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World Litigation Law and Practice

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Abstract

This review states that the two volumes, “World Litigation law and Practice” and Unit B ”Europe” are an up-to-date publication and thus a welcomed event. It goes on to explain how the two studies attempt to provide not only details as to the civil procedure of the country concerned, but also information concerning the general institutional background in which civil litigation takes place. After the review explains how the volumes should facilitate broad-based comparative procedural research, it offers a few suggestions for its continuance.

WORLD LITIGATION LAW AND PRACTICE, UNIT B, EUROPE: VOL. 1, ENGLAND AND WALES, BY LAURENCE J. COHEN; VOL. 2, ITALY, BY MAURO RUBINO-SAMMARTANO AND GIROLAMO ABBATESCIANNI. Ronald E. Myrick, Ed. New York, N.Y.: Matthew Bender, 1986. Looseleaf. $230.00. 3 volumes. Unit A, Canada; Unit B, England and Wales, Italy. Lib. Cong. No. 85-70305.

*Reviewed by Peter E. Herzog**

Professor Leflar once referred to choice of law as a "well watered plateau."[1] Though some might object to his characterization of choice of law as a plateau,[2] few would disagree about the rivers of printers' ink that have inundated it. But much of the resulting academic writing has concerned itself with general conflict of laws theory; procedural problems have received rather less attention. The reason may well be, as a German author recently (approximately) put it, that in the procedural area the clown, "conflicts methodology," may engage in his funny tricks in the foreground, but the real problems lie much more in depth.[3] That severe practical problems exist in that area for individuals engaged in international litigation was forcefully pointed out more than thirty years ago.[4] In some ways, the problems have since become worse and have led to a fair amount of friction between the United States and a number of its allies and trading partners, who resent the supposedly excessively aggressive assertion of American procedural principles in international litigation pending in the United States, while American courts dislike the restraints put on their fact-gathering processes by foreign courts.[5] That con-

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1. Leflar, *Choice of Law: A Well-Watered Plateau*, 41 LAW & CONTEMP. PROBS., Spring 1977, 10.

2. Dean Prosser referred to the area as a "dismal swamp." Prosser, *Interstate Publication*, 51 MICH. L. REV. 959, 971 (1953).

3. Stürner, *Der Justizkonflikt zwischen U.S.A. und Europa*, in R. Stürner, D. Lange, & Y. Taniguchi, DER JUSTIZKONFLIKT MIT DEN VEREINIGTEN STAATEN VON AMERIKA 3 (1986).

4. Jones, *International Judicial Assistance: Procedural Chaos and a Program for Reform*, 62 YALE L.J. 515 (1953).

5. A number of the incidents having caused friction between the United States and foreign countries are detailed by Stürner, *supra* note 3, at 5-8.

flicts methodology alone cannot solve these problems is clearly due to the "in depth" differences in basic conceptions and ideas concerning civil procedure. Solutions are thus impossible without an awareness of these differences. For this reason, the Columbia University Project on International Procedure sponsored, some twenty-five years ago, the publication of works discussing the civil procedure of France, Italy and Sweden.[6] These works, however, appeared in hard-bound volumes not permitting easy supplementation and law reform in the field of civil procedure has been so rapid that they, as well as some others describing the procedure of foreign countries[7] are, to a greater or lesser degree, out-of-date.[8] Much later, the Columbia Project resulted in the publication of a work on civil procedure in Japan in loose-leaf form,[9] thus facilitating updating in an area increasingly the object of reforms everywhere.[10]

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6. M. CAPPELLETTI & J. PERILLO, Civil Procedure in Italy (H. Smit ed. 1965); R. GINSBURG & A. BRUZELIUS, CIVIL PROCEDURE IN SWEDEN (H. Smit ed. 1965); P. HERZOG (with the collaboration of M. WESER), CIVIL PROCEDURE IN FRANCE (H. Smit ed. 1967).

7. *E.g.*, 2 E. COHN, MANUAL OF GERMAN LAW 162-260 (2d ed. 1971); Kaplan, von Mehren & Schaefer, *Phases of German Civil Procedure*, 71 HARV. L. REV. 1193 (1958).

8. The process of change has been particularly rapid in France where a reform of court organization and civil procedure, begun in 1958, did not end with the promulgation of a new Code of Civil Procedure in 1975. But rapid change makes supplementation of procedural studies necessary everywhere as the volume on England and Wales, reviewed here, shows. It discusses the Civil Jurisdiction and Judgments Act, 1982, by which the United Kingdom implemented the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, which the original six Member States of the European Economic Community had concluded on September 27, 1968, effective February 1, 1973. *See* 1972 O.J. No. L 299, p. 32 (official English text at 1978 O.J. No. L 304, p. 36). The United Kingdom, together with Denmark and Ireland, acceded to that convention by the Convention of October 9, 1978, 1978 O.J. No. L 304, p. 1. Entry into effect of most provisions of the Jurisdiction and Judgments Act, 1982, was made dependent on the entry into effect of the 1978 Convention, which had to be ratified by the signatories. At the time the study on England and Wales was written, it was confidently expected that ratification and entry into effect of the Convention would be completed by 1985, that is, before the publication date of the book, and the study so advises its readers. *See* § 4.04[7], note 24. But because of a delay by Belgium in ratifying the Convention, a separate sheet had to be added to the book, informing the readers that the Convention, and thus also the Jurisdiction and Judgments Act, 1982, were not yet in effect. Shortly after the book came off the press, Belgium ratified the Convention so that this special notice now has to be cancelled again, not a difficult thing given the loose-leaf presentation of the book.

9. T. HATTORI & D. HENDERSON, CIVIL PROCEDURE IN JAPAN (1985).

10. Even the recent discussion of procedural problems in R. SCHLESINGER, COM-

The planned publication, in an easily-supplemented loose-leaf format, of a series on "World Litigation Law and Practice," of which in Unit B "Europe" two volumes have appeared to date,[11] is thus a welcome event. The two studies attempt to provide not only details as to the civil procedure of the country concerned, but also information concerning the general institutional background in which civil litigation takes place. Consultation of the series is facilitated by the use of a fairly uniform outline: Chapter 1 - The Legal System and Tradition; Chapter 2 - The Courts; Chapter 3 - Attorneys and other Legal Professionals; Chapter 4 - Exercise of Domestic Judicial Power, Jurisdiction, Competence and Venue; Chapter 5 - Parties; Chapter 6 - Procedure in Domestic Cases of First Instance; Chapter 7 - Special Proceedings; Chapter 8 - Enforcement Proceedings; Chapter 9 - Recognition of Foreign Judgments; Chapter 10 - Appellate Procedures; Chapter 11 - International Judicial Assistance (Assistance in Aid of Foreign Courts); Chapter 12 - Summary of Key Considerations for a Foreign Lawyer; Chapter 13 - Insolvency and Bankruptcy Proceedings; Chapter 14 - Arbitration. Nevertheless, the outlines and contents even of the two volumes available to this reviewer are not completely parallel. There are, of course, some variations due to differences in domestic legal structures. Furthermore, the recognition and enforcement of foreign judgments constitutes a separate chapter in the study on Italy, while it is included in the chapter on judgments and their enforcement in the study on England and Wales. Beyond these differences in structure, there are also occasional variations in substantive coverage. The volume on England and Wales contains, in its chapter 9 on Appeals, a section concerning the reference of questions on Community law to the Court of Justice of the European Communities, a matter not covered in the country study on Italy. Likewise, in the English study, the chapter on insolvency and bankruptcy deals, at least in a general way, with the structure

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PARATIVE LAW 329-461 (4th ed. 1980) is no longer quite up-to-date in all details. Comprehensively comparative in scope, it does not, of course, attempt to take the place of detailed country studies.

11. A section on Belgium is to be included subsequently into the binder now limited to Italy. Additional countries to be covered in the Unit on Europe are Austria, Germany, France and Spain, as well as the European Economic Community. Thus far, in Unit A ("North America"), the study on Canada has appeared.

of corporations, which the Italian study essentially ignores.[12]

The chapters with the more detailed descriptions of court organization and procedure should always be consulted only after a careful examination of chapter 1 which, as noted, gives some basic information on institutional structures and legal traditions. In the Italian volume additional and very helpful material on the same point is also contained in the chapter on Key Considerations for the Foreign Lawyer. The Italian volume also includes a useful glossary of Italian legal terms that should help to reduce terminological confusion.[13] The use of a fairly standardized outline, conceived primarily for the American reader, insures that points of particular concern or possible misconception for such a reader are not ignored. There are thus discussions on, for example, the role of precedent.

As what has already been said indicates, both volumes contain a very large amount of information that will be quite helpful to the attorney involved in transnational litigation in the country concerned. (There is also much discussion on problems of service of process abroad, on obtaining evidence for use in foreign litigation, etc.) While neither volume purports to be a detailed comparative study, each one furnishes much material for such an endeavor. The series, when completed, should greatly facilitate broad-based comparative procedural research. A few suggestions may, however, be appro-

12. *Compare* chapter 12, especially § 12.02[1] of the study on England and Wales *with* the corresponding § 13.01 of the Italian study. Presumably, this variation is due to the differing approaches in the two countries. In England, a "company" (corporation) is "wound up;" only individuals can be subject of "insolvency proceedings." *See* § 12.01 of the study on England and Wales. In Italy, on the other hand, both companies and individuals are subject to the same bankruptcy proceedings. *See* § 13.01 of the Italian study.

13. App. XI of the Italian study. Even so, there is one instance of such confusion in the Italian volume: chapter 6 on proceedings in first instance refers to the writings by which the parties assert their claims and defenses as "pleadings." The chapter discusses the drawn-out manner of Italian proceedings in detail, thus readers are not likely to be misled by the use of that term though the "pleadings" in an Italian court may occur also at stages subsequent to the commencement of the action. But in chapter 3, dealing with law professionals, the authors, when describing the difference between the lawyer known as *procuratore* and the lawyer known as *avvocato*, state that the *procuratore* may amend pleadings — thus obviously using the word pleading essentially in its American sense, in the same way as in chapter 6 — but state immediately afterwards that the *avvocato* will plead the case in court, here obviously using the word plead with the same connotation as the French term *plaider*, i.e., to present a case in court through argument and the submission of (written) evidence.

priate for its continuance. In the first place, full use should be made of its loose-leaf format. If there is a significant development in a country already covered, especially a development of interest to foreign litigants, supplements can be issued reasonably quickly. Secondly, the term "procedure" should, not, in subsequent volumes, be defined too narrowly. The Italian volume, for instance, contains a brief reference, in section 10.01[9], to the procedural effects of *res judicata* in barring further review, but nothing as to its substantive scope or the existence or absence of principles such as collateral estoppel in its various forms (issue preclusion as opposed to claim preclusion, third-party issue preclusion). The matter is, however, of increasing importance in international litigation, in the light of the development of American rules in that area[14] and the increase in transborder litigation involving multiple parties. One would hope also that volumes dealing with non-European countries will eventually appear, where, especially in the Far East, the attitude towards litigation may be quite different from that prevailing in the United States.[15] In addition, the inclusion of a study on the United States in the Unit on North America would certainly be helpful. Of course there is not any shortage of works on United States procedure directed to the American practitioner. However, large damage awards and procedural devices, such as extensive discovery, attract a considerable amount of international litigation to this country.[16] A compact description of procedure in the United States will thus undoubtedly be helpful to many foreign attorneys involved in litigation here. Beyond this practical use, the controversies between the United States and other countries over procedural issues are due only in part to lack of information on foreign procedures in the United States. The converse is also true. In foreign countries, there is often an insufficient understanding of the basic reasons for some aspects of American

14. *See* Smit, *International Res Judicata and Collateral Estoppel in the United States*, 9 U.C.L.A. L. REV. 44 (1962) and, more recently, Casad, *Intersystem Issue Preclusion and the Restatement (Second) of Judgments*, 66 CORNELL L. REV. 510 (1981).

15. For Japan, there is, of course, the recent volume by T. HATTORI & D. HENDERSON, mentioned *supra* note 9.

16. *See* Lord Denning's statement: "[a]s a moth is drawn to the light, so is a litigant drawn to the United States. If he can only get his case into their courts, he stands to win a fortune." *Smith-Kline and French Laboratories v. Bloch*, [1983] All E.R. 72, 74, [1983] 1 W.L.R. 730, 733 (C.A. 1982).

procedure. A work on procedure in the United States, conceived for the non-United States reader, might thus help to calm the conflicts mentioned. This would be even more the case if the series were eventually to lead to the publication of an extensive and up-to-date set of country studies for most major countries of the world.