CONSTITUTIONAL NORMS OF CIVIL PROCEDURE AS REFLECTED IN THE ALI/UNIDROIT PRINCIPLES OF TRANSNATIONAL CIVIL PROCEDURE

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SUMMARY: I. *Introduction*. II. *The Background and Development of the Principles*. III. *Harmonization of Constitutional Norms and Article 6(1) of the European Convention*. IV. *Analysis of Some Constitutional Norms in the Principles*. V. *Conclusions*.

I. INTRODUCTION

This paper will examine some constitutional norms of civil procedure as they find expression in the relatively recently published ALI/UNIDROIT Principles of Transnational Civil Procedure[1] (hereinafter "the Principles"). In order to do so we must first discuss the background and development of the Principles as well as the sources and previous expression

* Professor of Civil Procedure, Faculty of Law, The Hebrew University of Jerusalem. It is a great honor and pleasure for me to write this paper for publication in this estudios en homenaje a Hector Fix-Zamudio, a most esteemed colleague, in honor of his fifty years of juridical research. During the Fall term 2006, I had the great pleasure of co-teaching three sessions on Procedural Justice in the seminar of Professor Robert S. Summers on Central Issues in Jurisprudence and Legal Theories at Cornell Law School. My interest in writing this paper as well as some of the ideas contained herein were stimulated greatly by my discussions both with Professor Summers personally and with the students of the seminar, to whom I am greatly indebted.

[1] As adopted and published by the American Law Institute, at Washington, D. C., USA, May 2004 and by UNIDROIT, at Rome, Italy, April 2004, and as published by Cambridge University Press (Cambridge 2006).

of constitutional norms of civil procedure. We will start with the background and development of the Principles.

II. The Background and Development of the Principles

The origin of what are now the Principles of was an American Law Institute (ALI) project to develop and promulgate "transnational rules of civil procedure", which began in 1997. A full discussion of the history of that project, as well as my views concerning it, would go far beyond the confines of this paper. Moreover, in 2001 I published an article covering these subjects.[2]

For purposes of this paper suffice to say this project, as with other "harmonization" projects was a product of a relatively recently developed view among some sophisticated comparative proceduralists that the two archetypal procedural systems —*common law* and *civil law*— are essentially the same with the differences between being more apparent than real.

I had previously written that this view is misleading in its minimization of the very important systemic differences between the two systems, which differences prevent the development of truly unified or harmonized rules which would apply to both of them.[3] Moreover, such an attempt to harmonize procedural rules of very different systems would be thwarted by some peculiar constitutional norms, such as the american right to jury trial as well as different specific manifestations of general constitutional norms of due process and natural justice that exist in different procedural systems even within the same procedural family.[4]

[2] Goldstein, S., "The Proposed ALI/UNIDROIT Principles and Rules of International Civil Procedure: the Utility of Such a Harmonization Project, *VI Uniform Law Review*, 2001-4, pp. 789-801.

[3] Goldstein, S., "On Comparing and Unifying Civil Procedural Systems", *Butterweorth Lecture 1994: Process and Substance*, Londres, 1995, pp. 1-43.

[4] Goldstein, S., "The Utility of the Comparative Perspective in Understanding, Analyzing and Reforming Procedural Law", Oxford, University of Oxford, The Institute of Comparative and European Law, 1999, pp. 1-45, a revised version of this monograph was published as *Comparative Law Review*, The Institute of Comparative Law in Japan, 87 (1999) and a revised, combined and concised version of both of the above was also published as in Liepold, D. and Sturner, R. (eds.), *Zeitschrift fur Zivi lProzess International (ZZZPlnt): Jarbuch des Internationalen ZivilProzessrechts*, Koln 2001, p. 375. For the sake of simplicity further references herein will be to the first publication, *i. e.*, the "Oxford monograph".

I was, therefore, extremely skeptical about the efficacy of this project as originally conceived. However, when, in 2000, UNIDROIT later joined the project draft, "Principles" were added to the draft Rules. This represented a most important improvement to the project.

Rules of Civil Procedure, whether transnational or domestic are intended to be applicable directly and to control the litigation. By their nature, therefore, they should be complete and comprehensive. If they are not so, they are, thereby, defective. Thus, the inability to harmonize systemic aspects of procedure and those that relate to unique constitutional norms, such as the american civil jury, or specific manifestations of general norms of natural justice, will inevitably produce defective rules.

Principles, on the other hand, are not intended to be applicable directly and to control litigation. Rather, they serve as guidelines to those who promulgate the Rules. They, therefore, need not be complete and comprehensive. Thus, if they do not include harmonized principles as to systemic aspects of procedural systems or peculiar constitutional norms, they are not thereby defective.

Moreover, and, indeed, even more importantly, the abstract nature of principles, as compared to rules, allows the harmonization of different manifestations of constitutional norms based on universal norms of due process or natural justice, by referring to the universal norm, rather than its specific manifestations in different procedural systems.[5]

The fact that principles, as opposed to rules, are not immediately binding and controlling of litigation, but rather are "only" guides to policy makers in their fashioning of Rules, as well as their more abstract nature, should make.

Principles more conducive to the acceptance by the proponents of the different procedural systems of such non-radical changes in systemic aspects of their procedural system through harmonized Principles.

Thus, in my view, a project that included adopting and promulgating Principles of Transnational Civil Procedure was clearly preferable to one limited only to adopting and promulgating Rules of Transnational Civil Procedure. This, of course, does not mean that the adoption of such Principles is an easy task. The fact that within the short time of the joint project, the Principles underwent a number of drafts, with some major differences among them, shows the difficulties involved.

[5] See articles cited, *supra*, notas 2-4.

These difficulties include both the content of the harmonized Principles and the desirable degree of their abstraction. In terms of the desired level of abstractness, it is clear that to be useful the Principles should be less abstract than, for example, article 6 of the European Human Rights and Fundamental Freedoms, which we will discuss below. On the other hand, Principles that would be so concrete as to approach Rules in this respect would lose a considerable part of their advantage over Rules.

In 2001, writing as part of a symposium on the now combined project,[6] I expressed my view that well drawn Principles were not only preferable to Rules, but were desirable in absolute terms. Such Principles would be most useful on two levels. First and foremost, they would serve as most important guidelines to policy makers concerning the Rules of Civil Procedure which they should adopt.

Second, both the process of formulating the Principles and their final version will be most helpful to comparative procedural scholars, like myself, particularly in terms of what principles may be agreed upon as applicable both to common law and civil law procedural systems. For, indeed, there are such principles, both traditional ones and newly developing ones.

In concluding this article, I questioned the necessity for the continuation of two aspects of the project. The first is why should these Principles be limited to transnational commercial disputes. This limited application was clear not only by the fact that the Principles were part of the then denominated ALI/UNIDROIT Principles and Rules of Transnational Procedure, but also by then Principle 1 (Scope of Application), which explicitly limits the application of the Principles to the "procedure of a forum for adjudication of disputes arising from transnational commercial transactions".

It was clear that this limitation was purely an historical accident. The project began as one for the formulation of Rules for Transnational Civil Procedure and it is quite understandable why such Rules should have only a very specific application. The Principles were then added to the project and took on the limited application of the Rules.

On the other hand, when viewed separately from the Rules, in my view, there was no reason to so limit the Principles. By their nature and, indeed, their content, they should be applicable to all civil procedure, domestic and transnational, commercial and noncommercial. I noted that the history of the joint project may prevent the elimination of the limited

6 Article, *supra*, nota 2.

application of the Principles at this point. However, I expressed my hope that, at some point, the Principles will be drafted and promulgated as applying universally to all civil litigation.

The second question I raised was whether the Rules should be retained as part of the project or should the project be limited only to the Principles. I asked this question since, as I have stated above, my view as to the utility of the Rules was negative, while my view as to the utility of the Principles was positive. Yet, in my view as expressed in that Article, the Project could still be both viable and useful even if the Rules were retained, if two conditions were to be accepted.

The first is the recognition that the Principles are primary and the Rules secondary. The Rules must be seen as deriving from the Principles; not the Principles arising from the Rules.

Secondly, the Principles, because of their transcendental and abstract qualities, must be viewed as being capable of being translated into diverse sets of Rules, all of which are legitimately derived from the Principles. Ideally, the project itself should draft and promulgate such different sets of Rules. Short of this, the project should realize, and announce, that the Rules it has promulgated are only one of a number of possible sets of Rules which could be legitimately derived from its Principles.

While I cannot be certain that my article was the cause for these developments, I am most happy that both of my suggestions were effectuated by the organizers of the Project. Thus, in the final version, the ALI/UNIDROIT Principles of Transnational Civil Procedure,[7] Principle 1, as quoted above has been eliminated and in its stead is an unnumbered preamble paragraph which states as follows: "Scope and Implementation: These Principles are designed primarily for adjudication of transnational commercial disputes. These Principles may be equally appropriate for the resolution of most other kinds of disputes and may be the basis for future initiatives in reforming civil procedure".

Even more significantly, as indicated by the title of the final published version, the project has now been limited to the Principles. While the published book of the Principles also includes a set of "Rules" as an appendix, it is made clear that they were neither adopted nor even approved, neither

[7] *Supra*, nota 1.

by the ALI nor by UNIDROIT, but are only "the reporters model implementation of the Principles...".[8]

In terms of constitutional norms of civil procedure we can now evaluate whether the Principles as adopted have achieved the desired goals of finding the correct balance between abstractness and particularization, as well as avoiding constitutional norms unique to given systems and harmonizing different manifestations of constitutional norms based on universal norms of due process or natural justice, by referring to the universal norm, rather than its specific manifestations in different procedural systems.

But before doing so we must expand on the discussion above about the difficulties of the harmonization of constitutional norms and discuss briefly the primary prior statement of constitutional norms of civil procedure: article 6(1) of The European Convention for the Protection of Human Rights and Fundamental Freedoms of November 4, 1950, (hereinafter "article 6(1) of the European Convention"), its progeny and the jurisprudence interpreting it.

III. Harmonization of Constitutional Norms and Article 6(1) of the European Convention

As I have attempted to explain elsewhere,[9] when one looks at constitutional procedural norms from a comparative law perspective, it is seen that they may be classified into three categories.

First, there are norms which are peculiar to a given system, which reflect the peculiar history of that system, but which do not, at all, represent a general norm of due process or natural justice. Second, there are constitutional norms that do reflect general norms of natural justice, but are not the only possible manifestations of such general norm. Third, at least in theory, one could posit a given constitutional norm which is the only possible manifestation of a general norm of natural justice.

A good example of the first kind of constitutional norm is that of the american civil jury. That is, the right to trial by jury in civil litigation is constitutionally protected by the federal Constitution and by most State Constitutions. Yet it is clear that this peculiarly american constitutional

[8] *Ibidem*, p. 99.

[9] Goldstein, S., *op. cit.*, nota 4.

right does not reflect a general norm of due process or natural justice and could not be harmonized with other systems that do not contain such a constitutional norm.

This, of course, does not mean that the civil jury could be easily done away with in the United States. It would take a constitutional amendment to do so in terms of the federal judicial system and the judicial systems of the States that have a similar right in their Constitutions. This is a most formidable task and there is no indication that it will be accomplish.

In general, however, there are very few examples of constitutional norms that do not reflect at all a universal norm of due process or natural justice. Most of the constitutional norms in most systems do reflect such universal norms. On the other hand, I can think of no examples of the third category, *i. e.*, where the given constitutional norm is the only is the only possible manifestation of the universal norm. In the vast majority of cases, a given constitutional norm is only one of a number of possible manifestations of such a universal norm.

The implications of this understanding for harmonization projects are most important. Very specifically drawn Rules that endeavor to choose one manifestation of the universal norm, to the exclusion of others, as *the* harmonized rule will inevitably run afoul of the constitutional norms of one or more of the procedural systems involved. On the other hand, acceptance of the universal norm as the guiding harmonized principle which may be manifested in different, but equally legitimate, ways in different procedural systems not only solves the problem but also greatly advances the understanding of the universal norm.

Moreover, it would appear that both the ALI and the UNIDROIT bodies involved in adopting the Principles were aware of this writer's analysis of this most important consideration in harmonizing constitutional norms.[10]

An excellent example of the approach to harmonization of constitutional norms advocated by this writer is to be found in the jurisprudence

[10] See the preface contained in the published version of the Principles, *supra*, nota 1, xxxi-xxxiv and xxxiii, which quotes this writer's statement in the text above about the different types of constitutional norms and the need to harmonize them pursuant to the general norm of due process or natural justice reflected in the particular manifestations of the general norm as that statement was contained in the article, *supra*, nota 2, pp. 793 and 794, which Preface was written by Jorge A. Sanchez-Cordero Davila who is described expressly as a Member of the governing council of UNIDROIT and ALI member.

of the European Court of Human Rights (ECHR) concerning the interpretation of article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms: "In the establishment of his civil rights and obligations... everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal [court][11] established by rule".

A full discussion of this jurisprudence would go well beyond the purposes of this paper. In addition I have discussed it at length elsewhere.[12]

Suffice to state herein, that in applying these constitutional norms, particularly as to the requirements of "public hearings" and an "impartial court" not only as to the variety of civil law continental jurisdictions, upon the constitutional fundamental principles of which article 6(1) was based, but also as to the common law jurisdictions of Britain and Ireland, the ECHR has quite rightly and sensitively enforced on the States involved the universal norms of natural justice that underlay the provisions of article 6(1), while allowing different manifestations of such fundamental principles in different procedural systems.

As noted above, article 6(1) itself represents the primary existing statement of constitutional norms of civil procedure. Its most important role in this regard is emphasized by the fact that has been incorporated verbatim into the European Union Charter of Fundamental Rights adopted by the European Council of Nice December 7, 2000, the Inter-American Convention of Human Rights of November 22, 1969, adopted by the member States of the Organization of American States in San Jose, Costa Rica, coming into force on July 18, 1978, the African Charter of Human and Peoples' Rights,

11 Although the English text of article 6(1) uses the word "tribunal" not "court", this is generally accepted to be a mistaken translation of the French word "tribunal", which clearly means a first instance court. Compare the use of the word "tribunal" in the french text of the Principles as the translation for the word "court" in the english text. In the english text of article 6(1) the word "tribunal" was used apparently because of its surface parallelism to the French term "tribunal", with no intent to mean anything other than the French text, i. e., a first instance "court". This has been understood by all the authorities including the ECHR. See S. Goldstein, the Oxford monograph, supra, note 4, at 27. Thus for the remainder of this paper we will refer to article 6(1) as if it used the word "court," not "tribunal".

12 Goldstein, S., "Administration of Justice and Financial Means", in *Law in Motion*, Blainplain, R. (ed.), R., *Kluwer Law International*, The Hague, 1997, p. 211; see also, the Oxford monograph, *supra*, nota 4, pp. 25-34.

which came into force on October 21, 1986 and the Protocol Ouagadougou, from June 9, 1998.

While, as stated above, the Principles should be more specific than the very general text of article 6(1), and they also include norms that are not constitutional in nature, article 6(1) and its interpretation by the ECHR are a good basis for comparison with the constitutional norms expressed in the Principles.

IV. Analysis of Some Constitutional Norms in the Principles

The constitutional norms contained in article 6(1) can be broken down into the following:

1. Adjudication before an independent and impartial court established by law.
2. A fair hearing.
3. A public hearing.
4. Adjudication within a reasonable time.

We now turn to an examination of the Principles according to each of these norms.

1. *Adjudication Before an Independent and Impartial Court Established by Law*

This norm finds its expression in Principle 1, entitled Independence, Impartiality, and qualifications of the Court[13] and its judges, which provides as follows:

1. The Court and the judges should have judicial independence to decide the dispute according to the facts and the law, including freedom from improper internal and external influence.

[13] Since the Principles are meant to apply only in the regular court system, it is not necessary to discuss the very interesting jurisprudence of the ECHR concerning what kind of judicatory entity other than an ordinary court is sufficiently court-like so as to qualify as an independent and impartial court within the meaning of article 6(1). See Goldstein, S., *op. cit.*, nota 12, pp. 218-223; *id.*, *op. cit.*, nota 4, pp. 26-34.

2. Judges should have reasonable tenure in office. Nonprofessional members of the Court should be designated by a procedure assuring their independence from the parties, the dispute, and other persons interested in the resolution.
3. The Court should be impartial. A judge or other person having decisional authority must not participate if there is reasonable ground to doubt such person's impartiality. There should be a fair and effective procedure for addressing questions of judicial bias.
4. Neither the Court nor the judge should accept communications about the case from a party in the absence of other parties, except for communications concerning proceedings without notice and for routine procedural administration. When communication between the court and a party occurs in the absence of another party, that party should be promptly advised of the content of the communication.
5. The Court should have substantial legal knowledge and experience.

In our view, except for 1.5, this Principle[14] 1 is a good specification of the norm of article 6(1) that adjudication should be before an independent and impartial court established by law.

P. 1.1 and P.1.4 are clear and need no further explanation.

P.1.2 sets forth mechanisms designed to achieve the "judicial independence" mandated by P1.1. In analyzing it we must first note what it does not state. It contains no limits on the manner of the selection of judges. P.1.2. accepts the many, varied ways that judges are selected in different jurisdictions: selection by training and objective qualifications as is generally true in civil law jurisdictions as well as by appointment by political figures as is generally true in common law jurisdictions, or even by popular election as is true of most state court judges in the United States,[15] as long as once selected they have "reasonable tenure" in office and, of course, their judicial activities conform to Principle 1.1.

14 Hereinafter the Principles and sub-Principles will be referred to by the initial "P".

15 See Goldstein, S., "Contrasting Views of Adjudication: an American-Israeli Comparison", in Liepold, D., Luke, W. and Yoshino (eds.), *Gedachtnisschift fur Peter Arens,* 1993, pp. 169-186; Goldstein, S., "The Role of Supreme Courts, Regional Report: *Common Law* Countries", in Yessiou-Faltsi, P. (ed.), *The Role of Supreme Courts at the National and International Level Reports for the Thessaloniki International*, Colloquium 21-25 May 1997, Thessaloniki, 1998, pp. 279-359.

The meaning of "reasonable" tenure is not specified and Comment P-1C on this point recognizes, and apparently acquiesces in, the fact that while "typically judges serve for an extensive period of time ...in some systems... some judicial officials are designated for short periods". It makes it clear, however, that the Principle forbids the creation of ad hoc courts.

The second sentence of P.1.2 permits the use of nonprofessional members of a Court, such as America-style jurors, lay assessors or other nonprofessionals as used in other jurisdictions, as long as such nonprofessionals are themselves "designated by a procedure assuring their independence from the parties, the dispute, and other persons interested in the resolution". We would emphasize that while P.1.2. permits such use of nonprofessionals, it does not affirmatively encourage their use, let alone require it.

In all of its aspects P1.2. represents a good statement of the general norm of due process or natural justice requiring judicial independence, while avoiding requiring peculiar manifestations of that norm.

P1.3. Deals with a most important constitutional norm recognized by all systems: judicial impartiality. Yet again it is important to note that it does not require the adoption of any specific manifestation of that norm which may be found in some jurisdictions. Thus, it does not require that cases be assigned to judges or judicial panels on a random basis as is often required in civil law jurisdictions. It recognizes that the common law system in which cases are assigned to a judge or judicial panel by an assigner who is familiar both with the case and with the judge or panel to which it is assigned does not, in and of itself, violate the norm of judicial impartiality.

Nor does it disqualify a judge from being the final decision maker in a case because he has been involved significantly in prior aspects of the case. Of course, in civil law jurisdictions the judge or panel that ultimately decides the case on the merits is the same judge or panel that has handled the case since its inception. On the other hand, in common law jurisdictions, traditionally the judge who decided the case on the merits, the "trial judge," had not been involved in prior aspects of the case. Rather he was to begin the trial ignorant of the case. This situation has, however, changed in recent decades in many common law jurisdictions, including the United States and England with the development of "managerial" judges. While there has been criticism of this common law development on the grounds

that it violates the norm of judicial impartiality, common law managerial judges have now generally been accepted and rightly so. This general acceptance of civil law type managerial judges also in common law jurisdictions is evidenced most clearly by the fact that the Principles themselves, in P.14.1., provide that "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.[16]

More problematic, however, than other forms of prior judicial involvement in the proceeding are situations in which the judge who is to decide the case on the merits has been involved extensively in earlier unsuccessful attempts to induce the parties.

Yet P.1.3. Does not automatically disqualify such a judge from deciding the case on the merits. Again, we are confronted here with a difference between *common law* and *civil law* procedure, for in the latter judicial involvement in inducing the parties to settle has long been an accepted part of the process. This is not true as to the traditionally aloof *common law* judges. However, in recent decades, parallel to the development of *common law* managerial judges, *common law* "settlement" judges have been created.[17]

This is not top say that before these recent developments common law judges never attempted to promote settlements. The extent to which they did so varied from jurisdiction to jurisdiction and even from judge to judge. In Israel, for example, which is a *common law* jurisdiction in terms of its procedure, judges at all levels have always been heavily involved in attempts to promote settlements. Israel in this regard represents the opposite common law extreme from the historic situation in England where, until recently High Court judges traditionally had refrained from involvement in promoting settlements.

16 For further discussion of *common law* managerial judge, see, Goldstein, S., *op. cit*., nota 11, pp. 225-229; *id*., "The Wolff Report and its Critics in a Comparative Perspective", Oxford, University of Oxford, The Institute of Comparative and European Law, pp. 1-17.

17 See, Galanter, M., "...A Settlement Judge, not a Trial Judge: Judicial Mediation in the United States ", 12 Journal of Law and Society 1-18, 1985; Levin, A. L. and Golash, D., "Alternative Dispute Resolution in Federal District Courts", 37 *Univ. of Fla. L. Rev. 29*, pp. 41 y 42; Resnick, J., "Many Doors? Closing Doors? Alternative Dispute Resolution and Adjudication", *10 Joiutnal of Dispute Resolution*, pp. 211, 229-235.

Thus, two things have changed in recent years. First, in common law jurisdictions, such as Israel and the United States, where judges have in practice long been involved in inducing settlement, such involvement has received official recognition in legislation and rules of civil procedure as a legitimate part of the judicial role.[18] Even more significantly, in England where judges have not been traditionally involved in inducing settlements, the recent English procedural reforms resulting from the Woolf Report have made judicial promotion of settlement one of the cornerstones of the new, 1998, High Court Rules of Civil procedure.[19]

Thus, it is not surprising that the Principles, reflecting the current norms of both *common law* and *civil law* procedure, provide that "the court, while respecting the parties' opportunity to pursue litigation, should encourage settlement between the parties when reasonably possible". P.24.1. The Commentary on this Principle (P-24A) states that "the proviso «while respecting the parties» opportunity to pursue litigation' signifies that the court should not compel or coerce settlement among the parties. However, the court may conduct informal discussions of settlement with the parties at any appropriate times". Note that this Commentary does not prohibit the judge from encouraging settlement as long as such "encouragement" does not amount to compulsion or coercion. Thus, a judge is encouraged to initiate settlement discussions and even attempt to persuade reluctant parties to settle. This is, indeed, a most positive attitude to judicial promotion of settlements.

The only remaining question in this regard is whether a judge who has attempted, actively but unsuccessfully, to encourage settlement is thereafter barred from determining the case on the merits on the grounds that his activities have created a "reasonable ground to doubt... [his] impartiality".

Despite the universal concern for judicial impartiality, jurisdictions differ as to what extent of a judge's involvement in an unsuccessful attempt to induce a settlement creates a reasonable ground to doubt his impartiality. One variable is the extent to which the jurisdiction wants to encourage judges to be involved extensively in preliminary aspects of cases. Another is the extent to which the jurisdiction wishes to support its judges in promoting settlements. This is so since a judge presiding

[18] See sources, cited *supra*, nota 18; Goldstein, S., "Civil Procedure–Israel", *International Encyclopedia of Laws*, 3a. ed., 2007, p. 108.

[19] Goldstein, S., *op. cit.*, nota 16, pp. 16-25. Rule 1.4 (f) of the Rules of Civil Procedure for England and Wales 1998.

over settlement negotiations is, obviously, strengthened in his power to induce the parties to settle if they know he will be the same judge who, if the settlement process is unsuccessful, will determine the case on the merits.

In civil law jurisdictions these two variables lead inexorably to the view that only in a very rare case would a judge's unsuccessful attempt to induce settlement raise a reasonable ground as to his impartiality so as to disqualify him from determining the case on the merits. Indeed, in a study we conducted in 1997 we found no cases in which the ECHR held that a judge should have been disqualified on such a ground.[20]

If we were writing twenty years ago we surely would have expected common law jurisdictions to reach a different result. Until the recent development of managerial judges, as discussed above, common law jurisdictions did not encourage the trial judge to participate actively in prior aspects of the proceedings. Furthermore many common law jurisdictions were then quite wary of judges being actively involved in settlement negotiations. Thus it is not surprising that, american authorities dating from the mid-1980's generally take the view that a judge who has been heavily involved in extensive settlement negotiations should not decide the case on the merits.[21]

However, as noted above both parameters involved in this issue have changed greatly in the common law world, including the United States, in the last twenty years and thus it should not be assumed that this is still the prevailing view in the *common law*.

Evidence that it may not be is the fact that it is not the view of the Principles as to which the American Law Institute is a joint adopted and promulgator. As to the relevant parameters, as noted above, the Principles both provide that "commencing as early as practicable, the court should actively manage the proceeding" (P.14.1) and that that "the court, while respecting the parties' opportunity to pursue litigation, should encourage settlement between the parties when reasonably possible" (P.24.1).

Thus, it is not surprising that the Commentary to P.24.1 states expressly that while "a judge participating in settlement discussions should

20 Goldstein, S., *op. cit.*, nota 11, pp. 231 y 232. Indeed, even in criminal cases the ECHR has disqualified systematically judges from determining the case on the merits because of their prior involvement in the process only in the extreme case of the investigating judge himself participating in a later final determination of the case. *Idem*.

21 *Ibidem*, pp. 232-235.

avoid bias ...active participation, including a suggestion for settlement, does not impair a judge's impartiality or create an appearance of impartiality" (Comment P-24A).

It should also be noted that the neither the primary Principle dealing with judicial impartiality, *i. e.*, P.1.3., quoted above nor its Commentary mention any specific judicial conduct as raising, *ab initio*, reasonable ground to doubt a judge's impartiality. Rather it concentrates on there being a fair and effective procedure for addressing the issue. Moreover the Commentary suggests strongly that the Principles do not want to encourage the raising of claims of judicial bias, to say the least. It states: "A procedure for addressing questions is necessary only in unusual circumstances, but availability of the procedure is a reassurance to litigants, especially nationals of other countries. However, the procedure should not invite abuse through insubstantial claims of bias" (Comment P-1D).

The reference in this last Comment to nationals of other countries reminds us that despite the statement quoted above that the 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", there basic function remains their historic one: "standards for adjudication of transnational commercial disputes".

This is the only possible explanation for P.1-5 which states that "the court should have substantial legal knowledge and experience". While this is a noble aspiration, it cannot be effectuated in practice as to every case as long as there are recently selected, not yet experience judges, as there are in every system. The fact that this Principle is meant to apply only to transnational litigation is made clear by the Commentary which states: "Principle 1.5 requires only that judges for transnational litigation be familiar with the law. It does not require the judge to have special knowledge of commercial or financial law, but familiarity with such methods would be desirable".

Every system has to deal with the issue of how to prevent young, inexperienced judges from having to determine important, complicated cases. As noted above, common law jurisdictions deal with the matter by case allocation. Civil jurisdictions cannot deal with it in the same way due to the constitutional norm of the natural judge, as also discussed above. Yet until recent years this problem was handled in most civil law jurisdictions by having courts of first instance sit in panels of three, with young, inexperienced judges being assigned to sit on panels with more

experienced colleagues. Yet in recent years, due to budget restraints a number of civil law jurisdictions have changed their system so that single judges now sit in the first instance. This creates a major problem as to how to keep the large, complex and important cases from being assigned to a young, inexperienced judge.[22]

In our view, it is not axiomatic that all transnational litigation is *ipso fact* such that it should not be determined by a single, inexperience judge, as the Comment quoted above seems to think. But even if we accept, *arguendo*, that such is the case and we limit P.1.5 to such transnational litigation, how is this to be accomplished in civil law jurisdictions where a single judge, rather than a three-judge panel, sits in the first instance. In such a case might P.1.5 require that the jurisdiction in question create special chambers for transnational litigation which would not include young, inexperienced judges. Would such special chambers not violate the neutral judge principle? Would they be practicable? Would the Principles require the creation of special courts for this purpose?[23] These are most difficult questions, as to which further discussion would go beyond the scope of this paper. We would just conclude by stating that, in our view, it would have been better if P.1.5. Had not been included in the Principles. As we will see later in this paper this is also true as to some other very specific Principles meant to apply only to transnational litigation.

2. *A Fair Hearing*

While the term "fair hearing" as such does not appear in the Principles, they do contain a number of aspects of a fair hearing, such as proce-

22 See Goldstein, S., *op. cit*., nota 4, pp. 21 y 22.

23 Compare Comment R-3B in the Reporters' suggested Rules which states that for transnational commercial litigation in jurisdictions that adopt such Rules "it would be convenient that a specialized court or division of court be established in a principal commercial city, such as Milan in Italy or London in the United Kingdom. Committing disputes under these rules to specialized courts would facilitate development of a more uniform procedural jurisprudence". We would note that the Reporters' suggested Rules do not contain anything related to the P.1.5, but are rather attached to a general Rule (3.1). which provides that "proceedings under these Rules should be conducted in a court of specialized jurisdiction or in the forum's first-instance courts of general jurisdiction". We would emphasize again that the Reporters' suggested Rules have no official status since they were expressly and purposefully not adopted, neither by the ALI nor by UNIDROIT.

dural equality of the pasties (P.3), the right to engage a lawyer (P.4.) and due notice and the right to be heard (P.5).We will focus herein on the first of these, *i. e.*, P.3, Procedural Equality of the Parties which states as follows:

1. The Court should ensure equal treatment and reasonable opportunity for litigants to assert or defend their rights.
2. The right to equal treatment includes avoidance of any kind of illegal discrimination, particularly on the basis of nationality or residence. The Court should take into account difficulties that might be encountered by a foreign party in participating in litigation.
3. A person should not be required to provide security for costs, or security for liability for pursuing provisional remedies, solely because the person is not a national or resident of the forum state.
4. Whenever possible, venue rules should not impose an unreasonable burden of access to court on a person who is not a habitual resident of the forum.

As seen above, article 6 (1) does not contain an express equality norm. Yet procedural equality can be understood as included in the concept of a fair hearing. P.3, therefore, quite properly, represents an express specification of the general article 6 (1) constitutional norm.[24]

P. 3.1.1 is clear and needs no explanation.

In P.3.2 we see again the emphasis on transnational litigation. Yet in this case such emphasis does not distort the Principle, since, despite the emphasis on discrimination against foreigners, all forms of "illegitimate discrimination" are prohibited. This is made clear by the Commentary which provides: "Illegitimate discrimination includes discrimination on the basis of nationality, residence, gender, race, language, religion, political or other opinion, national or social origin, birth or other status, sexual orientation, or association with a national minority" (Comment P-3A).

This is not true as to P.3.3 and P.3.4, which deal only with foreign litigants and appear to give them unjust advantages. On its face P.3.3 appears to be only a specific example of discrimination against foreigners

24 Compare Rule 1.1. of the new english Rules of Civil Procedure, 1998, which provides, *inter alia,*: "(1) These Rules are a new procedural code with the overriding objective of enabling the court to deal with cases justly. (2) Dealing with cases justly includes so far as practicable – (A) ensuring that the parties are on an equal footing...".

prohibited by P.3.2 in regard to providing security for costs or for liability for pursuing provisional measures since it prohibits requiring them to post such securities "solely" because they are foreigners. However, the question is whether such discrimination is "illegitimate discrimination" in the language of P.3.2.

The Principles accept the prevailing view of most legal systems[25] that, "the winning party ordinarily should be awarded all or a substantial part of its reasonable costs... [which] include court filing fees, fees paid to officials such as court stenographers, expenses such as expert-witness fees, and lawyers' fees" P.25.1.

Similarly, they provide that "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 preliminary relief to post a bond or formally to assume a duty of compensation P.8.3.[26]

It should be noted, however, that, unlike the reference above as to posting a bond as to preliminary relief, neither Principle concerning costs (P.25) nor the Commentary thereto refers at all to the provision of security as to the payment of costs.

However, the Commentary to P.3.3 does refer to the provision of security for costs and states as follows:

> Some jurisdictions require a person to provide security for costs, or for liability for provisional measures, in order to guarantee full compensation of possible future damages incurred by an opposing party. Other jurisdictions do not require such security, and some of them have constitutional provisions regarding access to justice or equality of the parties that prohibit such security. Principle 3.3 is a compromise between these two positions and does not modify forum law in that respect. However, the effective responsibility of a non-national or nonresident for costs or liability for provisional remedies should be evaluated under the same general standards.

25 Comment P-25 A states that this is the view in most legal systems, it is not the rule, for example, in China, Japan and the United States.

26 For further discussion of this provision and other provisions of the Principles concerning preliminary relief, see S. Goldstein, "Revisiting Preliminary Relief in light of the ALI/UNIDROIT Principles and the New Israeli Rules", to be published in *3 Studia in Honorem of Professor Pelayia Yessiou-Faltsi*, Athens-Thessaloniki, 2007.

As we have suggested above, however, different standards as to foreign litigants concerning such posting of security should not be viewed as "illegitimate discrimination", if, in fact foreign litigants present different risks of nonpayment than do local litigants.

In analyzing this matter, we should stress that despite the reference in P.3.3 and the above quoted comment to "person" or "persons" in general, the real issue concerns plaintiffs, not defendants. Almost invariably plaintiffs are the litigants who apply for and receive preliminary relief against defendants. While problems of payment for costs are not similarly limited to plaintiffs, the issue of security for costs is again, almost invariably, concerned with plaintiffs. This is so since a losing defendant generally is required to pay far greater sums in compensation to the plaintiff than the costs involved. Typically judgment-proof defendants are not sued at all and plaintiffs have various forms of preliminary relief available to them to try to insure payment of judgments if they are successful.

Thus, for example, the relevant rule of Court in Israel, Rule 519 of the Israeli Rules of Civil Procedure,1984, concerning security for costs applies only to plaintiffs. It provides that a court may require a plaintiff to provide security for the payment of the defendant's costs if the latter prevails in the action.

While the Rule itself contains no criteria for its implementation, the jurisprudence has limited it so as not to impose an undue burden on plaintiffs. Thus, in practice security for costs is imposed on plaintiffs only in two situations. First, when a particular plaintiff has acted in a way, for example by giving a defective address, so as to suggest that he is attempting to avoid the payment of costs if he loses.

Second, and more importantly for our purposes herein, where the plaintiff is a foreign resident with no assets in Israel that could be reached in execution of an order for costs. The rationale for this is quite clear: a local defendant should not have to pursue the plaintiff abroad and bring an action in a foreign state in order to implement an order for costs.

Moreover, this basis for security for costs is limited by the fact that Israel is a signatory to the 1905 and 1954 Hague Conventions on Civil Procedure which provide for the creation of expedited proceedings for the recovery of costs awarded to residents of other signatory States and, in return, prohibit a signatory State from requiring a plaintiff from another signatory State to give security for costs merely because he is a foreign plaintiff. The Israeli Rules of Civil Procedure adopted to implement

the Hague Conventions provide, therefore, that a plaintiff who is a citizen or domiciliary of another signatory State to either of these conventions will not be required to give security for costs solely because of the fact that Israel is not his place of domicile or residence.

The totality of Israeli law in this regard, including the Hague Conventions, makes it quite clear that requiring a foreign plaintiff to provide security for costs is not a case of illegitimate discrimination against foreign plaintiffs, but rather a very legitimate mechanism for the protection of local defendants from possible difficulties in enforcing an award for costs.[27]

This is generally true as to such provisions also in other jurisdictions and, thus, in our view, P.3.3 is an incorrect Principle[28] and should not be followed.[29]

The same is true as to P.3.4, which again uniquely protects foreign litigants. The Commentary tries to justify this by stating that "venue rules of a national system (territorial competence) generally reflect considerations of convenience for litigants within the country". P-3E. We know of no authority for such a statement. To the best of our knowledge modern venue rules are aimed primarily at having an action brought in an appropriate place in terms of the matter involved and secondarily in protecting defendants.

27 That this is the rationale for the Israeli law on this point is further reinforced by the existence of a special Israeli provision concerning security for costs as to limited liability corporations. This provision, found in sec. 353 A of the Companies Law, 1999, provides that the court may impose security for costs on corporate plaintiffs, both domestic and foreign, unless it finds that the circumstances involved in the particular case do not justify requiring such security or the corporation proves that it has the ability to pay the defendant's costs if the latter wins the case.

28 The ALI position expressed in P.3.3 may have been influenced by the fact that, to the best of our knowledge, the United States is not a signatory to the above mentioned Hague conventions.

29 P.3.3. also, of course, applies to security for liability for pursuing provisional remedies. However, this is not further discussed neither in the Commentary to P.3.3 nor in the Principle or Commentary concerning liability for preliminary relief, P.8.3. This probably reflects the lack of rules or jurisprudence on this point and, indeed, we have not found any in our research. In our view, however, the same analysis as to security for costs applies, *mutatis mutandi*, also to security for liability for preliminary relief. For an analysis of the strong connection between costs and liability for damage caused by preliminary relief, see Goldstein, S., "The Problematic Nature of Preliminary Relief: A Comparative Analysis Based on the Israeli Experience", *III Studi in ONore di Vittorio Denti*, Pavia, 1994, 181.

P-3E goes on to state that "a venue rule that would impose substantial inconvenience within the forum state should not be given effect when there is a more convenient venue and transfer of venue within the forum state should be afforded from an unreasonably inconvenient location". This statement is obviously correct but why limit its application to foreign litigants?

This appears to be another vestige of the historical limitation of the Principles to transnational litigation. In our view P.3.4 would be quite acceptable if it simply stated: "Whenever possible, venue rules should not impose an unreasonable burden on any person". As such it should be part of a more general Principle concerning access to courts. Such a Principle is notably missing from the Principles. In addition to questions of venue, it might include such matters as court filing fees, the right to representation by counsel, include State provided counsel in unique situations,[30]mandatory, mediation or arbitration, etcetera.[31]

3. *A Public Hearing*

Unlike P.3.3 and P.3.4 which are directed expressly at transnational litigation, the Principle concerning public hearings, P.20, like P.3 that concerns independence, impartiality, and qualifications of the court and its judges, is correctly more general in its application.

> 20 Public Proceedings:
>
> 20.1. Ordinarily, oral hearings, including hearings in which evidence is presented and in which judgment is pronounced, should be open to the public. Following consultation with the parties, the court may order that hearings or portions thereof be kept confidential in the interest of justice, public safety or privacy.
>
> 20.2 Court files and records should be public or otherwise accessible to persons with a legal interest or making a reasonable inquiry, according to forum law.
>
> 20.3 In the interest of justice, public safety, or privacy, if the proceedings are public, the judge may order part of them to be conducted in private.
>
> 20.4 Judgments, including supporting reasons, and ordinarily other orders, should be accessible to the public.

30 See Airey v. Ireland (1979), 2 E.H.R>R. 305; compare P. 4.

31 As to the general right of access to courts and some of its manifestations, see generally, Goldstein, S., *op. cit*., nota 11, pp. 218-223, 236-249.

In the words of the ECHR:

> The public character of proceedings before judicial bodies referred to in article 6(1) protects litigants against the administration of justice in secret with no public scrutiny; it is also one of the means whereby confidence in the courts, superior and inferior can be maintained. By rendering the administration of justice visible, publicity contributes to the aim of Article 6(1), namely a fair trial, the guarantee of which is one of the fundamental principles of any democratic society...[32]

Consistent with article 6(1)'s "public hearing" right, P.20.1 requires that oral hearings ordinarily be open to the public. Article 6(1) in turn reflects the fact that a number of civil law States have express constitutional provisions that require "public hearings" or public pronouncement of judgments or both.[33] These provisions stem from the reforms of the french Revolution. They were a reaction to the systems of secret justice which were in general use in continental Europe until the Revolution.[34]

In contrast, common law jurisdictions generally do not have such express constitutional provisions, although in the United States at least, the jurisprudence has created a generalized public hearing right, at least in criminal litigation, based on principles of freedom of speech and press.[35]

One would expect that because of the difference between civil law and common law jurisdictions concerning the express right to public hearings that public hearings would be much more prevalent in civil law jurisdictions than in common law jurisdictions. Yet the situation is quite the reverse. Indeed, in a discussion on P.20 that I conducted with spanish law students, they told me that, in their view, this principle was inconsistent with spanish law.

How can this paradox be explained? The answer is found in the close connection in civil law jurisdictions between publicity and orality. As well stated by professor Cappalletti, in the french Revolution reforms "orality in turn, was frequently pronounced in the same breath with publicity; only an oral trial can be really open to the public".[36]

32 Axen *vs.* Germany, 1983, 6 E.H.R.R. 195, at para. 25

33 Goldstein, S., *op. cit.*, nota 12, pp. 249-259.

34 Cappelletti, M., "Fundamental Guarantees of the Parties in Civil Litigation", *25 Standford L. Rev.*, pp. 651, 705-707.

35 See generally, Goldstein, S., *op. cit.*, nota 12, pp. 240-259.

36 Cappelletti, M., *op. cit.*, nota 34, p. 706.

That, is in civil law jurisdictions the public hearing right meant historically that oral hearings be public. Publicity and orality have never meant that civil litigation in civil laws jurisdictions is conducted exclusively, or even primarily, in public oral hearings. Rather these procedures are typically conducted by the transmission of written materials, with only an occasional oral hearing or hearings.

In contrast, the *common law* trial is an oral happening. Thus, paradoxically, despite the difference as to express constitutional norms requiring public hearings, *common law* proceedings are, in fact, generally more public than are civil law proceedings.

P.20.1 does not require oral hearings; it only requires that when they are held, they should, ordinarily, be open to the public. In contrast the ECHR has held that article 6(1) in some unique situations does require that there be oral hearings. However, in practice this has been applied almost exclusively to litigation before judicial bodies that are not courts.[37] Since the Principles apply only to courts, the drafters correctly, in our view, did not use the public hearing norm as requiring the holding of oral hearings where they are not otherwise held.[38]

In regard to the publicity norm not in the context of oral hearings, P.20.2 opt for a publicity norm, albeit somewhat limited, as to court records, despite the fact, as suggested above, that this is not the norm in some civil law jurisdictions. As stated by the Commentary, P-20A:

> There are conflicting approaches concerning publicity of various components of proceedings. In some civil-law countries, the court files and records are generally kept in confidence although they are open to disclosure for justifiable cause, whereas in the common- law tradition they are generally public. One approach emphasizes the public aspect of judicial proceedings and the need for transparency, while the other emphasizes respect for the parties' privacy. These Principles express a preference for public proceedings, with limited exceptions. In general, court files and records should be public and accessible to the public and the news media.

37 Goldstein, S., *op. cit*., nota12, pp. 240-259. There is also language in some opinions of the ECHR that the publicity right might require oral hearings on appeal. However, we know of no cases in which it has been held that this requirement was breached. *Ibem*.

38 On the level of non-constitutional norms, the Principles in P.19 attempt to reach a compromise between common law and civil law procedures as to oral versus written presentations.

> Countries that have a tradition of keeping court files confidential should at least make them accessible to persons with a legal interest or making a responsible inquiry.[39]

P.20.3 supplements and generalizes the second sentence in P.20.1 in providing for the extraordinary situation in which the public proceedings norm must give way to other interests.

P.20.4 is on its face superfluous since P.20.1 expressly requires that hearings in which judgments are pronounced ordinarily be open to the public and judgments that are not pronounced in a hearing are clearly covered by P.20.2 as court records. Why then are judgments given separate treatment in P.20.4?

The answer seems to be historical circumstances. We have quoted extensively in this paper from the first sentence of article 6(1) European Convention for the Protection of Human Rights and Fundamental. However, there is also a second sentence to this article that requires specifically and expressly that, subject to certain exceptions, "judgment shall be pronounced publicly".[40] This provision, in turn, was the result of similar provisions in some civil law countries, including France, as a result of the same french Revolution reforms that produced the more general constitutional provisions discussed above concerning public hearings. Indeed, until this day the french constitutional norm is that judgments must be pronounced orally in public hearings.[41]

However, in applying this explicit provision of article (6)(1) that "judgments must be applied publicly", the ECHR has held that this provision is not to be taken literally where it does not, as in France, accord with established State practice and public access to written judgments would suffice in such cases.[42] P.20 in its entirety takes the same position.

39 Despite the reference in the quote to the "common-law tradition", it should be noted that this tradition is not uniform. For example, in the United States court records have historically been much more publicly accessible than they have been in England. It should be noted in this regard that in 2006 the English Rules of Civil Procedure were amended to make court records more accessible to the public than previously. See 42nd. Update, 2006, to the1998, High Court Rules of Civil Procedure, Rule 5.4 C.

40 See Goldstein, S., *op. cit*., nota 12, p. 253.

41 *Ibidem*, pp. 253 y 254.

42 *Ibidem*, pp. 255 y 257.

4. *Adjudication Within a Reasonable Time*

The primary Principle concerning prompt rendition of justice provides as follows:

> 7. Prompt Rendition of Justice
>
> 7.1 The court should resolve the dispute within a reasonable time.
>
> 7.2 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.

There are, however, even additional Principles that emphasize the norm of the need for disputes to be determined promptly. P.11.2 provides that "the parties share with the court the responsibility to promote a fair, efficient and *speedy* resolution of the proceeding.P.14.1 states that" 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*. Finally in this regard, P.23.1 provides that "upon completion of the parties' presentations, the court should *promptly* give judgment...".

Following the constitutional norm expressed in article 6(1) that a person's human rights in civil litigation includes the determination of his cause "within a reasonable time, these Principles reflect the widely accepted view that justice delayed is justice denied".[43] Indeed, Hebrew terminology refers to delayed justice as "torture of the law", thereby emphasizing most strongly the gravity of the harm to the litigants.[44]

As stated in the Comment to P.7, P.7B : "Prompt rendition of justice is a matter of access to justice and may also be considered an essential human right...".

In construing article 6, the ECHR has held that resolving civil litigation within a reasonable time is of extreme importance for the proper ad-

[43] See, Zuckerman, A. A. S., "Quality and Economy in Civil Procedure", *14 Oxford Journal of Legal Studies 355*, 1994.

[44] See generally, Goldstein, S., "The Influence of Constitutional Principles on Civil Procedure in Israel", *17 Israel L. Rev. 467*, 504-508, 1982.

ministration of justice.[45] Moreover, under article 6(1) the reasonable time requirement is not judged according to the given organization of a State's legal system. Rather States have a duty to organize their legal systems so as to allow their courts to comply with this provision of article 6.[46] Excessive workloads and attendant backlogs do not excuse States from the reasonable time requirement. Rather, the States have an obligation to structure their systems so as to eliminate these defects.[47]

Most importantly, according to the jurisprudence of the ECHR, a State cannot justify unreasonable delays by pointing out that the State civil procedure is governed by the principle of party disposition, *i. e*., the power of initiative rests with the parties who are responsible for the expeditious, or lack thereof, conduct of the proceedings. In the opinion of the ECHR this "principle does not release the courts from ensuring the expeditious trial of the action as required by article 6". [48]

This is, of course, consistent with the Principles which, while also requiring parties to cooperate with the court in expediting the litigation process, places the major burden in this regard on the court. As stated in the Comment, P-7B, "in all legal systems the court has a responsibility to move the adjudication forward". While the reference to "all legal systems" may be inaccurate as to some traditional *common law* systems that have yet to embrace managerial judges, there is no doubt that the comment reflects the view of the Principles.

The importance of recognizing that the determination of litigation within a reasonable time is a constitutional norm of civil litigation cannot be exaggerated. Such recognition means that when States take measures to expedite their systems of civil litigation so as, *inter alia*, to improve the speed of the process, they are taking measures to protect and further the constitutional rights of litigants.

When such measures appear to restrict some traditional, but not constitutional, norms of a State's system of litigation it is clear that the constitutional norm of expeditious justice must prevail.[49]

45 See Guincho *vs*. Portugal (1984) 7 E.H.R.R. 597, para. 38.

46 See Goldstein, S., *op. cit*., nota12, p. 217 and sources cited therein, note 15.

47 *Idem*.

48 Guincho *vs*. Portugal, *supra*, nota 45, para. 23. See also, Scopelliti *vs*. Italy, (1993) 17 E.H.R.R. 493, para. 25.

49 See Goldstein, S., *op. cit*., nota16.

Moreover, when such measures, at least *prima facie*, appear to limit other constitutional rights such as access to courts, public proceedings, representation of attorneys, restrictions on appeals, etcetera, the conflict, if one exists is between two conflicting constitutional norms. A speedy judicial process is not just a desirable aim which must be weighed against constitutional norms; it is itself a constitutional norm and thus if it conflicts with other constitutional norms the issue is the most difficult one of accommodating the aims of competing constitutional norms.[50]

V. Conclusions

Our comparison of the constitutional norms contained in article 6(1) of the European Convention, *i. e.*, adjudication before an independent and impartial court established by law; a fair hearing; a public hearing; and adjudication within a reasonable time, with their respective Principles has shown that, in general, the Principles as adopted have achieved the desired goals of finding the correct balance between abstractness and particularization, as well as avoiding constitutional norms unique to given systems and harmonizing different manifestations of constitutional norms based on universal norms of due process or natural justice, by referring to the universal norm, rather than its specific manifestations in different procedural systems.

The exceptions to this general conclusion are the Principles that are aimed primarily, if not exclusively, to apply in transnational commercial litigation, *i. e.*, P.1.5 requiring the court to have substantial legal knowledge and experience P.3.3 concerning security for costs or security for liability for pursuing provisional remedies and P.3.4 concerning venue. While the emphasis on transnational commercial litigation is understandable given the history of the Principles in these cases this emphasis has, in our view led to the promulgation of unsuccessful, if not completely wrong, provisions.

50 See Goldstein, S., *op. cit.*, nota 12, pp. 223-264.