 by applying the right of making reserve or condition by most countries. The said Article provides: *Convention du 18 mars 1970 sur l'obtention des preuves à l'étranger en matière civile ou commerciale*: Art.23: Tout État contractant peut, au moment de la signature, de la ratification ou de l’adhésion, déclarer qu’il n’exécute pas les commissions rogatoires qui ont pour objet une procédure connue dans les États du Common Law sous le nom de pre-trial discovery of documents. CADIET, Loïc. Quelles preuves? Discovery, témoins, experts, rôle respectif de parties et du juge. In: FOUCHARD, Philippe (Sous la dir.). *Op. cit.*, p. 115-119.

34 CORNU, Gérard. *Supra* note 17, 720.